





## ABBREVIATIONS.

### REPORTS.

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C/LP 7
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| <p>A.I.R. 1914 All., Bom., etc. .. All India Reporter, Allahabad, Bombay, etc., sections of the respective years.</p> <p>A.M.L.J. .. Ajmer-Merwara Law Journal</p> <p>Agra H.C.R. .. Agra High Court Reports.</p> <p>All. or I.L.R. All. .. Indian Law Reports, Allahabad Series.</p> <p>All. L. Jour. .. Allahabad Law Journal.</p> <p>All.W.N. .. Allahabad Weekly Notes.</p> <p>All. W.R. .. Allahabad Weekly Reporter.</p> <p>I.L.R. Assam. .. Indian Law Reports, Assam Series.</p> <p>B.R. .. Bihar Reports.</p> <p>Beng. L.R. .. Bengal Law Reports.</p> <p>B.L.J.R. or Bihar L.J.R. .. Bihar Law Journal Reports.</p> <p>Bom. or I.L.R. Bom. .. Indian Law Reports, Bombay Series.</p> <p>Bom.H.C.R. .. Bombay High Court Reports.</p> <p>Bom.L.R. .. Bombay Law Reporter.</p> <p>Bom.P.J. .. Bombay Printed Judgments.</p> <p>Bur.L.Jour. .. Burma Law Journal.</p> <p>Bur. L. R. .. Burma Law Reports.</p> <p>Bur. L. Tim. .. Burma Law Times.</p> <p>Cal. or I.L.R. Cal. .. Indian Law Reports, Calcutta Series.</p> <p>Cal. L. Jour. .. Calcutta Law Journal.</p> <p>Cal. L. R. .. Calcutta Law Reports.</p> <p>Cal. W. N. .. Calcutta Weekly Notes.</p> <p>Cal. W.N. (D.R.) .. Calcutta Weekly Notes. (Dacca Reports).</p> <p>C.P.L.R. .. Central Provinces Law Reports</p> <p>Cr. App. Rep. .. Cohen's Criminal Appeal Reports.</p> <p>Cr. or Cri. L. Jour. .. Criminal Law Journal.</p> <p>I.L.R. Cut. .. Indian Law Reports, Cuttack Series.</p> <p>Cut.L.T. .. Cuttack Law Times.</p> <p>E.P. .. East Punjab.</p> <p>I.L.R. E.P. or East Pun. .. Indian Law Reports, East Punjab Series.</p> <p>F.C.R. .. Federal Court Reports.</p> <p>F.L.J. .. Federal Law Journal.</p> <p>I.L.R. Hyd. .. Indian Law Reports, Hyderabad Series.</p> <p>Ind. App. .. Law Reports, Indian Appeals.</p> <p>Ind. Cas. .. Indian Cases.</p> <p>I.L.R. or Rul. .. Indian Rulings or Ruling.</p> <p>I.T.R. .. Income Tax Reports.</p> <p>J &amp; K .. Jammu &amp; Kashmir.</p> <p>J. &amp; K.L.R. .. Jammu &amp; Kashmir Law Reports.</p> | <p>J.L.R. or Jaipur L.R. .. Jaipur Law Reports.</p> <p>I.L.R. Kar. .. Indian Law Reports, Karachi Series.</p> <p>K.B. .. (Law Reports) King's Bench Division. (L.J.) K.B. .. Law Journal Reports, King's Bench.</p> <p>K.L.T. or Ker. L.T. .. Kerala Law Times.</p> <p>I.L.R. Lah. .. Indian Law Reports, Lahore Series.</p> <p>Lah. L. Jour. .. Lahore Law Journal.</p> <p>Lah. L.T. .. Lahore Law Times.</p> <p>L.R.A. .. Law Reporter, Allahabad.</p> <p>Low. Bur. Rul. .. Lower Burma Rulings.</p> <p>Luck. or I.L.R. Luck. .. Indian Law Reports, Lucknow Series.</p> <p>Madh. B. or M.B. .. Madhya Bharat.</p> <p>I.L.R. Madh. B. .. Indian Law Reports, Madhya Bharat Series.</p> <p>Madh. B.L.J. .. Madhya Bharat Law Journal.</p> <p>Madh. B.L.R. .. Madhya Bharat Law Reporter.</p> <p>Mad. or I.L.R. Mad. .. Indian Law Reports, Madras Series.</p> <p>Mad. H.C.R. .. Madras High Court Reports.</p> <p>Mad. L. Jour. .. Madras Law Journal.</p> <p>Mad. L. Tim. .. Madras Law Times.</p> <p>Mad. L. W. .. Madras Law Weekly.</p> <p>Mad. W. N. .. Madras Weekly Notes.</p> <p>M. L. R. or Marwar L. R. .. Marwar Law Reporter.</p> <p>Moo. Ind. App. .. Moore's Indian Appeals.</p> <p>Moo. P. C. C. .. Moore's Privy Council Cases.</p> <p>Mys. .. Mysore.</p> <p>I. L. R. Mys. .. Indian Law Reports, Mysore Series.</p> <p>Mys. H. C. R. .. Mysore High Court Reports.</p> <p>Mys. L. J. .. Mysore Law Journal.</p> <p>I. L. R. Nag. .. Indian Law Reports, Nagpur Series.</p> <p>Nag. L. Jour. .. Nagpur Law Journal.</p> <p>Nag. L. R. .. Nagpur Law Reports.</p> <p>N. W. P. H. C. R. .. North-West Provinces High Court Reports.</p> <p>Oudh Cas. .. Oudh Cases.</p> <p>Oudh L. Jour. .. Oudh Law Journal.</p> <p>Oudh L. R. .. Oudh Law Reports.</p> <p>Oudh S. C. .. Oudh Select Cases.</p> |
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# ABBREVIATIONS (contd.)

Oudh W.N. .. Oudh Weekly Notes.  
 Pak. Cas. .. Pakistan Cases.  
 Pak. L. R., Lahore .. Pakistan Law Reports, Lahore.  
 Pat. or I. L. R. Pat. .. Indian Law Reports, Patna Series.  
 Pat. L. Jour. .. Patna Law Journal.  
 Pat. L. Tim. .. Patna Law Times.  
 Pat. L. W. .. Patna Law Weekly.  
 Pat. W.N. .. Patna Weekly Notes.  
 I.L.R. Patiala .. Indian Law Reports, Patiala Series.  
 Pepsu L. R. .. Pepsu Law Reports.  
 I. L. R. Punj. .. Indian Law Reports, Punjab Series.  
 Pun. L. R. .. Punjab Law Reporter.  
 Pun. Re. .. Punjab Records.  
 Pun. W.R. .. Punjab Weekly Reporter.  
 I. L. R. Raj. .. Indian Law Reports, Rajasthan Series.  
 R.L.W. or Raj. L. W. .. The Rajasthan Law Weekly.  
 Rang. or I.L.R. Rang. .. Indian Law Reports, Rangoon series.

Rang. L. R. .. Rangoon Law Reports.  
 Rat. Or Rat. Un. Cr. C. .. Ratanlal's Unreported Criminal Cases.  
 R.D. .. Revenue Decisions.  
 Sau. .. Saurashtra.  
 Sau. L. R. .. Saurashtra Law Reporter.  
 Sind L. R. .. Sind Law Reporter.  
 S. C. J. .. Supreme Court Journal.  
 S. C. R. .. Supreme Court Reports.  
 Suth. W. R. .. Sutherland's Weekly Reporter.  
 I.L.R. Trav. Co. or T. C. .. Indian Law Reports, Travancore-Cochin Series.  
 T. C. L. R. or Trav. Co. L. R. .. Travancore-Cochin Law Reports.  
 T. L. J. or Trav. L. J. .. Travancore Law Journal.  
 U. P. L. R. .. United Provinces Law Reports.  
 Upp. Bur. Rul. .. Upper Burma Rulings.  
 Vind. Pra. or V. P. .. Vindhya Pradesh.  
 Weir .. Weir's Criminal Rulings.

## Other Abbreviations.

A.C. .. Appellate Jurisdiction, Civil.  
 A. Cr. .. Appellate Jurisdiction, Criminal.  
 App. .. Appendix or Appeal.  
 Appr. .. Approved.  
 Art. .. Article.  
 B. R. .. Board of Revenue.  
 C. A. .. Court of Appeal.  
 Civ. .. Civil.  
 Cl. .. Clause.  
 Cons. .. Considered.  
 Cr. .. Criminal.  
 Diss. .. Dissented.  
 Dist. .. Distinguished.  
 D. B. .. Division Bench.  
 Expl. .. Explained.  
 F. A. .. First Appeal.  
 F. B. .. Full Bench.  
 F. C. .. Federal Court.  
 Foll. .. Followed.  
 Illus. .. Illustrations.  
 Jour. .. Journal.  
 L. P. .. Letters Patent.

N. .. Note.  
 No. .. Number.  
 O. .. Order.  
 O. C. .. Original Jurisdiction Civil.  
 O. Cr. .. Original Jurisdiction Criminal.  
 Over. .. Overruled.  
 P. .. Page.  
 Pr. .. Para.  
 Pt. .. Point.  
 P. C. .. Privy Council.  
 Pre. .. Preamble.  
 R. .. Rule.  
 Ref. .. Referred or Reference.  
 Rel. on .. Relied on.  
 Rev. .. Revenue.  
 S. .. Section.  
 S. A. .. Second Appeal.  
 S. B. .. Special Bench.  
 S. C. .. Supreme Court.  
 S. N. .. Short Notes of cases.  
 V. .. Volume Number.



# THE FIFTY YEARS' DIGEST

1901—1950

(Civil, Criminal & Revenue)

## VOLUME XII

### PENAL CODE (XLV of 1860)

#### PENAL CODE (XLV of 1860)

—S. 161.

##### Synopsis.

1. Applicability and scope
2. Gratification
3. Offence under
4. Sanction for prosecution
5. Sentence
6. Miscellaneous.

##### 1. Applicability and scope.

—S. 161—Applicability and scope.

S. 161 of the Penal Code deals with three categories of cases:—

(1) acceptance of gratification as a motive or reward for doing or forbearing to do any official act,

(2) acceptance of gratification for showing or forbearing to show in the exercise of his official function, favour, or disfavour, and

(3) acceptance of gratification for rendering or attempting to render any service or disservice to any person with the Legislative or Executive Government of India or with the Government of any Presidency, or with any Lieut. Governor, or with any public servant.

Where a constable working in Court accepts gratification from certain witnesses on the inducement that the identification of property for which they had come would be expedited, the case falls under the last category mentioned above. 1949 A.L.J. 326=1949 A.W.R. 529.

—S. 161—Offence under—Accepting illegal gratification or rendering service with public servant.

S. 161, I. P. Code, is not confined to cases in which the illegal gratification is taken for doing an official act, and it is an offence under that section for a public servant to accept any gratification other than legal remuneration as a motive or reward for ren-

dering or attempting to render any service to any one with any public servant as such. 51 M. 86, foll. 1948 A.W.R. (C.C.) 120=1948 O.A. (C.C.) 120=51 Cr.L.J. 219=A.I.R. 1949 Oudh 84.

—S. 161—Offence under by public servant.

Under the concluding words of S. 161, a public servant may be guilty under that section even independently of the exercise of his official function, that is, if he obtains a reward for rendering or attempting to render any service to a person with another public servant. A. I. R. 1943 F.C. 18=44 Cr.L.J. 466=47 C.W.N.F.C. 5=9 B.R. 310=1943 M.W.N. 315=22 Pat. 349=24 P.L.T. 139=(1943) 2 M.L.J. 62=I.L.R. (1943) Kar. (F.C.) 2 Sup.=1943 F.C.R. 7=206 Ind. Cas. 232 (F.C.)

—S. 161.

Section 161 is not confined to cases in which the gratification is taken for doing an official act under it. It is an offence if a public servant accepts any gratification other than legal remuneration as a motive or reward for rendering or attempting to render any service to any one with any public servant as such. 105 Ind. Cas. 829=51 Mad. 86=39 M.L.T. 615=26 M.L.W. 529=1927 M.W.N. 764=28 Cr.L.J. 1005=9 A.I.Cr.R. 180=A.I.R. 1927 Mad. 1011=53 M.L.J. 723.

—S. 161—"Motive or reward"—If covers also a case where the payment is made in respect of past favours—Person on leave—Does not cease to be a public servant to whom S. 161 is applicable.

What is forbidden by S. 161 of the I. P. Code generally is receiving any gratification as motive to do or a reward for having done any such thing as is described in the definition. Accordingly the phrase, "motive or reward" under S. 161 covers a case where the payment is made in respect of past favours.

S. 161 will apply also to a person who is on leave as he cannot be said to have ceased to be a public servant. Such leave counts as duty and so long as a person is on duty he must be deemed to be a public servant. 60 L.W. 488 (1)=48 Cr.L.J. 1008=A.I.R. 1948 Mad. 63=1947 M.W.N. 491=(1947) 2 M.L.J. 160.



—S. 161—Offence under—Police constable accepting money to get accused released on bond.

The accused who was a police constable was charged under S. 161, I. P. Code, for having accepted money to get one M who was under arrest in a petty case released on a bond. It was contended that as it was no part of the official duty of the accused to release M, his demanding and receiving money did not amount to an offence under S. 161, I. P. Code:

**Held**, that the accused was a public servant and an officer of the thana and demanded money for the purpose of securing the release, that it was clearly demanded and paid as a motive or reward for the accused rendering service to M with a public servant, namely, the officer in the thana who could grant the release, and that, therefore, the accused was guilty of an offence under S. 161, I. P. Code. 222 Ind. Cas. 522=47 Cr.L.J. 316=A.I.R. 1946 Cal. 270.

—S. 161—Clerk demanding that applicant should invest Rs. 100 in war loan as condition for forwarding application—Offence under S. 161, held committed by clerk.

It was the official duty of the Arms Act Clerk to put up to the Sub-Divisional Officer the application which the petitioner made for renewal of the licence for his gun. As a condition to the performance of that duty, the Arms Act Clerk demanded that the petitioner should invest Rs. 100 in war loan;

**Held**, that the demand of the Arms Act Clerk constituted an offence under S. 161. A.I.R. 1945 Pat. 258=26 P.L.T. 38=24 Pat. 138=11 B.R. 486=46 Cr.L.J. 748=220 Ind. Cas. 416.

—S. 161.

Station master supplying wagons and honestly believing that demurrage would be chargeable taking Rs. 20 for demurrage cannot be convicted under S. 161. A.I.R. 1944 F.C. 66=23 Pat. 517=1944 M.W.N. 430=48 C.W.N.F.C. 109=11 B.R. 20=45 Cr.L.J. 755=(1944) 1 M.L.J. 503=1944 F.C.R. 262=1944 A.W.R. 26=25 P.L.T. 200=1944 A.L.J. 258=214 Ind. Cas. 199 (F.C.)

—S. 161—False report.

Lahore High Court Rules—Process Server not authorised to conduct Court Sale—False report by—Liability. 1930 Cr.C. 108=A.I.R. 1930 Lah. 92.

—S. 161—Applicability.

Even where an act is not within the exercise of the official duty of a public servant, if a public servant erroneously represents that the particular act is within the exercise of his official duty he would be liable to conviction under S. 161, if he obtained a gratification by inducing such an erroneous belief in another person. 113 Ind. Cas. 179=51 All. 467=11 A.I.Cr.R. 205=1929 A.L.J. 153=10 L.R.A.Cr. 23=30 Cr.L.J. 67=A.I.R. 1928 All. 752.

—S. 161—Illustrations—Scope.

The principle of the illustration applies as much to the other purposes set out in S. 161 as to doing or forbearing to do any official act. 105 Ind. Cas. 829=51 Mad. 86=9 A.I.Cr.R. 180=39 M.L.T. 615=26 M.L.W. 529=1927 M.W.N. 764=28 Cr.L.J. 1005=A.I.R. 1927 Mad. 1011=53 M.L.J. 723.

—S. 161—"In the exercise of official function".

Statement that Government servant worked for money in favour of a candidate at an election is not charging him with bribery as such work is not in discharge of his official duty. It is on the contrary prohibited. 97 Ind. Cas. 354=6 Pat. 224=7 P.L.T. 608=1926 P.H.C.C. 314=27 Cr.L.J. 1090=A.I.R. 1926 Pat. 499.

—S. 161—Present for obtaining employment.

The accused, a candidate for service, went to interview an officer and after saying that he wished to apply for a post in his department offered him 20 currency notes of Rs. 10 each saying, "I have brought this as a present for you". The officer immediately caught hold of the accused, and after getting the notes counted by his servant turned the accused out of his quarters:

**Held**, that a clear case under S. 161 was made out. 88 Ind. Cas. 857=6 Lah. 98=26 P.L.R. 263=26 Cr.L.J. 1241=A.I.R. 1925 Lah. 401.

—S. 161—Public servant.

If a convict warder accepts gratification from a prisoner for smuggling certain papers with some person outside the jail he commits an offence under S. 161. 83 Ind. Cas. 342=26 Bom. L.R. 267=25 Cr.L.J. 1382=A.I.R. 1924 Bom. 385.

—S. 161—Chaprasi as intermediary—Whether liable.

A Chaprasi who received Rs. 20 for payment to clerk of the Court who is to register the name of one of the two persons paying, for the post of a copyist, is guilty of an offence under S. 161, I. P. C., and the evidence of the persons who paid the amount corroborated by that of the pleader who witnessed the payment is sufficient for that purpose. 18 Cr.L.J. 536=9 P.R. 1917 (Cr.)=39 Ind. Cas. 680.

—S. 161—Demand of money for registering vakalat—Whether offence.

Vakalats and affidavits registered before a Village Munsiff are not judicial records. Therefore, a demand of money for registering a vakalat is not an offence under S. 161. 18 Cr.L.J. 37=36 Ind. Cas. 869 (Mad.).

—Ss. 161 and 384—Burmah Village Act, Ss. 7 and 8—Threat by Village Headman—Burmah Gambling Act, S. 10.

A village headman who enforces payment of money not legally due by threatening persons with a criminal charge under S. 10 of the Gambling Act does not commit an offence under S. 161 of the Penal Code as he is neither empowered to arrest people contravening S. 10 of the Gambling Act nor bound to give information of or investigates such offence under the Village Act and as he is not therefore exercising any official functions or doing an official act. 6 Bur. L.T. 92=14 Cr.L.J. 413=20 Ind. Cas. 237.

—S. 161.

Liability under S. 161 being one under general law is not affected by the imposition of liability under S. 61 (c) of Bihar and Orissa Excise Act, 1915. A.I.R. 1943 Pat. 229=22 Pat. 76.



## 2. Gratification.

—S. 161—Dasturi or customary payment—If illegal gratification—Offence.

Even a customary payment in the nature of dasturi comes within the mischief of S. 161, I. P. Code. I.L.R. (1946) Nag. 982=A.I.R. 1947 Nag. 109=1946 N.L.J. 586=226 Ind. Cas. 276=47 Cr.L.J. 873.

—S. 161—Bribe in kind.

A public servant accepting a donation to a charity in which he is interested, as a motive for showing favour to the donor in his official acts, is guilty under S. 161.

Gratification in S. 161, is not restricted to pecuniary gratification or gratification estimable in money. 67 Ind. Cas. 818=24 Bom. L. R. 534=23 Cr. L. J. 466=A.I.R. 1923 Bom. 44.

## 3. Offence under.

- (a) Abetment
- (b) Attempt
- (c) Essentials
- (d) Proof.

## 3 (a). Offence under—Abetment.

—Ss. 161 and 116—Public Servant receiving bribe on behalf of another public servant who was to show favour to the person paying the bribe—Conviction under S. 161—Legality.

Where a constable receives a bribe on behalf of a Sub-Inspector who was to release the accused on bail as the consideration of "doing or forbearing", etc., was not required from the constable he cannot be convicted under S. 161, I. P. Code, as the principal offender. He can, however, be found guilty under S. 161 read with S. 116 as an abettor. A. I. R. 1950 All. 412=4 A.I.Cr.D. 411=51 Cr.L.J. 1073=1950 A.L.J. 750.

—Ss. 161 and 109—Person complying with demand of public servant for bribe—If guilty of abetment.

A person who complies with a demand made by a public servant for a bribe, in order to avoid pecuniary injury or personal molestation, is guilty under S. 109, I. P. Code, of abetting an 'offence' under S. 161, I. P. Code. I.L.R. (1950) Nag. 229=1950 N.L.J. 435=51 Cr.L.J. 235=A.I.R. 1950 Nag. 1.

—Ss. 161 and 116—Offer of bribe to public servant to induce him not to make a report—Report already made—Offence, if any, committed.

Where bribe is offered to a public servant with a view to induce him not to make a report, though the report might have been already sent, the giver of the bribe would be guilty of an offence under S. 161, read with S. 116 of the Penal Code. I.L.R. (1947) A. 444=229 Ind. Cas. 613=1947 A.L.J. 312=48 Cr.L.J. 467=1947 A.W.R. (H.C.) 263=1947 A. Cr. C. 49=1947 A.L.W. 94=A.I.R. 1948 All. 17.

—S. 161.

Offering of bribe—If per se an offence.

See Penal Code, Ss. 116 and 161. (1947) 1 M.L.J. 179=A.I.R. 1947 Mad. 306 (2).

—Ss. 161 and 116.

Where the accused paid the money to a person to be handed over to a public servant as a bribe but the money was not so paid:

Held, that the accused was guilty of abetment of an offence under S. 161 read with S. 116. 1942 N.L.J. 104.

—Ss. 161, 116—Abetment of offence.

The provisions of S. 161 are not limited to official acts only. That section applies even if a public servant is requested to render any service with another 'public servant'. The section does not require that the public servant must, in fact, be in a position to do the official act, favour or service at the time. Illustration (c) to the section shows that even if a person offers gratification to a public servant by way of reward for services, which in fact were never rendered by him, he would still be guilty of the offence under S. 161. The heinousness of the act obviously lies in the intention of the bribe giver to corrupt the public servant and the act cannot be considered to be less heinous merely because the public servant does not happen to possess the necessary power to do the required favour or service.

The accused who had got a warrant for attachment of certain land issued against a judgment-debtor wanted to have the warrant signed by the Revenue Assistant in his capacity as a Collector. He wished to bribe the Reader of the Revenue Assistant in order to get this done. While he was standing outside the Court room of the Revenue Assistant he saw a Magistrate, coming out of the Court room and thinking that he was the Reader of the Revenue Assistant placed Rs. 2 and the warrants of attachment in his hand, asked him to get the warrants signed and take the money:

Held, that the accused did request the Magistrate in his capacity as a public servant, to render him the service of getting the warrants signed by another public servant, viz., the Revenue Assistant and therefore, although the Magistrate did not render him the service required, yet the act would still be punishable as 'abetment' of the offence under S. 161 read with S. 116. A.I.R. 1941 Lah. 276=43 P.L.R. 273=42 Cr.L.J. 636=I.L.R. (1942) Lah. 402=195 Ind. Cas. 229.

—S. 161—Abetment of offence.

The latter part of S. 161, makes it an offence for a public servant to accept any gratification other than legal remuneration as a motive of reward for rendering or attempting to render any service with a public servant as such and the offer of the gratification amounts to an abetment of offence under S. 161.

The Divisional Forest Officer in his official capacity was holding a departmental inquiry in which M, a public servant, was cited as a witness. The accused offered a sum of Rs. 100 to M as illegal gratification as a motive or reward for rendering him a service in the proceedings before the Divisional Forest Officer by not giving evidence against him or so shaping his evidence as not to injure him, or generally by influencing the Divisional Forest Officer in the accused's favour in connection with the allegations against him:

Held, that in doing so, he was attempting to bribe a public officer to render him service with another public servant who was acting as such and that he was guilty of an abetment of offence under S. 161. A.I.R. 1935 Sind 7=37 Cr. L. J. 20=158 Ind. Cas. 992.



## —S. 161—Abetment of offence under.

A mere statement by a person to a Judicial Officer that the plaintiff in a certain case would be willing to pay a certain sum of money to him as bribe if he decides the case in favour of the plaintiff does not amount to the abetment of an offence under S. 161. A.I.R. 1933 All. 513=34 Cr.L.J. 623=1933 A.L.J. 1481=55 All. 654=143 Ind. Cas. 661.

## —S. 161—Government Hospital—Doctor—Bribe, offer of to induce him to retain patient.

Where the doctor in charge of a Government hospital has already decided to discharge a patient but that patient is still in the hospital he cannot be regarded to be *functus officio* as his duties and responsibilities to the patient still remain and an offer of a bribe to him to retain the patient for a longer period is an offence under S. 161, and the refusal of the bribe brings the case under illustration (a), S. 116. 126 Ind. Cas. 603=32 M.L.W. 17=A.I.R. 1930 Mad. 671.

## —S. 161—Bribing police.

Where a person is accused of abetment of bribing a Head Constable of Police, the first part of S. 116, is applicable and not the second part as an offence under S. 161, is not cognizable by the police and is not one, the commission of which it is the duty of the head constable to prevent. 109 Ind. Cas. 681=10 L.L.J. 364=29 Cr.L.J. 601=10 A.I.Cr.R. 356=A.I.R. 1928 Lah. 840.

## —S. 161—Instigation—Statement to Public servant "X wished to pay you Rs. 5,000" may, taken with the context, amount to instigation.

The accused interceded with the Municipal Commissioner on behalf of his cousin and got some building regulation released in his favour, and then waited upon the Commissioner to thank him. The cousin had also other business with the Municipality pending. In the course of the conversation the accused said, "my cousin wished to pay you Rs. 5,000". The Commissioner thought he was being offered a bribe and asked him to leave which he did after apologies:

**Held, Per Macleod, C.J.**—That the words of the accused, though not an offer, amounted to an instigation to the Commissioner to attempt to get the Rs. 5,000.

There are many other ways of instigating a public servant to commit an offence besides by means of a direct offer of a bribe. The illustration (a) to S. 116 is only an example of an abetment of an offence under S. 161.

A person is said to instigate another to an act when he actively suggests or stimulates him to an act by any means or language, direct or indirect, whether it takes the form of express solicitation or hints, insinuation or encouragement.

**Per Shah, J.**—Without straining the meaning of the language used, it could not be said that the accused instigated the complainant to do anything. Particularly where the conversation does not amount to an offer, the Court should be slow to infer a sinister purpose from words which do not naturally bear that interpretation. 67 Ind. Cas. 818=24 Bom. L.R. 534=23 Cr.L.J. 466=A.L.R. 1923 Bom. 44.

## —S. 161.

Where it was not within the powers of the public servant to show any favour to the person offering the bribe:

**Held**, that the latter should not be convicted under Ss. 161 and 109. 64 Ind. Cas. 369=33 C.L.J. 379=23 Cr.L.J. 1=A.I.R. 1921 Cal. 344.

## —Ss. 161 and 109—Abetment of bribery—Motive immaterial.

A person handing currency notes to a Magistrate to show favour to an accused is guilty under S. 161, though his motive may be merely to expose a corrupt Magistrate. 22 M.L.T. 373=6 L.W. 677=(1917) M.W.N. 831=19 Cr.L.J. 29=42 Ind. Cas. 989.

## —S. 161, 116 and 107—Public servant asking for bribe—Abettor-liability.

A person responding to the call of the public servant through payment of a sum of money, is not the less guilty of abetment under S. 107, I.P.C. The solicitation on the servant's part making the offence is only more culpable than it would otherwise have been. S. 107 does not require instigation but intentional aiding to do a thing. 18 Cr.L.J. 327=9 L.B.R. 52=10 Bur. L.T. 252=38 Ind. Cas. 439.

## 3 (b). Offence under—Attempt.

## —S. 161.

A mere offer to pay an illegal gratification to a public servant is an attempt to bribe; actual money or other consideration need not be produced at the time the offer is made. 83 Ind. Cas. 679=3 Pat. 647=3 Pat. L.R. Cr. 61=26 Cr.L.J. 119=A.I.R. 1925 Pat. 48.

## —Ss. 161, 511—Attempt to obtain illegal gratification—Asking is attempting.

A Civil Court peon asking a party in a suit to pay him *dasturi* if he wished him to serve summons on a witness without an identifier is guilty of the offence of attempting to obtain illegal gratification. To ask for a bribe is an attempt to obtain one. 2 A. 253, Foll. (1905) 9 C.W.N. 547=32 C. 292.

## 3 (c). Offence under—Essentials.

## —S. 161—Acceptance of money to constitute an offence under—Requisites.

Simple acceptance of money is not an offence under S. 161, Penal Code; it must be as a motive or reward for an official act. If a person accepts money as a motive or reward for an act which cannot be said to be an official act, he would not be guilty under S. 161. 1950 A.L.J. 57.

## —S. 161—Ingredients of offence—Public servant not in a position to do official act.

All the ingredients of the offence under S. 161, I.P. Code, would exist if an illegal gratification is accepted by a public servant as a motive or as a reward for doing or forbearing to do some official act. It is wholly immaterial whether the public servant concerned is in a position to do any official act or not. 1941 Lah. 276; 51 A. 467; 31 B. 335 and 1948 Nag. 82, foll. 3 A.I.Cr.R.D. 217=A.I.R. 1949 Ajmer 12=50 Cr.L.J. 400=1949 A.M.L.J. 121.



—S. 161—Offence under—Public servant not in a position to show official favour.

S. 161, I. P. Code, does not require that the public servant receiving a bribe must in fact be in a position to do the official act, favour or service at the time. It is sufficient if he promises to show favour in the exercise of his official functions although he has in reality no such power. I.L.R. (1947) Nag. 611=1947 N.L.J. 393 =49 Cr.L.J. 124=A.I.R. 1948 Nag. 82.

—Ss. 161 and 114—Offence under—Payment to public officers intended as a donation to a public institution in which they were interested—Connection between the payment and performance of the official duty not established—Defence of India Rules, R. 34 (6) (c).

Certain monies were offered to two officers in the Provincial Textile Commissioner's office by the accused who were the applicants for a permit. It was established by the attendant circumstances that the payment was made as a donation to a public institution in which the officers were interested and that the amounts were offered independently of the result of the application:

**Held:** (i) that as the *sine qua non* was the establishment of a connection between the payment and the performance of the official duty before it can be said that gratification offered was a motive or reward for the purposes mentioned in S. 161 of the Code no offence had been made out;

(ii) for the same reasons there was no inducement offered to the officers to fail in the performance of their duties and consequently no "prejudicial act" had been committed by the accused within the meaning of R. 34 (6) (c) of the Defence of India Rules, 1948 M.W.N. 86=61 L.W. 140=A.I.R. 1948 Mad. 281=49 Cr.L.J. 265=(1948) 1 M.L.J. 142.

—S. 161.

The fact that a person giving the bribe to an officer on behalf of his principal is not in the service of his principal is immaterial. A.I.R. 1943 Lah. 255=45 Cr.L.J. 64=46 P.L.R. 166=209 Ind. Cas. 66.

—S. 161—Public servant *functus officio*.

No offence under S. 161 is committed where the public servant to whom the bribe is offered is at the time when the offer is made *functus officio* as to the matter in respect of which the bribe is offered. A.I.R. 1935 Pesh. 26=36 Cr.L.J. 626=154 Ind. Cas. 910.

—S. 161—Officer *functus officio*.

If a man in the vain hope of getting a public officer to re-consider a question, as to which that public officer is *functus officio* offers a bribe he commits no offence whatever.

Amendment of the present law suggested. 119 Ind. Cas. 315=30 M.L.W. 235=1929 Cr. C. 334=1929 M.W.N. 695=2 M.Cr.C. 230=30 Cr.L.J. 1055=A.I.R. 1929 Mad. 756=57 M.L.J. 239.

—S. 161—Essentials.

Mere knowledge that a bribe was to be given would not make a person who has the knowledge a participator in the giving of the bribe. 120 Ind. Cas. 340=53 Bom. 479=31 Bom. L.R. 545=1929 Cr.C. 114=31 Cr.L.J. 65=A.I.R. 1929 Bom. 296.

—S. 161.

It is necessary that the gratification need actually be produced. 105 Ind. Cas. 829=51 Mad. 86=39 M.L.T. 615=26 M.L.W. 529=1927 M.W.N. 764=28 Cr.L.J. 1005=9 A.I.Cr.R. 180=A.I.R. 1927 Mad. 1011=53 M.L.J. 723.

—S. 161.

For a conviction under S. 161, I.P.C., the illegal gratification must be proved to have been received with one of the intents mentioned in the section. 89 Ind. Cas. 455=26 Cr.L.J. 1367=1 L.C. 522 (Lah.)

—S. 161.

No favour need be shown to the briber as a fact; it would be sufficient if he was led to believe that the matter would go against him if he did not give the Officer a present. 86 Ind. Cas. 72=27 Bom. L.R. 120=26 Cr.L.J. 696=A.I.R. 1925 Bom. 261.

—S. 161.

Motive of accused must relate to official act.—What is departmentally reprehensible merely is distinct from what is criminal—Karnam taking bribe for getting darkhast commits no offence. 84 Ind. Cas. 940=20 M.L.W. 618=1924 M.W.N. 894=26 Cr.L.J. 326=A.I.R. 1924 Mad. 851=47 M.L.J. 662.

—S. 161—Discharge of official functions at the time of receiving bribe—Offence.

To sustain a charge under S. 161 actual discharge of public functions when receiving bribe is not required. 19 Cr.L.J. 486=18 P.R. 1918 (Cr.)=26 P.W.R. 1918 (Cr.)=96 P.L.R. 1918=45 Ind. Cas. 150.

—S. 161—Reward for any other purpose.

A public servant taking a sum of money as a motive or reward, only for any of the purposes mentioned in the section is liable under S. 161, I.P.C. To receive gratification for any other purpose is not culpable. 21 C.W.N. 552=18 Cr. L.J. 565=39 Ind. Cas. 805.

—S. 161—"In the exercise of his official functions"—As a motive or reward.

S. 161 requires proof that an official has obtained as a motive or reward for official conduct an illegal gratification for himself or another. That other may or may not be an official and therefore may be wholly unconnected with the official conduct. The conduct which is contemplated as the consideration for the bribe must be that of the official obtaining it. To obtain a bribe as a motive or reward for another's conduct, does not fall within the section though it may be an abetment of that offence or cheating. The performance of the act which is consideration for the bribe is not essential but it is essential that the bribe should be obtained 'as a motive or reward'. The phrase evidently means on the understanding that the bribe is given in consideration of some official act or conduct. Such an understanding need not be proved by explicit evidence of any precise agreement. It may be inferred from circumstances. (1907) 9 Bom. L.R. 331=31 B. 335.

3 (d). Offence under—Proof.

—S. 161 and the Prevention of Corruption Act (II of 1947), S. 4—Acceptance by public servant



**of gratification other than legal remuneration—Presumption of acceptance as motive or reward.**

The petitioner was a public servant and he accepted Rs. 100 and a gold ring as reward for exercising his official favours in favour of the bribe-givers by recommending to his superior officer, their retention in their jobs, despite a retrenchment discharge notice served on them. He was convicted for an offence under S. 161 of the Penal Code, and in revision, it was contended that the petitioner did not receive the gifts as illegal gratification, or bribe, but simply as 'mariyadas', or honours rendered to him by persons benefitted by his recommendation, who gave them willingly and even joyfully out of the gratitude for his recommending them:

**Held**, the essence of the matter is the real nature of the payment to be gathered from the circumstances and under the general presumption in S. 4 of the Prevention of Corruption Act, II of 1947, viz., that in any trial for offences punishable under S. 161, where it is proved that an accused person has accepted or obtained for himself any gratification other than legal remuneration or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained it as a motive or reward as is mentioned in S. 161 of the Penal Code. 1949 M.W.N. 649=62 L.W. 712=A.I.R. 1950 Mad. 93=51 Cr.L. J. 386=(1949) 2 M.L.J. 443.

**—S. 161—Conviction—Proof—Sufficiency—What has to be proved—Proof of mere passing of marked currency notes from spy or decoy witness to accused—Sufficiency.**

The mere handing over of currency notes to the accused cannot adequately prove that they were given as bribe, so as to render the receiver liable to conviction on a charge under S. 161, I. P. Code. The prosecution must either succeed or fail according as it proves that the notes were paid as bribe or not. To sustain a conviction it must be proved that the money was received by the accused for an illegal purpose; it is not sufficient to prove that marked notes passed from the decoy or spy witness to the accused. I.L.R. (1949) Cut. 585.

**—S. 161.**

Recovery of marked coins amounts to corroboration. A.I.R. 1936 Nag. 245=38 Cr.L. J. 423=I.L.R. (1937) Nag. 181=167 Ind. Cas. 521.

**—S. 161—Illegal or guilty intention—Proof—Passing of marked currency notes to accused—Proof—Sufficiency for conviction of offence of receiving bribe—Corroboration of statement of police decoy—Necessity—Duty of prosecution.**

It is not sufficient for the prosecution in a case of receiving illegal gratification or bribe, to merely prove that some marked currency notes passed into the hands of the accused from a police decoy or agent provocateur. The prosecution must produce evidence in support or corroboration of the statement of the decoy that the money in question was received by the accused for an illegal purpose. The mere statement of the decoy that he paid the money for an illegal purpose is not sufficient to justify a conviction. 48 Cr.L. J. 964=49 P.L.R. 253=A.I.R. 1948 Lah. 27.

**—S. 161—Proof of charge—Independent evidence—Duty of prosecution to adduce—Police trap or decoy witness—Evidence of—Sufficiency.**

A charge under S. 161, I. P. Code, cannot be established by the tainted evidence of accomplices or spies of the police. If they are persons set up by the police, to make out a case against the accused who had probably earned the reputation of corruption, from beginning to end, their evidence is not sufficient. There must be some independent evidence, either direct or circumstantial. It cannot, of course, be laid down as a general rule that no prosecution can be based upon police traps. While it is generally impossible to defect this class of offence in any other way except by police traps, that should not lighten the task of the prosecution which lies upon it under the general principles of criminal law that the accused's guilt must be established beyond all reasonable doubt. Anybody may be easily taken unawares by a police trap or decoy witness who is no better than an accomplice, whose tainted evidence cannot in law be held sufficient to bring home the charge to the accused. 4 A.I.Cr.D. 363.

**—S. 161—Proof of offence—Evidence of person offering bribe—Value of.**

A person who offers a bribe to a public servant is an accomplice, and it is generally unsafe to convict a person on the evidence of an accomplice unless corroborated in material particulars. 1929 Nag. 215, ref. to. 3 A.I.Cr.D. 270=A.I.R. 1949 Ajmer 12=50 Cr. L. J. 400=1949 A.M.L.J. 121.

**—S. 161—Proof—Corroboration.**

Bribery case—Payment of bribe not voluntary—Very slight corroboration would be sufficient to make evidence of accomplice admissible against receiver of bribe. A.I.R. 1935 Bom. 230=59 Bom. 486=37 Bom.L.R. 366=36 Cr.L.J. 968=156 Ind. Cas. 615 (2).

**—S. 161—Persons instrumental in negotiating bribe.**

In a case under S. 161, persons who were either instrumental in negotiating the bribe or in arranging for its payment are in the position of accomplices and according to well-settled principles it is highly unsafe to base a conviction on their testimony without independent corroboration. (1934) 147 Ind. Cas. 557=34 P.L.R. 836=35 Cr. L. J. 452.

**—S. 161—Accomplice in offering bribe.**

A person who offers a bribe to a public officer is an accomplice. Persons who actually pay the bribes or co-operate in such payments or are instrumental in the negotiations for the purpose are also accomplices of the person bribed, and a person who with knowledge that the bribe has to be paid advances money is clearly an abettor and as such an accomplice. 114 Ind. Cas. 457=30 Cr.L. J. 311=1929 Cr. C. 110=A.I.R. 1929 Nag. 215.

**—Ss. 161 and 384—Nature of evidence required.**

S. 161 requires the acknowledgment of receipt and not the mode of obtaining illegal gratification to be established by evidence; in the particular case, principal witnesses for the prosecution are abettors so that their evidence ought to be treated as that of an accomplice. 15 A.L. J. 127=18 Cr. L. J. 317=38 Ind. Cas. 429.

**—S. 161.**

Offence under—Every possibility of innocence of accused should be excluded. A.I.R. 1944 F. C. 66



=1944 A. L. J. 258=23 Pat. 517=1944 M.W.N. 430=48 C.W.N. F.C. 109=11 B. R. 20=45 Cr. L. J. 755=(1944) 1 M.L.J. 503=1944 F.C.R. 262=1944 A. W. R. 26=25 P.L.T. 200=214 Ind. Cas. 199 (F.C.)

—S. 161—Proof of offence—Receiving bribe even for doing a just and proper act is an offence—People of locality accustomed to pay bribe—Independent proof of offence is necessary.

The fact that the people of a particular tract of the country have been given to the practice of making payments in money or in kind to subordinate officials to win their favour, does not relieve their prosecution of the necessity of strict and conclusive proof of the offence of bribery.

When a bribe has been proved to have been given it is not necessary to ask what, if any, effect the bribe had on the mind of the receiver and it is an offence even when the act, done for the bribe given, is a just and proper one. The gist of the offence is a public servant taking gratification other than legal remuneration in respect of an official act. 89 Ind. Cas. 1035=8 N.L. J. 138=26 Cr.L. J. 1467=A.I.R. 1925 Nag. 313.

—S. 161—Bribery against a public officer—Nature of evidence—Proof.

Evidence should be conclusive to establish a charge of bribery against a public servant or his having committed an offence while discharging his duties. 26 P.W.R. 1911 (Cr.)=12 Cr.L. J. 485=12 Ind. Cas. 93.

—S. 161—Evidence—Nature of.

Proof that money was borrowed by the man who is alleged to have paid the bribe shortly before the alleged payment, is no evidence of payment. (1911) 1 M.W.N. 327=21 M.L.J. 283=12 Cr.L. J. 150=10 M.L.T. 84=9 Ind. Cas. 897.

—S. 161—Proof of offence—Evidence of good character of accused—Value of.

Cases of bribery like all other criminal cases are subject to the rule that the accused cannot be convicted unless the Court is satisfied concerning his guilt beyond reasonable doubt, to which may be added as a corollary, that where the accused in a bribery case pleads and produces evidence of good character which the Court regards as satisfactory, and if it appears to the Court that a person possessing such a character would not be likely to act, in the circumstances proved to have existed at the time, in the manner alleged by the prosecution, such improbability must be taken into account in determining the question whether or not there is reasonable doubt as to the guilt of such accused person. 48 Cr.L. J. 882=A.I.R. 1947 Lab. 410.

#### 4. Sanction for prosecution.

—S. 161—Sanction to prosecute for an offence under—Requisites.

In order to constitute proper sanction to prosecute an accused for an offence under S. 161, Penal Code, there should be evidence either from the order granting sanction or other documentary authority placed before the Court or even oral evidence that the facts were placed before the officer from whom sanction was sought.

Where a sanction merely refers to the particular offences for which sanction is being accorded and the name of the person to be prosecuted and there is nothing to indicate that the facts giving rise to the offence were placed before the sanctioning officer, the sanction cannot be said to be a legal one. The mere heading in the sanction that it was in regard to the "acceptance of illegal gratification" would not be a sufficient compliance with the requirements of the law. 1950 M.W.N. 899=63 L.W. 816=(1950) 2 M.L. J. 333=A.I.R. 1951 Mad. 255.

—S. 161—Sanction.

Sanction is not necessary for the prosecution for receiving bribe of an Excise Inspector in U. P. as he is removable from his office by the Excise Commissioner. 92 Ind. Cas. 857=48 All. 264=24 A.L. J. 230=27 Cr.L. J. 345=7 L.R.A. Cr. 41=A.I.R. 1926 All. 271.

—S. 161.

Where the president of the Panchayat Court is charged for bribery, either under S. 161 or 171-E, the sanction of the Government is necessary for the prosecution. 65 Ind. Cas. 612=15 L.W. 199=1922 M.W.N. 122=30 M.L.T. 351=23 Cr.L. J. 148=A.I.R. 1922 Mad. 62=42 M.L. J. 139.

#### 5. Sentence.

—Ss. 161 and 116—Offence under—Measure of sentence—Trap laid against giver—Discretion.

Per Malik, J.—The question of sentence must, in each case, depend upon a variety of considerations and is a matter primarily in the discretion of the Court which passes the sentence.

It is no doubt true that bribery and corruption in connection with military contracts have become so common that they amount to a public scandal and it is necessary that deterrent sentences should be passed. But the proper way of putting down this evil is to punish, not only those who offer bribes but still more severely those who take bribes, and when the facts disclose that the bribe was solicited, even with the object of getting a man caught and punished, it would render the abetment less culpable than it would otherwise be. A.I.R. 1945 All. 207=1945 A.L. J. 204=I.L.R. (1945) All. 450=47 Cr.L. J. 132=1945 A.W.R. (H.C.) 167=1945 O.W.N. (H.C.) 195=221 Ind. Cas. 256.

—Ss. 161 and 116—Distinction between one who offers bribe and one who accepts it.

Per Iqbal Ahmad, C. J.—Both the giver and taker of the bribes are parts of the same instrument; the minds of both work in unison, both act in concert and it is their concerted action which produces a result constituting a menace to society. There is, therefore, no distinction between the two.

[Tests for different sentences for different offences laid down.] A.I.R. 1945 All. 207=1945 O.W.N. (H.C.) 195=1945 A.W.R. (H.C.) 167=I.L.R. (1945) All. 450=47 Cr.L. J. 132=1945 A.L. J. 204=221 Ind. Cas. 256.

—Ss. 161 and 116—Offence under—Measure of sentence—Trap laid against giver—Accused 25 years old and acting as agent of his father—Taker not tried—Loss in other way—Belated application for revision.



**Per Iqbal Ahmad, C. J.**—In awarding the lighter sentence for an offence under S. 161 read with S. 116, I. P. C., against the accused who offered bribe, the facts that a trap was laid against him, that he was of 25 years of age and was acting in a firm as an agent of his father and that the taker of the bribe was not tried in ordinary Court of law are not the matters to be considered. But when it was found that the accused sustained a heavy loss by way of cancellation of his contracts and that the application for revision praying for the enhancement of sentence was belated, the decision of the Sessions Judge was not to be interfered with. A.I.R. 1945 All. 207=1945 A.L.J. 204=I.L.R. (1945) All. 450=1945 A.W.R. (H.C.) 167=1945 O.W.N. (H.C.) 195=47 Cr.L.J. 132=221 Ind. Cas. 256.

**—S. 161—Bribery in connection with military contracts—Consideration in awarding punishment.**

In a case under S. 116 read with S. 161 against a military contractor whose business was to supply goods to a military depot of specified quality, the fact that a trap was laid to catch the accused is no reason for not imposing a sentence of imprisonment. A.I.R. 1945 All. 207=1945 A.L.J. 204=47 Cr.L.J. 132=I.L.R. (1945) All. 450=1945 O.W.N. (H.C.) 195=1945 A.W.R. (H.C.) 167=221 Ind. Cas. 256.

**—S. 161—Bribery prevalent among higher officials also—Points to be considered while giving punishments to subordinate officials.**

In apportioning the punishment in the case of bribery, the Court is entitled to take into consideration the fact that corruption of the nature of which the accused has been convicted is undoubtedly widely prevalent not only amongst the class of subordinate officials to which he belongs, but also in much higher places. It is common knowledge that bribery and corruption are widely indulged in by many persons. The more influential they are and the greater the pecuniary benefit they derive therefrom, the greater is the degree of immunity which they seem to enjoy. It is little wonder, therefore, that following the general example of such persons the small fry are easily tempted and more easily succumb, even though the latter are relatively in greater danger of being found out and punished. Although this does not lessen the gravity of the offence it is a consideration in favour of comparative lenience in punishing such people. Until something is done to reduce the prevalence of this class of offence in high and influential quarters, it is unfair to visit the smaller practitioner with punishment of extreme severity. A.I.R. 1943 Lah. 255=45 Cr.L.J. 64=46 P.L.R. 166=209 Ind. Cas. 66.

**—S. 161—Punishment must be deterrent—Mere fine is not enough.**

Punishment in the case of offences by or relating to the public servants, and particularly those of obtaining or giving bribes by or to public servants, ought to be deterrent as their object is to check repetition of the offences not only by the actual culprits, but also by the other public servants. A lenient punishment as of a mere fine can hardly act as a corrective, or deter men from committing similar offences. 86 Ind. Cas. 469=26 Cr.L.J. 821=A.I.R. 1925 Nag. 321.

**—S. 161—Payment of bribe—Effect.**

Payment of a bribe to a public official must be a wrong act but the circumstances may be such as to

render the immorality of a very venial description. 12 Cr.L.J. 170=9 M.L.T. 503=9 Ind. Cas. 978.

**6. Miscellaneous.**

**—Ss. 161 and 384.**

Principal offence under S. 384—Conviction under S. 161 is not illegal if offence comes within definition of S. 161. A.I.R. 1944 Cal. 374=46 Cr.L.J. 94=48 C.W.N. 632=215 Ind. Cas. 298.

**—S. 161.**

As it appeared from the admission of the parties that both the parties were guilty of an offence under S. 161, in having taken bribes by looting the public dishonestly, the High Court directed that they be ordained to show cause why they should not be prosecuted for an offence under S. 161. A.I.R. 1934 All. 493=3 A.W.R. 415=1934 A.L.J. 1256=149 Ind. Cas. 396.

**—S. 161—Charge under.**

A charge under S. 161, I.P.C., need not be in respect of every item received by the accused from several people for a common object useful to all. 11 P.R. 1911 Cr.=146 P.L.R. 1911=32 P.W.R. 1911 (Cr.)=12 Cr. L.J. 217=10 Ind. Cas. 156.

**—Ss. 161, 165—Continuous offence when—Bribe partly on one day and partly on another—Same or separate offences.**

Where a certain sum of money is paid on a certain day to a public servant as illegal gratification and another certain sum on another day for the same purpose, the offence of receiving illegal gratification becomes a continuous offence and there ought not to be separate convictions for offences, under Ss. 161, 165, I. P. C. (1901) 5 C.W.N. 332.

**—S. 162—Motive.**

A conviction under S. 162 of the Code cannot be sustained without a finding that the money was accepted or obtained by the accused as a motive or reward for tampering with a public officer. (1910) M.W.N. 776=9 M.L.T. 137=11 Cr.L.J. 696=8 Ind. Cas. 668.

**—Ss. 162, 193—Statement made to Police—Admissibility in evidence—Sanction to prosecute for perjury—Cr. P.C., S. 476—Revision.**

Statements made to Police officers and recorded by them in the diaries cannot be used in evidence except for the sole purpose of the contradicting the Police officer. 19 A. 390, foll. Where a person denied having made a particular statement to a Police officer in whose diary it was to be found:

**Held**, that the prosecution for perjury against that person could not successfully be maintained. **Held**, further that the High Court had power to interfere in revision in a case where the Magistrate sanctions a prosecution under the above circumstances even if the order was passed under S. 476, Cr. P.C. 4 A.L.J. 811=1908 A.W.N. 22.

**—S. 166—Applicability—Essentials of offence—Mere disobedience of order without dishonesty or mala fides.**

The offence which is made punishable under S. 166, I.P. Code, is a wilful disobedience of an express direction



of the law. A mere disobedience to an order does not constitute an offence under the section, when there can be no imputation of either dishonesty or *mala fides*. 4 A.I.Cr.D. 729.

—S. 166—Notice of service—Representation as a warrant—Conviction.

A peon who was directed to require the signature of the persons on whom notices were to be served represented the notice to be a warrant and actually arrested the complainant. Held, that he had disobeyed a direction of law and his conviction therefore for such disobedience was right. 7 M.L.T. 429=20 M.L.J. 568=11 Cr.L.J. 400=6 Ind. Cas. 773.

—Ss. 167 and 193—Distinction between.

While S. 167 deletes incorrent preparation of a public record, S. 193 applies when the record forms part of the record of a judicial proceeding. A.I.R. 1945 Mad. 9= (1944) 2 M.L.J. 157=57 M.L.W. 465=1944 M.W.N. 684=46 Cr. L.J. 259=217 Ind. Cas. 236.

—S. 167—Preparation and framing of electoral rolls.

Under S. 167, I.P.C., there is no difference between the preparation and the framing of an electoral roll. The signature and the delivery of the electoral rolls under R. 13 (1), Bihar Municipal election Rules are operations subsequent to the preparation under Sub. R. (1), and serve to indicate that the preparation was complete, but cannot be said to be essential to the framing required by S. 167, I.P.C. for it is not always impossible to show in other ways that the process of preparing was complete.

A Head Clerk of a Municipality appointed under R. 13 (1), Bihar Municipal Election Rules, 1937, to prepare the electoral rolls, prepared them but went away on leave before signing or delivering them and they were, therefore, signed and delivered by his *locum tenens*:

Held, that for S. 167, I.P.C., to apply, the preparing and framing must be complete and final so far as the author is concerned, and it was difficult to exclude anything that it would have been permissible for the Head Clerk to do the rolls until the time came for his signing them and delivering them. He could not, therefore, be convicted under S. 167. A.I.R. 1941 Pat. 539=22 P.L.T. 443=7 B.R. 690=42 Cr. L.J. 508=194 Ind. Cas. 108.

—S. 167.

Appointment of Head Clerk to prepare electoral rolls under R. 13 (1), Bihar Municipal Election Rules, 1937, of Municipality of five wards—Subsequent Government Notification deviding Municipality into sixteen wards—Appointment of Head Clerk neither revoked nor fresh formal appointment made:

Held, that the word "charged" in S. 167 is not to be very narrowly construed. It was no part of the ordinary duty of Head Clerk to prepare any electoral roll but as he was expressly appointed to prepare the electoral rolls under the Election Rules, he was a public servant charged with the preparation of electoral rolls. A.I.R. 1941 Pat. 539=22 P.L.T. 443=7 B.R. 690=42 Cr. L.J. 508=194 Ind. Cas. 108.

—S. 167—False entry by Station House officer.

Evidence of subsequent conduct, whether sufficient for conviction,

A false entry in his diary by a station House Officer is sufficiently proved by evidence of his subsequent conduct displaying *mala fides* in his actions and is rightly convicted under S. 167. (1011) 2 M.W.N. 64=12 Cr. L.J. 502=12 Ind. Cas. 222.

—S. 167—Forgery.

The offence under S. 167, is included in the offence under Ss. 467-471, and therefore, conviction, both under S. 167 and Ss. 467-471, is not maintainable. 99 Ind. Cas. 122=3 O.W.N. 760=7 A.I. Cr.R. 51=13 O.L.J. 817=28 Cr. L.J. 90=A.I.R. 1926 Oudh 615.

—S. 167—Tampering with records.

Any official, however humble, who deliberately tampers with official records, and issues false copies, whatever his motives, deserves severe punishment not merely for his own conduct, but as a deterrent to others who may be tempted to follow his example. 99 Ind. Cas. 63=28 Cr. L.J. 31=7 L.R.A. Cr. 162=A.I.R. 1926 All. 719.

—S. 168 — Scope—Offence by public servant—Engaging in trade in contravention of R. 21, Bombay Civil Service Conduct, Discipline and Appeal Rules, 1932—Prosecution under S. 168, I.P. Code — If barred by R. 49, Civil Service (Classification, Control and Appeal) Rules.

It is a wrong hypothesis to say that if a public servant is guilty of a wrongful deed which falls under two distinct laws, e. g., Penal Code, S. 168, and R. 21 of the Bom. Civil Service Conduct, Discipline and Appeal Rules, framed under R. 49 of the Civil Service (Classification, Control and Appeal) Rules. Penalty can be imposed on him only under one law. If a public servant is guilty of a crime under the Penal Code, he can be prosecuted, convicted and sentenced under that Code. There is also no doubt that after such conviction, or even irrespective of the result of the prosecution, he can be dismissed under R. 49 of the Civil Service (Classification, Control and Appeal) Rules. Although R. 49 of the Rules does not lay down that one of the penalties which could be imposed upon the members of the services comprised in the classes specified is a prosecution under S. 168, I. P. Code, a public servant who engages himself in trade, in contravention of the rules under which he is legally not to do so, can be prosecuted under S. 168, I. P. Code, and such a prosecution is not barred or rendered unsustainable by R. 49. 52 Bom. L. R. 648=A.I.R. 1951 Bom. 233.

—S. 168—Applicability—"Engage in trade"—Meaning of—Bombay Civil Service Conduct, Discipline and Appeal Rules, 1932, R. 21—"Trade"—Public servant in office of Public Health Engineer—Preparation for money for outsiders of plans, estimates, etc.—Offence.

The word "trade" used in S. 168, I. P. Code, and in R. 21 of the Bombay Civil Services Conduct, Discipline and Appeal Rules, cannot be construed as being limited to its technical meaning, but must be construed in a wider sense as covering every kind of trade, business, profession or occupation. Where a public servant, employed in the office of the Public Health Engineer to the Government of Bombay, executes the work of preparing plans and estimates for schemes of drainage and water works for outsiders for money, it being his duty to handle such schemes in the course of his employment in the Government Department, it must be held that such public servant



engages himself in trade and renders himself liable to conviction under S. 168, I. P. Code, as under R. 21, he is bound not to engage himself in trade. 52 Bom. L. R. 648=A.I.R. 1951 Bom. 233.

—S. 168.

Clerk of Circle Board letting out his house to Board—No permission of Commissioner taken—The clerk held, committed an offence under S. 168, I.P.C., read with S. 77, Burma Rural Self Government Act 1921. A.I.R. 1939 Rang. 69=40 Cr.L.J. 248=179 Ind. Cas. 716.

—S. 168—Berar Municipal Act of 1886, S. 146 (1)  
—Lending money on personal credit.

A member of a Municipal Board in Berar who lends money to a contractor, upon the personal credit of such contractor, for the purpose of a contract with the Municipal Board violates S. 146 (1) of the Berar Municipal Act and is guilty of an offence under S. 168, I.P.C. 7 N.L.R. 53=12 Cr.L.J. 281=10 Ind. Cas. 577.

—S. 168—Offence under Berar Municipal Law.

A member of a Municipal Committee in Berar, who becomes directly or indirectly interested in a contract with the Committee, in violation of S. 146 of the Berar Municipal Law, commits an offence not punishable under the Municipal Law, but punishable under S. 168, I.P.C. and S. 151 of the Municipal Law does not apply. 6 N.L.R. 114=11 Cr.L.J. 613=8 Ind. Cas. 274.

—S. 168—Police Officer—Carrying on trade—Police Act (V of 1861), S. 10.

The conduct of a police servant carrying on a shop comes within the prohibition contained in S. 10 of the Police Act and he is, therefore, liable to be convicted under S. 158, I.P.C. The words 'any employment or office whatever' in S. 10 of the Police Act are wide enough to cover the case of a Police Officer who engages in trade. 19 Cr.L.J. 152=48 Ind. Cas. 440 (Cal.)

—S. 168.

Prosecution under S. 168, I.P.C., read with S. 34, U.P. District Boards Act need not be started on a complaint of the Board or of some person authorised by the Board. A.I.R. 1933 All. 543=34 Cr.L.J. 1208=1933 A.L.J. 1559=55 All. 798=146 Ind. Cas. 149 (2).

—S. 168—Sanction of Local Government.

It is open to a Court to take cognizance of an offence under S. 168, without previously obtaining the sanction of the Local Government. A complaint alleging that a member of a Municipal Committee had committed an offence under S. 168, can, therefore, be taken cognizance of without sanction.

A member who in his private capacity takes a contract with a Municipal Committee cannot be said to have done so "while acting or purporting to act in the discharge of his official duty." A.I.R. 1932 Nag. 133=28 N.L.R. 156=34 Cr.L.J. 70=140 Ind. Cas. 711.

—S. 168—Sentence—Gross abuse of official position by public servant—Deterrent sentence—Necessity—Sentence of fine of Rs. 1,000 or simple imprisonment for three months in default—Sufficiency.

In the case of an offence by a public servant under S. 168 of engaging himself in trade, in a case of gross

abuse of an official position by him extending over a fairly long time, the matter calls for deterrent punishment. A sentence of a fine of Rs. 1,000 or in default to suffer three months simple imprisonment, is grossly inadequate and must be enhanced. A sentence of simple imprisonment for 9 months and a fine of Rs. 5,000, and in default, further simple imprisonment for three months awarded in place of the punishment inflicted by the lower Court. 52 Bom. L. R. 648=A.I.R. 1951 Bom. 233.

—S. 170.

Promise to appoint person as constable or writing something nonsense and unintelligible on paper cannot be regarded as act done under colour of office of C.I.D. officer. A.I.R. 1943 Pat. 378=9 C.L.T. 45=10 B.R. 187=45 Cr.L.J. 211=210 Ind. Cas. 78.

—S. 170—Posing as C.I.D. Officer.

Where the accused posed as a C.I.D. Officer and by so doing obtained the services of the Kamdar Mahar, services which he would not otherwise have obtained and which the Kamdar Mahar was bound to give on demand by a Government Officer:

Held, that the accused did an act under the colour of the office which he had assumed and was guilty of an offence under S. 170. A.I.R. 1941 Nag. 321=1941 N.L.J. 222=43 Cr.L.J. 79=1.L.R. (1942) Nag. 484=196 Ind. Cas. 759.

—S. 170.

C.I.D. Constable pretending to be Police Officer. The accused, a C.I.D. Constable, pretended to be a Police Officer, and as such demanded the production of the rahdari papers from people who had cattle with them:

Held, that he was guilty under S. 170. A.I.R. 1935 Lah. 92=37 Cr.L.J. 81=159 Ind. Cas. 353.

—S. 170—'Under colour of office'—Personating C.I.D. Officer.

Accused went to the platform of a railway station without a ticket and obtained admission on the pretence that he was a C.I.D. Officer. Held, that his conviction under S. 170, I.P.C., was wrong. The mere assumption of false character without any attempt to do an official act is not sufficient to bring the offence within the meaning of S. 170, I. P. C. 3 Pat. L.J. 389=(1918) P.H.C.G. 287=4 Pat. L.W. 39=19 Cr.L.J. 209=43 Ind. Cas. 785.

—S. 170—Personating a public servant—Acts done in such assumed character—"An Act under-colour of such office".

Mere personation is insufficient to justify conviction under S. 170. The section, further requires that the offender should be shown to have attempted to do or to have done in such assumed character some act under colour of such office. The phrase "an act under colour of such office" points to acts which could not have been done without assuming official authority or responsibility and would not connote acts of a ministerial or mechanical character which might be done without requiring the justification of office in the person doing them. (1907) Bom L.R. 222=5 Cr.L.J. 211.



—S. 170—Personating a public servant—Act done by person not in office under colour of office—Offence.

For a conviction under S. 160, it is not necessary that the act done under colour of the office assumed should be such an act as could be done only by one holding such office. 10 A. 59, Foll. (1904) A.W.N. 232=1 A.L. J. 604=27 A. 294.

—S. 170—Essentials—Dishonest intention.

A dishonest intention is not expressly made an essential ingredient of the offence punishable under S. 170. (1907) 9 Bom. L.R. 706=6 Cr.L.J. 70.

—Ss. 170, 175—Joint trial for offences under.

Where it appeared that the accused committed a technical offence under S. 170, I.P.C.; but that he had acted through vanity rather than with any criminal intention, and was tried of two offences under Ss. 170 and 175, I.P.C. together:

Held, that a trial of the two offences under Ss. 170 and 175 together was illegal and contrary to the provisions of Ss. 232 and 235, Criminal P.C. and that the conviction should be set aside no further enquiry being necessary. A. I. R. 1933 Mad. 434=34 Cr. L. J. 1183=146 Ind. Cas. 195.

—S. 171-A—Applicability—Acts amounting to offence under S. 52, Madras District Municipalities Act no offence under Penal Code.

In the matter of the Election Offences Act (introduced as Chap. 9-A in the Penal Code) bearing on elections to the Legislative Council there is no section corresponding to S. 52, District Municipalities Act. If an allegation is made in the matter of an election to the Legislative Council that a candidate committed acts which would amount to an offence under S. 52, District Municipalities Act, it could not be an offence under the Election Offences Act relating to the Legislative Council. 122 Ind. Cas. 33=30 M.L.W. 889=A.I.R. 1929 Mad. 910=57 M.L.J. 551.

—S. 171-B—Bribery.

Where a candidate for an election takes steps to dissuade the rival candidate from standing and offers money to the rival candidate through his agent for withdrawing the candidature, his conduct comes within the definition of 'bribery' contained in S. 171-B. A.I.R. 1938 Cal. 274=174 Ind. Cas. 808=39 Cr.L.J. 483.

—S. 171-C—Gosha voters—Circular that goshas should unveil themselves if identity is disputed—Validity.

There was a large number of Muhammadan gosha voters in a certain polling area. Booths were set apart for women, women Polling Officers were appointed and it was also ordered that only females could be appointed agents of candidates but the candidates themselves were admitted to the booths. The District Election Officer sent a circular subsequently that gosha ladies will have to unveil themselves in the polling booths if their identity was challenged by the candidates or their agents. A candidate insisted on each purda voter unveiling herself in accordance with this circular. He was subsequently elected but his election was set aside on the grounds (i) that the circular that goshas should unveil themselves was *ultra vires* and illegal and

(ii) that the candidate had consequently, committed an offence under S. 171-C, I.P.C.:

Held, (i) that to prevent false personations in elections it was essential that candidates should have an opportunity of looking at the voters and the circular that gosha ladies will have to unveil themselves was not illegal or *ultra vires*;

(ii) that, in any event, the candidate was not guilty of any offence under S. 171-C, I.P.C. in insisting on gosha voters unveiling themselves in accordance with the circular, and the election was not liable to be set aside. A.I.R. 1934 Mad. 27=39 M.L.W. 466=146 Ind. Cas. 572.

—S. 171-C.

Held, on facts, that the circular that goshas should unveil themselves before candidate, was not illegal or *ultra vires*, and the candidate in calling them to unveil their faces for identification, was not guilty of any offence and election was not liable to be set aside. A.I.R. 1934 Mad. 269=66 M.L.J. 367=39 M. L. W. 465=57 Mad. 571=148 Ind. Cas. 668.

—S. 171-C—Offence—Essentials.

Where the complainant, a candidate for election, was prevented from coming out of his house and going to the voters by his rival candidate and the latter's supporters who were picketing the former's house:

Held, that the accused, the rival candidate, is not guilty of an offence under S. 171-C. 93 Ind. Cas. 692=7 Lah. 218=27 P.L.R. 190=27 Cr.L.J. 468=A.I.R. 1926 Lah. 297.

—S. 171-C.

Telling people not to vote and making false representations to them that voting would lead to increase of taxes and to confiscation of voters' properties are not an offence under S. 171 (c) and (f). Eng. law referred to. 66 Ind. Cas. 566=14 M.L.W. 548=1921 M.W.N. 757=A.I.R. 1922 Mad. 337=41 M.L.J. 577.

—Ss. 171-D and 171-F—Punishment—Proper sentence—Fine—Adequacy.

It is the duty of magistrates to understand the necessity of purity in elections and to regard and punish the offence of personation in elections as a serious offence. A sentence of fine is a ludicrously inadequate punishment; the only proper sentence in such a case is one of rigorous imprisonment, whether it be a first offence or otherwise. I.L.R. (1947) Kar. 134=A.I.R. 1948 Sind 109=230 Ind. Cas. 37=48 Cr.L.J. 481.

—S. 171-D—Ingredients of offence.

Section 171-D is wide enough in its terms to cover the case of a man who knowing that he has no vote and knowing that another person bearing the same name as himself has a vote, applies for a voting paper in the name of that person, though that name be the same name as his own. But before he can be convicted under such circumstances, the prosecution must prove as in all other cases in which the burden lies upon them, the facts which bring the accused within the particular provisions of the section. A.I.R. 1937 Sind 21=38 Cr.L.J. 806=30 Sind L. R. 425=166 Ind. Cas. 640.



## —S. 171-D.

It may well be argued that the word "personation" itself implies some corruption or fraud. A.I.R. 1937 Sind 21=38 Cr.L.J. 306=30 Sind L.R. 425=166 Ind. Cas. 640.

## —S. 171-D.

Where it is not shown that the accused knew he was not entitled to vote in that there was upon the list the name of another person which name was the same as his own, no offence is committed within the section. A.I.R. 1937 Sind 21=38 Cr.L.J. 306=30 Sind L.R. 425=166 Ind. Cas. 640.

## —S. 171-D—Applicability.

In a Municipal electoral roll Mohammad Din, son of Faqir Mohammad, was recorded as a person entitled to vote. The accused Mohammad Din whose father's name was admittedly Abdulla asked for a ballot paper in the name of Mohammad Din, son of Faqir Mohammad; and when questioned he asserted more than once that his father's name was Faqir Mohammad. The contention that the officer who prepared the electoral roll intended to put the accused on the register and that Mohammad Din, son of Faqir Mohammad had no existence at all, was not proved:

Held, that the accused was guilty of personation. 117 Ind. Cas. 883=30 Cr.L.J. 853=A.I.R. 1929 Lah.52.

## —S. 171-E—Amount paid to club to pay off its debt and repair its premises with object of inducing its members to vote, is bribe.

A candidate may lawfully pay either an association of persons or an individual to work for him at an election, but he may only pay what is a reasonable sum on the particular work done. Where that payment is to a voter it may, however, amount to a bribe if the payment is out of all proportion to the work done or agreed to be done. Whether any particular payment by a candidate is or is not a bribe must always fall to be decided upon the particular facts of each case. Money paid to a club to pay off its debt and to repair its premises with the object of inducing those of its members who are voters to record their votes in favour of the candidate is a bribe. Whether the object was in fact achieved is immaterial. The motive of the briber and not the effect of the bribe is the test. A.I.R. 1942 Rang. 52=199 Ind. Cas. 110.

## —S. 171-F—Ingredient of offence.

*Mens rea* is an ingredient in the offence under S. 171 (f) and where the corrupt intention is absent, the offence of personation cannot be committed: *The Stepney Case*, 4 O. M. & H. 31, Foll. 121 Ind. Cas. 763=1930 Cr.C. 199=31 M.L.W. 71=31 Cr.L.J. 329=3 M.Cr.C. 1=1930 M.W.N. 174=A.I.R. 1930 Mad. 246=58 M.L.J. 111.

## —S. 171-F—False signature.

The offence of false preparation of signature sheet at an election being specifically described and designated by the legislature, it is not open to any Court to say that although the offence may be specifically one under S. 171 (f) of the Penal Code, it falls equally under S. 465 of the same Code and therefore, it is open to the Court to try the offender under either of the two sections. 84 Ind. Cas. 714=47 All. 268=22 A.L.J. 1106=26 Cr.L.J. 362=6 L.R.A.Cr. 25=A.I.R. 1925 All. 230.

## —S. 171-F — Gist of offence — Fraudulently obtaining signature slip is no offence under S. 171 (f) read with S. 511.

The accused went to the officer who had the custody of signature slips. He did not give out his name but produced a certain piece of paper which bore a certain number. The officer looked at that number then looked at the electoral roll and discovered that against that number the name of one L appeared. On being asked by that officer if he was L, the applicant said he was. A patwari of the village was there and he said that the applicant was not L but was one M. There was a dispute and ultimately the applicant admitted that he was M and not L:

Held, that the obtaining of the "signature slip" was an act which by itself would not have amounted to an application for a voting paper. 84 Ind. Cas. 711=22 A.L.J. 1102=6 L.R.A.Cr. 20=26 Cr.L.J. 359=A.I.R. 1925 All. 226.

## —S. 171-F—Abetment of personation.

Voter to be identified by candidate—Candidate identifying without ascertaining identity of the voter—He is guilty of abetment of personation at election (Mears, C. J. and Walsh, J.)—He is only technically guilty. 118 Ind. Cas. 577=30 Cr.L.J. 933=A.I.R. 1928 All. 150.

## —S. 171-F—No offence.

Candidate attesting voting slips after honestly making due enquiries of voters' identity in polling officer's presence is not guilty of abetment. 94 Ind. Cas. 897=24 A.L.J. 180=7 L.R.A.Cr. 18=27 Cr.L.J. 705=A.I.R. 1926 All. 231.

## —S. 171-F—Lenient view.

Iqbal Ahmad, J.—The system of election in India is still in its infancy, if not, in its experimental stage. The degree of solemnity that attaches to elections in England does not attach to elections in this country, and these possibly are the reasons that influenced the legislature in providing for comparatively lenient and alternative punishments for offenders committed at elections in India as compared with the punishments provided in England. 118 Ind. Cas. 577=30 Cr.L.J. 933=A.I.R. 1928 All. 150.

## —S. 171-F—Enhancement of sentence.

Abetting personation at election—Abettor an M.L.C.—The fact is not a justification for enhancing the sentence. 118 Ind. Cas. 577=30 Cr.L.J. 933=A.I.R. 1928 All. 150.

## —S. 171-G.

See also, Penal Code, Ss. 499 and 500.

## Publication that rival candidate is leper.

Publication by one of the candidates to an election against the other candidate that he is a leper, knowing it to be untrue, with the *mala fide* intention of injuring his reputation and humiliating him before the public, does not constitute an offence under S. 171-G. A.I.R. 1940 Mad. 230=1939 M.W.N. 610=41 Cr.L.J. 577=188 Ind. Cas. 327.

## —Ss. 171-G, 499, 500.

It cannot be said that S. 171-G is a species of the more general offence of defamation or is carved out of



S. 499. The prosecution under S. 171-G is not obligatory when the offence committed is also one under S. 500. A.I.R. 1940 Nag. 249=I.L.R. (1942) Nag. 208=1940 N.L.J. 309=41 Cr.L.J. 734=189 Ind. Cas. 382.

—S. 171-G—Defamatory statements about non-candidates.

It is only in the case of an offence under S. 171-G that previous sanction is necessary. And the offence defined in that section is the making of a false statement in relation to the personal character or conduct of a candidate at the election. It does not apply to defamatory statements made about persons who are not candidates. A.I.R. 1936 Mad. 316=1935 M.W.N. 1164=37 Cr.L.J. 629=162 Ind. Cas. 494.

—S. 171-G—General charges of misconduct.

General charges of misconduct are not statements of fact within the meaning of S. 171-G.

Where the important statements in question were that it appeared that because complainant committed fraud in respect of money in the fund office, he was removed by the General body or by the department, and complainant and (another) have removed from the list of voters the names of those who did not vote for them:

Held, that the first of the above statements may be construed as a statement of fact. The other statement that he removed the names of voters from the list of electors, that is, the names of those who did not vote for him at the previous election three years before, is a general statement, a general imputation of misconduct unaccompanied by any charge of particular acts not amounting to a statement of fact within the meaning of S. 171-G. A.I.R. 1936 Mad. 316=1935 M.W.N. 1164=37 Cr.L.J. 629=162 Ind. Cas. 494.

—S. 171-G—Essentials.

In order to constitute an offence under S. 171-G, something must be stated as a fact and not as a general imputation or as a matter of opinion.

Where during an election at which R was a candidate the accused published a document in which he stated that R and his father had no properties, that they will not shrink from committing even murder, that they were in enjoyment of some properties by virtue of an adoption which was false and opposed to law, that R's father had been making many kinds of forgeries, that they were doing many kinds of harm to the poor and that R was an atheist and that he was committing forgeries, misrepresentation and false personation, etc:

Held, that though in the document in question there were one or two statements which could properly be described as statements of fact, the bulk of it was taken up with general imputations of misconduct unaccompanied by any charges of particular acts of misconduct, which could not properly be described as statements of fact within the meaning of S. 171-G, Penal Code and sanction of the Government was not, therefore, necessary for the prosecution of the accused. A.I.R. 1932 Mad. 511=35 L.W. 753=33 Cr.L.J. 665=1932 M.W.N. 1086=63 M.L.J. 380=55 Mad. 791=138 Ind. Cas. 604.

—S. 172—Conditions of applicability.

Section 172, Penal Code, can apply only if a summons, notice or order is to be served on the accused,

who absconded with a view to evading the service of such summons, notice or order. The order which the District Magistrate can pass under S. 552, Criminal P.C., is for the immediate restoration of the woman unlawfully detained to her liberty, or if she is a female child below 16 years, to her husband, parents, guardian or other person having the lawful charge of such child. An order of the District Magistrate directing the Police to produce the woman before him is not one under S. 552, Criminal P.C., at all. There is nothing in S. 552, Criminal P.C., which requires service of the order on any person. The order is one capable of execution, and the section lays down that the Magistrate "may compel compliance with such order using such force as may be necessary." Once an order under S. 552, Criminal P.C., has been passed, it is open to the Magistrate to use all lawful means to have the woman restored to her liberty. It is conceivable that, for that end, he may legally issue an appropriate direction to some other person in whose custody the woman may be. When the order of the District Magistrate is not one which can be considered to be, in substance or form, an order under S. 552, Criminal P.C., and he does not in that connection issue any summons, notice or order for service on the applicant and no attempt is or could be made to serve on him such summons, notice or order, S. 172, Penal Code, cannot apply. A.I.R. 1936 All. 354=1936 A.L.J. 373=1936 A.W.R. 210=37 Cr.L.J. 713=162 Ind. Cas. 755.

—S. 172—Scope.

The provisions of S. 172 do not cover the absconding from a warrant of arrest. 113 Ind. Cas. 740=50 All. 666=9 A.I.Cr.R. 443=9 L.R.A.Cr. 68=30 Cr.L.J. 203=26 A.L.J. 443=A.I.R. 1928 All. 232.

—S. 172—Absconding in order to avoid being served with a summons notice or order—Running away to avoid arrest under a warrant.

S. 172 has no application in the case of a warrant which is not a 'summons, notice or order' and a conviction under that section for absconding in order to avoid being served with a warrant is bad in law. (1905) 2 C.L.J. 625=3 Cr.L.J. 117.

—S. 172—Evasion of warrant.

The accused commits contempt of Court by evading the warrants of the Sessions Court and also by having the misrepresentation made in his application of revision to court that he was in jail and should be released on bail. A.I.R. 1940 All. 386=1940 A.L.J. 309=1940 A.W.R. 334=41 Cr.L.J. 741=I.L.R. (1940) All. 507=189 Ind. Cas. 468.

—S. 173—Getting away from the serving officer and shutting oneself in house amounts to "intentionally preventing service."

Personal service may be made either by delivering or tendering, but the tender must be real tender of a document which is understood by the person to be served, and he must have voluntarily waived actual delivery and indicated in some way that a tender was sufficient.

A man who gets away from the serving officer with the obvious intention of not allowing him to hold any communication with him at all and shuts himself in his house, is intentionally preventing service either by tender or by delivery. 107 Ind. Cas. 563=26 A.L.J.



107=9 L.R.A.Cr. 1=29 Cr.L.J. 263=9 A.I.Cr.R.  
52=A.I.R. 1928 All. 118.

—S. 173—Refusal of notice.

Refusal to accept a notice by a Police Officer under S. 160, Criminal P. C. does not amount to an offence of intentionally preventing service. 92 Ind. Cas. 460=24 A.L.J. 215=27 Cr.L.J. 284=7 L.R.A.Cr. 57=A.I.R. 1926 All. 304.

—S. 173—Refusal of summons.

Mere refusal to take a summons does not amount to disobedience under S. 173 and so is not an offence. 91 Ind. Cas. 814=24 A.L.J. 216=7 L.R.A.Cr. 24=27 Cr.L.J. 142.

—S. 173.

Where a police constable took a summons to the accused for the purpose of serving it on him and the accused refused to take the summons and sign an acknowledgment:

**Held**, that this is not enough to constitute an offence under S. 173. 86 Ind. Cas. 973=23 A.L.J. 148=26 Cr.L.J. 909=A.I.R. 1925 All. 322.

—S. 173.

A refusal to receive a summons is not an offence under Section 173, as the refusal cannot be said to be a prevention of service. There must be some act of opposition offered to the officer serving the process. 5 M. 199; 3 U.B.R. 202, Foll. 74 Ind. Cas. 65=2 Bur. L.J. 22=1 Rang. 49=24 Cr.L.J. 737=A.I.R. 1923 Rang. 146.

—S. 173—Intentionally prevents the serving of summons.

Mere refusal to accept summons does not mean intentionally preventing service of summons. It must be proved that the accused prevented the process-server from tendering the summons. 3 U.B.R. (1920) 202=57 Ind. Cas. 928=21 Cr.L.J. 688.

—S. 173—Refusing to take subpoena.

A person is not guilty under S. 173, I. P. C., by not taking subpoena issued under S. 160, Cr. P. C. 19 Cr.L.J. 801=21 O.C. 150=46 Ind. Cas. 817.

—S. 173—Refusal to receive summons.

A refusal to receive summons actually does not come under S. 173 of the Code. 40 All. 577=16 A.L.J. 453=19 Cr. L. J. 746=46 Ind. Cas. 522.

—Ss. 173 and 174—Refusal to receive the summons.

Refusal by the witness to receive a summons tendered to him to appear and give evidence does not amount to a preventing service and a person so refusing cannot be convicted of an offence under Ss. 173 and 174 of the Code. 11 M.L.T. 405=13 Cr.L.J. 245=(1912) M.W.N. 528=14 Ind. Cas. 597.

—S. 173—Land Revenue Act (III of 1901, Local), Ss. 147, 195 and 193—Citation to appear and pay Revenue—Declining to receive and sign duplicate.

A citation was issued under S. 147, Land Revenue Act, against a person who declined to accept the

citation and sign its duplicate: **Held**, that this was no offence, under S. 173 of the I. P. C. 5 M. 199, Foll. Refusal to sign and return the duplicate is not an act which prevents the service of the citation within S. 173. 5 B. H. C. R. Cr. 34, 3 C. 621, A. W. N. 883, 222, 20 C. 358, Foll. The rules made by the Board of Revenue to regulate the service of summonses and notices cannot add and do not attempt to add to or override the provisions of Ss. 195 and 196 of the Land Revenue Act, but the rules are for the guidance of the serving officers and merely point out how they should proceed when serving summonses or notices. They do not profess to declare what constitutes good and sufficient service in law. 31 All. 608=6 A.L.J. 777=10 Cr.L.J. 435=3 Ind. Cas. 965.

—S. 173.

See Police Act, S. 17. 10 C.W.N. 82=2 C.L.J. 555.

—S. 174.

**Synopsis.**

1. Complaint by whom to be made
2. Forum of trial
3. Lawful orders—What are and what are not
4. Non-attendance—When and when not offence
5. Public servant—Who is.

1. Complaint by whom to be made.

—S. 174—Complaint by whom to be made.

An offence under S. 174, is against the public servant before whom the accused fails to appear.

Where, therefore, the accused who was summoned as a prosecution witness in a case under S. 110, Criminal P. C., refused to take the summons and did not attend Court on the date fixed, the complaint must be made by the Magistrate in whose Court the case under S. 110, Criminal P. C., was pending and who had summoned the accused. Where there is no such complaint and the case is started on the complaint of the Sub-Inspector, the Magistrate has no jurisdiction to convict the accused. A.I.R. 1942 Oudh 425=43 Cr.L.J. 641=1942 O.W.N. 434=1942 A. W. R. (C.C.) 274 (1)=201 Ind. Cas. 228.

2. Forum of trial.

—S. 174—Forum of trial.

An offence under S. 174, Penal Code, is covered by S. 195, Criminal P. C., and as the exceptions provided in Ss. 480 and 485, Criminal P. C., do not apply to it, a Magistrate in whose Court the accused has failed to appear cannot try it. The prohibition is absolute and the consent or otherwise of the accused is immaterial. A.I.R. 1934 Lah. 545=35 P.L.R. 454=36 Cr.L.J. 407 (2)=153 Ind. Cas. 514 (1).

3. Lawful orders—What are and what are not.

—S. 174—"Summons".

(Per Boys and Young, JJ.)—A citation issued to a person who is in arrear of Government revenue under S. 147, Land Revenue Act is not a summons within the meaning of S. 174, Penal Code and the person so



served is not bound to appear in obedience to it and by his failure to attend he is not guilty under S. 174, Penal Code: (Sen, J. Contra). 123 Ind. Cas. 673=31 Cr.L.J. 546=1930 A.L.J. 354=A.I.R. 1930 All. 265.

#### —S. 174.

The issue of a citation to an alleged defaulter under S. 147 of the Land Revenue Act does not involve him in any legal liability to attend and therefore no offence under S. 174 is committed by non-appearance. 99 Ind. Cas. 409=25 A.L.J. 38=7 L.R.A.Cr. 177=28 Cr.L.J. 153=49 All. 215=A.I.R. 1927 All. 49.

#### —S. 174.

The issue of a citation to an alleged defaulter under S. 147 of the Land Revenue Act does not involve him in any legal liability to attend, and a person is not guilty of an offence punishable under S. 174 if he does not comply with such a citation. 99 Ind. Cas. 60=49 All. 205=24 A.L.J. 1001=28 Cr.L.J. 28=8 L.R.A.Cr. 41=7 A.I.Cr.R. 175=A.I.R. 1927 All. 122.

#### —S. 174—Person disobeying the order under S. 147, U. P. Land Revenue Act, is liable.

Section 147, U. P. Land Revenue Act, when it gives a revenue official exercising fiscal functions authority to issue a citation to a defaulter to appear, gives him authority to order that person to appear before him and the person is obliged to appear before him if so ordered under the penalty laid down by S. 174, Penal Code: 13 O.C. 55, Foll.; A.I.R. 1927 All. 122, Diss. 106 Ind. Cas. 686=4 O.W.N. 1211=29 Cr. L.J. 94=9 A.I.Cr.R. 336=A.I.R. 1928 Oudh 122.

#### —S. 174—U. P. Land Revenue Act, 1911, S. 147—Disobedience of citation.

Intentional disobedience of citation issued under S. 147 of U. P. Land Revenue Act is an offence under S. 174, I. P. C. 13 O. C. 55=11 C.L.J. 250=5 Ind. Cas. 805.

#### —S. 174—Order "ultra vires".

Section 36 does not authorize the District Magistrate to compel the attendance of an alleged tout in the proceedings or to receive orders in the case, and therefore he cannot be charged under S. 174, Penal Code, if he fails to attend the Court. 111 Ind. Cas. 672=6 Rang. 529=29 Cr.L.J. 912=A.I.R. 1928 Rang. 296.

#### —S. 174—Summons on wrong form.

Where in an application for action to be taken under S. 107 of the Cr. P. C. the Sub-Divisional Magistrate directed the Tahsildar to make inquiry into the matter and the latter sent summons to the parties on forms provided for cases under S. 193 of the Land Revenue Act, and on the parties failing to appear, convicted them under S. 174 of the Penal Code, Held that the proceedings were illegal *ab initio*, that the order of the Sub-Divisional Magistrate was *ultra vires* that there was no summons issued according to law, and that the conviction is not maintainable. 59 Ind. Cas. 335=22 Cr.L.J. 79=L. R. 2 A. (Cr.) 3 (All.)

#### —S. 174—Failure to appear before Commissioner—Solicitor—Privilege.

A Court could not ask a solicitor to attend before it and produce the letter written to him by his client, but

he could be asked to attend before it or a Commissioner and state whether he has received such a letter, without asking for contents. A solicitor absenting himself when called on to appear before a Court under a mistaken belief that he is asked to produce the letter, could not be held guilty. 42 Ind. Cas. 532 (Cal.)

#### —S. 174—Disobedience of summons wrongly issued.

Disobedience to summons, wrongly issued by the Collector under S. 193, U. P. Land Revenue Act, is not an offence under S. 174. 14 A.L.J. 1069=17 Cr. L.J. 471=36 Ind. Cas. 151.

#### —S. 174—Summons under Madras Revenue Summons Act (III of 1869), S. 1—Disobedience.

A Karnam, was summoned by the Tahsildar under S. 1 of the Madras Act III of 1869 to appear before him on a certain day for inquiring into correctness of sub-divisions of fields. He failed to appear and was convicted under S. 174, I. P. C. Held, (1) that the accused was rightly convicted of an offence under S. 174, I.P.C., though the inquiry for which accused was summoned was not held by the Tahsildar but by a subordinate officer. 8 M.L.T. 373=11 Cr. L.J. 566=8 Ind. Cas. 133.

#### —S. 174—Powers of Tahsildar.

Several persons, residents of villages near Almora, were summoned by the Tahsildar to serve as coolies and at their refusal to attend the Thasil were thereupon again summoned to appear at the Thasil to answer charge of non-attendance when summoned to attend as coolies. Held, that disobedience to the latter summons could not render the persons summoned liable to punishment under S. 174, inasmuch as the Thasildar had no authority to issue such a summons. 1904 A.W.N. 122=1 A.L.J. 263.

#### 4. Non-attendance—When and when not offence.

##### —S. 174—Offence under—Requisites—Failure to comply with summons not specifying time but only mentioning place and day—If an offence.

It is essential in order to sustain a conviction under S. 174, I. P. Code, that the accused person should have been left in no doubt both as to the place and time at which his attendance is required. Hence a summons which although it specified the place and the day, but omitted the time, is a summons which is not sufficiently specific to justify a prosecution if it be not complied with. I.L.R. (1947) All. 848=1947 A.W.R. (H.C.) 387=1947 A.L.J. 524=A.I.R. 1948 All. 137 (2)=49 Cr. L.J. 109=1948 A.L.W. 11.

##### —S. 174—Duty of medical officers to attend Court.

Medical Officers like other persons, are bound to attend Court on receipt of summons and to give evidence if required by the Court. They cannot refuse to give evidence for reasons which they may consider sufficient, but they should represent to the Court as regards the fees payable to them. Any declaration of terms is unnecessary and should be avoided. A.I.R. 1937 All. 768=1937 A.L.J. 972=39 Cr.L.J. 113=1937 A.W.R. 899 (1)=172 Ind. Cas. 31.



—S. 174—Late service.

U. P. Land Revenue Act, S. 147—Citation served on accused evening previous to date for appearance—Accused not appearing on the day fixed—He cannot be convicted under the Penal Code, S. 174. 111 Ind. Cas. 670=9 L.R.A.Cr. 130=26 A.L.J. 1201=10 A. I. Cr. R. 390=29 Cr.L.J. 910=A.I.R. 1928 All. 680 (F.B.)

—S. 174—Omission of place.

Sub-poena not stating definite place for attendance—Disobedience thereof is not an offence. 5 All. 7, Foll. 94 Ind. Cas. 889=24 A.L.J. 536=7 L.R.A.Cr. 132=27 Cr. L. J. 697=A.I.R. 1926 All. 474.

—S. 174—Inability to attend—Accused an advocate—Summons on—Pleader appearing for—Advocate engaged elsewhere on date of hearing—No offence.

Magistrate ordered the issue of summons to the petitioner, who was a barrister, to appear on the 12th April and answer a charge under the Burma Motor Vehicles Act. The summons was not served till 5 p. m. on the 11th April. Next morning another Barrister, appeared before the Magistrate on petitioner's behalf and stated that the petitioner was appearing as counsel in a case before the High Court and that therefore he was unable to attend. The learned Magistrate noted that the explanation was unsatisfactory but adjourned the case till 19th April 1923. On the 19th, the petitioner duly appeared and after the motor case had been disposed of was called upon to answer another charge namely that of disobeying the summons to attend on the 12th:

Held, that no offence under S. 174 was made out.

Held, further that the petitioner did not intend to disobey the summons but, placed as he was, he found himself unable to abandon his client's interests and therefore instructed a barrister to represent the circumstances to the Magistrate. 76 Ind. Cas. 693=1 Rang. 549=2 Bur.L.J. 146=25 Cr. L. J. 229=A.I.R. 1924 Rang. 35.

—S. 174—"Intentional."

What is made punishable by law under S. 174 is an intentional disobedience to the summons of a Court. The word 'intentional' does not appear to have been defined in the I.P.C. but it has been interpreted to mean non-attendance which amounts to wilful disobedience. 10 W.R. 33 (Cr.); 22 P.R. 1880, Foll. 72 Ind. Cas. 593=24 Cr. L. J. 433=A.I.R. 1923 Lah. 163.

—S. 174—Illness.

Failure to attend Court owing to illness in obedience to summons—Accused cannot be convicted. 65 Ind. Cas. 864=20 A.L.J. 192=23 Cr.L.J. 208=A.I.R. 1922 All. 82.

—S. 174—Officer—Direct service of summons.

Disobedience to summons served on an amin personally by a Police Sub-Inspector to give evidence at a police investigation is an offence under S. 174, I.P.C., which requires serving through heads of departments only in cases of summons issued by a Court of Justice. Such matters should be departmentally dealt with and prosecution should be generally

after consultation with the delinquent's official superior. 18 Cr.L.J. 733=40 Ind. Cas. 733 (Mad.)

—S. 174—Failure of complainant to attend—Prosecution for disobedience, whether justifiable.

Where a complainant was ordered to appear on the day of hearing on penalty that his complaint was liable to be dismissed for his absence, a prosecution for disobedience of any order is illegal as there was no order for his personal appearance, nor would such an order be justified. 2 Lah. L.J. 539.

—S. 174—Summons—Non-attendance.

For a conviction under S. 174, the summons must have been issued by a public servant legally competent as such to issue the same and that the accused must have intentionally omitted to attend. 15 Cr.L.J. 595=12 A.L.J. 680=25 Ind. Cas. 347.

—S. 174—Failure to attend—Case not taken up that day—Failure not culpable.

Where the complainant was ordered to attend Court on the date fixed for the hearing of the case and he failed to attend but the Magistrate did not take up the case owing to some other demand on his time, Held, that the complainant could not be convicted of an offence under S. 174, I.P.C., under circumstances of the case. 3 S.L.R. 155=10 Cr.L.J. 576=4 Ind. Cas. 410.

—S. 174—Vakil — Professional misconduct — Munsiff, jurisdiction of—Disobedience of order.

A Munsiff called upon a vakil to show cause on the 22nd November why a report should not be made against him to the High Court for gross professional misconduct. On the same date the vakil put in a written explanation and the matter was ordered to be put up on the 6th December for order. On the 6th December, the Vakil did not appear. Later, on the 20th December, proceeding was drawn up for the prosecution of the vakil under S. 174, for non-appearance on the 6th December. Held, that there was no order enjoining upon the vakil to appear personally before the Munsif on the 6th December, and the proceeding under S. 174, ought to be quashed and was accordingly set aside. Held also, that when the vakil had been called upon to offer an explanation, which he did on the 22nd of November to all intents and purposes this was a sufficient compliance with the order. *Quaero*.—Whether the Munsif had jurisdiction to take proceedings against the vakil in the way he did. (1903) 7 C.W.N. 797.

—S. 174—Summons not addressed to any one—Omission to attend—Offence.

When a summons is not addressed to any one in particular, but is served on a party, a pleader, her omission to attend is not an offence under S. 174. (1902) 6 C.W.N. 927.

—S. 174 — Summons served in pleader — Validity of—Service good as to suits how far good as to offence under S. 174.

Service of summons which may be good as to suit need not be good so as to make a person liable under S. 174. Service on one's pleader is not good service so as to make one liable under S. 174, for omission to attend. (1902) 6 C.W.N. 927.



—S. 174—Witnesses' refusal to allow commission inquiry to be held in witnesses' house—Consent by pleader, effect.

Where a person's pleader is served with a notice that such person will be examined in her house on commission, and the pleader had no authority to consent to that, her refusal to allow the commission inquiry to be held there is no offence under S. 174. (1902) 6 C.W.N. 927.

—S. 174—Notice to accused to appear—Appearance by agent—Agent's request to dispense with personal appearance—Notice to show cause why accused should not be committed for contempt—Motion before District Magistrate and High Court.

Where an accused who had been asked to appear and plead to a charge appears by agent and requests that his personal appearance should be dispensed with, it will not be an exercise of proper discretion to charge the accused for contempt under S. 174. He should be asked to appear personally on or within a day named and if he failed to appear, then proceedings may be taken for contempt. An accused is entitled to move the District Magistrate and the High Court to direct the Magistrate to dispense with his personal appearance and such application cannot make the appearance by agent a contempt of court or aggravate the contempt if any. (1900) 5 C.W.N. 131=27 Cal. 985.

—S. 174—Police officer's power to summon witnesses:—See Cr.P.C., S. 160. 4 Bom. L.R. 644.

### 5. Public servant—Who is.

—S. 174—Revenue Officer enquiring under S. 164 of the Estate Land Act—Public servant.

A Revenue Officer making inquiries under S. 164 of the Madras Estate Act is empowered to issue summons and is in the language of S. 174 of the I.P.C., 'a public servant legally competent to use it'. 7 Cr.L.R. 253 (Mad.)

—Ss. 174, 175 — 'Public servant' — Receiver appointed under S. 56, Bengal Act VIII of 1876—Order to produce accounts before Collector—Disobedience of.

A receiver appointed by a Commission of a Bengal Division is not a public servant within Ss. 174 & 175, Indian Penal Code. Disobedience of an order made by such receiver to produce certain accounts, etc., before a Collector is no offence under Ss. 174 and 175, Penal Code. (1901) 6 C.W.N. 141=29 C. 236.

—S. 175 — Withholding documents — Mere suspicion.

Where it appeared that the petitioner was amply justified on the respondent's own statements in supposing that there are other accounts that the defendant had knowledge of and access to, and that he was evading disclosing them to the Court:

Held, that this raised the deepest suspicion but was not sufficient to establish a charge of contempt of Court. To establish such charges, it is essential to prove that in fact there are in the case other documents which had been deliberately withheld. A.I.R. 1936 Cal. 132=161 Ind. Cas. 738.

12 F.Y.D.—2.

—S. 175—Conviction—Essentials for.

To sanction a conviction under S. 175, I.P.C., it must be shown that the accused was in possession of the document required to be produced and when it is doubtful which of two persons had it, they could not be convicted. 4 Pat. L.W. 65=19 Cr.L.J. 217=43 Ind. Cas. 793.

—Ss. 175, 193 and 471—Producing document on demand—Document belonging to third person—Evidence Act (I of 1872), S. 162.

A person who merely produces a document in obedience to a summons from Court and says that it was given to him by another person (which was found to be false) cannot be convicted of the offence of using a forged document though he might be prosecuted for perjury. 36 Mad. 392=11 M.L.T. 21=22 M.L.J. 181=(1912) M.W.N. 455=13 Cr.L.J. 46=13 Ind. Cas. 286.

—Ss. 175 and 188—Disobeying order for production or inspection of documents—C.P.C., O. 11, R. 21.

If a party to a suit fails to comply with an order for production or inspection of documents he can be dealt with only according to O. 11, R. 21, and is not punishable under S. 175, I.P.C., or any other section of the Penal Code. 15 P.W.R. 1910 (Cr.)=15 P.R. 1910 Cr.=90 P.L.R. 1910=11 Cr.L.J. 386=6 Ind. Cas. 623.

—S. 175—Omission of accused to produce incriminating document.

Where an accused while on his trial for offences under Ss. 471 and 193, I.P.C., being directed to produce a certain incriminating document, did not produce the document and in consequence the prosecution against him failed:

Held, the accused could not be convicted under S. 175, for his omission to produce the document. (1908) 12 C.W.N. 1016=8 C.L.J. 320.

—S. 175—Sub-Registrar, power of, to order production of a deed—Party, if legally bound to produce it—Non-production, if an offence.

A person called upon by a Sub-Registrar to produce the original document which was registered in his office to enable him to compare it with the copy of the deed in the Registration Office Register, which, it was suspected, was tampered with, is not legally bound to produce it, and he cannot, on his failure to do so, be convicted under S. 175. (1905) 2 C.L.J. 621=3 Cr.L.J. 114.

—S. 176—Essentials of offence.

Section 176 is intended to apply to parties who commit an intentional breach of obligation to report and not where the public servants have already obtained the information from other sources. A.I.R. 1933 Lah. 515=34 P.L.R. 712=144 Ind. Cas. 343.

—S. 176.

The fact that some persons bound to give information have given that information while other persons who might be bound to give that information have omitted to do so is no ground for their prosecution and conviction under S. 176. 4 Cal. 623; 20 Cal. 316 and 7 Mad.



436, Foll. 90 Ind. Cas. 145=26 Cr.L.J. 1489=A.I.R. 1926 Nag. 217.

—S. 176—Person receiving rent refusing to furnish information to Patwari—Offence.

By virtue of R. 116 framed under S. 234, U. P. Land Revenue Act, if a person who actually receives rent and is called upon by the patwari to furnish him with particulars for the preparation of the *siyaha* refuses to furnish this information he is guilty of an offence under S. 176, Penal Code. A.I.R. 1941 Oudh 525=42 Cr.L.J. 708=1941 O.W.N. 944=17 Luck. 89=1941 R.D. 706=195 Ind. Cas. 163.

—S. 176.

Proclamation under S. 87, Criminal P. C. issued—Duty of headman of village to report to Police the visits of such person to his village—Failure to report:

Held, that in order to find whether the accused (village headman) is guilty under S. 176, Penal Code, it is necessary to see whether he possessed any information respecting the proclaimed person's passage through or visit to his village. A.I.R. 1938 Oudh 80=39 Cr.L.J. 154=1938 O.W.N. 7=172 Ind. Cas. 530.

—S. 176—Recovery of excess rent.

Where a Zamindar collecting more than the recorded rent from the tenants has not been asked the information by Qanungo or the Patwari, his failure to inform the officials concerned the fact of such collection does not amount to an offence under S. 176, Penal Code. 98 Ind. Cas. 487=7 L.R.A. Cr. 195=27 Cr.L.J. 1367=A.I.R. 1927 All. 111.

—S. 176—Failure to report—Meaning of 'intentionally'.

Where a person is under a legal duty to report certain facts and he fails to report them he must be presumed to intend to conceal them unless he can show that he had reason to suppose that the authority to which the report was due had information from other sources. 16 Cr.L.J. 219=17 M.L.T. 263=(1915) M.W.N. 276=27 Ind. Cas. 843.

—S. 176—C. P. Code (Act X of 1918), S. 45 (1)(c)—Failure to make report—Offence non-bailable.

A Village Munsif was convicted under S. 176 of the I. P. C. for not giving information to a police of the loss of a jewel or theft of it in a certain person's house. It was held that as the information did not relate to the commission of a non-bailable offence which the Village Munsif was bound to communicate to the police under S. 45 (1) (c) of the C. P. C., his conviction was illegal. 5 M.L.T. 257=9 Cr.L.J. 224=1 Ind. Cas. 245.

—S. 176—Suspicious death in Master's house—Servants liability.

Under certain specified circumstances covered by S. 45 of the Cr. P. Code, 1898, the concealment of suspicious death is punishable under S. 176, I. P. C., but mere servants, who are entirely dependant on their master in whose house death takes place are not bound to communicate an occurrence of this sort. 17 P.W.R. 1911 (Cr.)=12 Cr.L.J. 425=11 Ind. Cas. 609.

—Ss. 176, 177—"For the commission of an offence".

The words, "for the purpose of preventing the commission of an offence" in S. 176, relate to the commission of any particular offence. (1901) 31 M. 548=19 M.L.J. 274=3 Ind. Cas. 612=4 M.L.T. 325=8 Cr.L.J. 425.

—S. 176—Commencement of sentence—Punjab Jail Manual.

Sentence under S. 176 of the I. P. C. should commence at once according to R. 464 (2) Punjab Jail Manual and should not be postponed till the expiry of imprisonment, inflicted on the accused for not furnishing security. 97 P.L.R. 1918=20 Cr.L.J. 316=50 Ind. Cas. 492.

—S. 177—Offence under—Ingredients—False information in sale-deed.

S. 177 of the Penal Code lays down two ingredients, firstly, that a person must be legally bound to furnish information on the particular subject to the public servant, and secondly, that he must furnish, as true, information on that subject which he knows or has reason to believe to be a false. Hence even if it be taken that under S. 21 of the Registration Act that the executants of a sale-deed were legally bound to furnish true information regarding the property, the Court is bound to see before convicting the executants for a wrong statement in it, to consider and decide whether they knew or had reason to believe the information furnished to be false. 51 Cr.L.J. 883=A.I.R. 1950 Ajmer 19 (2).

—S. 177.

Person submitting income-tax return false his knowledge is guilty of an offence under S. 177, Penal Code. (1937) 20 N.L.J. 214.

—Ss. 177, 182—Person must be legally bound to give information.

Section 177, Penal Code, has no application to a case in which a false statement has been made to the Police by a person who was under no legal obligation or who was not legally bound to give that information. Such a person may be liable for prosecution under S. 182, Penal Code. To bring a case under S. 177, Penal Code, it is absolutely necessary to prove that the informant was legally bound to give the information, which is proved to be false, to the Police.

The words, "any subject" occurring in S. 177, Penal Code, have reference to the matters enumerated in S. 45, Criminal P. C., or to matters about which a person is "legally bound" to give information under some other law, and to no other subjects.

A mukhia of a village who had taken away a girl from the village, signed a *panchayatnama* stating that a certain girl had died by having been drowned and sent it to the Police. The accused was prosecuted under S. 177, Penal Code:

Held, (Per Sulaiman, C. J. and Rachhpal Singh, J.; Bennett, J. contra), that as none of the events enumerated in Cl. (d) of S. 45, Criminal P. C. had happened, it could not be said that the accused was legally bound to give any information to the Police and that the false information which he gave to the Police did not bring his case within the four corners of S. 177, Penal Code. A.I.R. 1936 All. 788=38 Cr.L.J. 57=1936 A.L.J. 1064=1936 A.W.R. 905=1 L.R. (1937) All. 162=165 Ind. Cas. 769.



**—Ss. 177 and 43—Incorrect post-mortem report by Municipal doctor.**

Under an arrangement between the Municipality of B and the Bombay Government, the accused Medical Officer employed by the Municipality was to conduct **post-mortem** examination of the bodies sent to him by Police and to submit the results in the form prescribed by the Government. The remuneration for each examination was fixed at Rs. 4. According to R. 9, Civil Medical Code, every examination for medico-legal purposes should be complete; and according to R. 10 (i), information on each point referred to in the form was to be recorded and R. 14 required that the copy of the examination should be forwarded to the Police Sub-Inspector. Two dead bodies were sent to the accused by the Sub-Inspector on July 23, 1933. The bodies were those of two brothers. One of the bodies was lying on the ground. Without opening either of the bodies, the accused reported the one as too decomposed to permit any examination of the internal organs, and as regards the other he made a detailed report. Next day, by an order of the Sub-Divisional Magistrate under S. 176, Criminal P.C., the bodies were exhumed and on another **post-mortem** examination by the Civil Surgeon, the bodies were found to have no **post-mortem** incisions. The accused was thereupon tried for offences under Ss. 177 and 197, Penal Code, and found guilty. On appeal:

**Held**, (i) that S. 43, Penal Code covered a breach of contract, and not merely a tort. The breach of contract, however, must be one which furnishes ground for a civil action, that is to say, in respect of which damages could be obtained under S. 73 of the Contract Act, or which could be enforced specifically;

(ii) the contract to examine the body was a contract between the applicant, and the Municipality and it was difficult to see how the Municipality could suffer any damage by the breach of that contract, and there was no evidence that they did in fact suffer any damage. If this was so, the act of the applicant would not give rise to a civil action and could not be the foundation of a prosecution under S. 177, Penal Code;

(iii) there was no satisfactory evidence on the record of any contract between the applicant and Government and unless there was such a contract the applicant was not legally bound to furnish information as to these bodies within S. 177, Penal Code;

(iv) the applicant did not commit an offence under S. 177, however, reprehensible his conduct may have been. A. I. R. 1934 Bom. 202=36 Bom. L. R. 373=58 Bom. 491=35 Cr.L.J. 1429=151 Ind. Cas. 867.

**—S. 177—Filing of false return as to income without being served with notice—If offence—Income-tax Act, S. 22 (2).**

A person who furnishes false information to a public servant, when he is not legally bound to furnish the information, cannot be convicted of an offence under S. 177, Penal Code. Consequently, when a person who is not served with a notice under S. 22 (2), Income-tax Act, files a false return, he cannot be convicted under S. 177. A.I.R. 1934 Lah. 626=35 P.L.R. 544=36 Cr.L.J. 176=15 Lah. 832=152 Ind. Cas. 682.

**—S. 177—Lawyer absconding deliberately keeping assessable income out of return.**

Where the accused, a lawyer, deliberately kept out of the income-tax return certain assessable income and instead of being ready and willing to put matters

right, persisted in maintaining what he ought to have known was a false defence to the charges preferred against him, and it appeared that if he had included this income also in his return the income-tax he would have to pay would have been raised by Rs. 3000, and he was fined only Rs. 1000 by the District Judge:

**Held**, that the offence must be regarded as a serious one, bearing in mind the deleterious effect that it may have, unless other persons are deterred from acting in like manner, upon the position of the general body of tax-payers and that a mere fine of Rs. 1,000 was not sufficient but in addition to a sentence of one month's simple imprisonment should be awarded. A.I.R. 1933 Rang. 292=35 Cr.L.J. 131=146 Ind. Cas. 653.

**—S. 177—Essentials—Income Tax Act, S. 52.**

The essence of offence under S. 52, Income tax Act and Penal Code, S. 177 lies in the verification of an untrue statement, and provided the statement was deliberately false or not believed to be true, subsequent rectification cannot make it any the less an offence, though it may be considered as an extenuating circumstance in awarding sentence. 120 Ind. Cas. 435=1930 A.L.J. 26=31 Cr.L.J. 88=1929 Cr.C. 647=A.I.R. 1929 All. 919.

**—S. 177—Accidental explosion—Injury to property—Explosive Sub. Act, S. 8—Obligation to give notice to Police—Intention.**

Under S. 8 of the Explosive Substances Act, the primary requisite to give notice, is accidental explosion and not serious injury to property. S. 177 of the Penal Code will not apply unless the omission to give notice was intentional. 8 Bur. L. T. 288=16 Cr.L.J. 622=30 Ind. Cas. 446.

**—S. 177—Under-valuation, whether false information.**

Where a person in a return under the Road Cess and Public Works Act represented rent payable to him in respect of the subordinate holding to be in excess of that which the Magistrate found that the tenant was actually bound to pay, he could not be convicted under S. 177, I. P. C., since he did not under-value the property. 13 C.W.N. 191=5 M.L.T. 93=11 Cr.L.J. 11=4 Ind. Cas. 578.

**—S. 177—False statement to public officer—Land—Acquisition Act, S. 9—Absence of statement on record—Issue of process.**

A complaint that the accused made a false statement in response to a call for information under S. 9 of the Land Acquisition Act is not sustainable in the absence of the written statements on which the charge is founded, and in the absence of reference to any specific statement or statements on which the accusation was made; and the magistrate would not be exercising proper discretion in issuing process on such a vague complaint. (1900) 5 C.W.N. 131=27 Cal. 985.

**—S. 177—False statement—Land Acquisition Act, S. 9—Statement under consideration in High Court in Land Acquisition appeal—Prosecution.**

Where the statement of a person called upon to furnish information under S. 9 of the Land Acquisition Act is alleged to be false, no prosecution for such information ought to be started until the civil court has finally disposed of the land acquisition case before



it. Held, where lessor and lessee were both concerned in a Land Acquisition case, the lessor should not be prosecuted for false statement so long as the lessee's case was under consideration before the High Court as the statements of the lessor and lessee could not be distinguished. (1900) 5 C.W.N. 131=27 Cal. 985.

#### —S. 177—Jurisdiction.

A charge under S. 177, Penal Code within the meaning of S. 40 of the Income-Tax Act can be legally tried only at the place where the verification is made. 68 Ind. Cas. 843=45 Mad. 839=16 M.L.W. 335=31 M.L.T. 282=1922 M.W.N. 690=23 Cr.L.J. 619=A.I.R. 1923 Mad. 50=43 M.L.J. 475.

#### —S. 179—Refusal to answer questions touching a subject on which he is bound to state the truth.

An examination of the complainant as a witness for the prosecution of persons who have already been committed to Sessions on his own complaint, is relevant and the Magistrate has a discretion to require the complainant as a witness under S. 219, Criminal P. C. Where, therefore, the Magistrate finds that on such examination the complainant is guilty of refusing to answer questions touching a subject on which he was bound to state the truth and takes proceedings against him under S. 480, Criminal P. C. and convicts him under S. 179, Penal Code the conviction should be upheld. A.I.R. 1935 All. 267=36 Cr.L.J. 446=1935 A.L.J. 299=1935 A.W.R. 123=153 Ind. Cas. 907.

#### —S. 179.

A person is not legally bound to answer the questions truthfully put to him orally under S. 126, U. P. District Boards Act, and he cannot be convicted under S. 179, Penal Code on the ground that he did not answer the question truthfully. A.I.R. 1935 All. 620 (1)=36 Cr.L.J. 1102 (1)=1935 A.L.J. 1021=1935 A.W.R. 791=157 Ind. Cas. 119.

#### —S. 179—Question as to the result of a case — Witness denying knowledge — Subsequent answer that case was dismissed.

Where during cross-examination a witness was asked as to what was the result of a case and instead of answering in the affirmative or in the negative, he said, "I do not know," and subsequently said that the case was dismissed, and the witness was prosecuted and convicted under S. 179:

Held, that the Magistrate was not justified in assuming that the witness before him was aware of the result of the case and deliberately stated that he did not know and that the witness could not be considered to have refused to answer the questions put to him as he gave perfectly rational answers and there was no reason for the Magistrate to hold that the witness declined to answer. A.I.R. 1934 All. 136=1934 A.L.J. 427=35 Cr.L.J. 1036 (1)=4 A.W.R. 542=149 Ind. Cas. 1061 (1).

#### —S. 179—Investigation by police under Chap. XIV, Cr. P. Code—Refusal to answer questions.

A refusal to answer questions put by a police officer making an investigation under Chap. XIV of Cr. P. Code is not punishable under S. 179, Penal Code. 23 Mad. 541=27 P.R. 1908 and 7 Cal. 122, Foll. 128 Ind. Cas. 833=8 Rang. 511=1931 Cr.C. 16=32 Cr.L.J. 201=A.I.R. 1931 Rang. 98.

#### —S. 179—Prosecution—When not judicious.

Where the question for the refusal to answer which the witness was sought to be tried under Section 179 of the Indian Penal Code had no bearing whatsoever on the facts of the case:

Held, that his prosecution under that section was injudicious. 81 Ind. Cas. 951=11 O.L.J. 358=25 Cr.L.J. 1127=A.I.R. 1924 Oudh 402.

#### —S. 172—Indirect answer.

Where a witness, though persistently asked by the Court to give certain information, persisted in giving an indirect answer:

Held, that this amounted to a refusal to answer question and that an offence under S. 179, was committed but not one under S. 228. 84 Ind. Cas. 706=22 A.L.J. 1100=6 L.R.A.Cr. 14=26 Cr.L.J. 354=A.I.R. 1925 All. 239.

#### —S. 179—Refusal what is.

Where a Court asks a witness the name of his grandfather to which the witness replies that he does not remember, it is not refusal to answer within the meaning of S. 179; if the answer is false he may be proceeded with under S. 193. 92 Ind. Cas. 428=27 Cr.L.J. 252=A.I.R. 1926 Lah. 240.

#### —S. 179—Conduct of accused.

S. 179 has nothing whatever to do with the conduct of accused persons in Court. 77 Ind. Cas. 422=47 Mad. 396=19 M.L.W. 292=34 M.L.T. 331=1924 M.W.N. 141=25 Cr.L.J. 374=A.I.R. 1924 Mad. 540=46 M.L.J. 40.

#### —S. 180—Refusal to sign record under S. 342—Criminal P. C.

Where the Magistrate put questions to the accused under S. 342, Criminal P. C., but the accused refused to answer, the record will contain only the questions and the note that the accused refused to answer the questions. Such a record has to be signed by the accused. If he refuses to sign he obstructs the process of the Court and is liable to punishment under S. 180, Penal Code. A.I.R. 1935 All. 652=36 Cr.L.J. 1098=1935 A.L.J. 1058=1935 A.W.R. 800=157 Ind. Cas. 146.

#### —S. 180—Refusal to sign.

It is an offence under S. 180, I.P.C., to refuse to sign a statement which S. 364, Cr. P. Code makes compulsory on the Magistrate to require the accused to sign. 39 All. 399=18 Cr.L.J. 559=15 A.L.J. 291=39 Ind. Cas. 703.

#### —S. 180—Refusal of witness to affix his thumb, mark—No offence.

There is no obligation upon witnesses in Civil cases to sign or thumb-mark their depositions and they cannot be compelled and are not liable to prosecution for an offence under S. 180, I. P. C. Correction slip No. 61 of 29th August 1904 has not the force of law. 8 P.R.Cr. 1912=37 P.W.R. Cr. 1912=245 P.L.R. 1912=13 Cr.L.J. 713=16 Ind. Cas. 521.



—S. 180—Inquest report—Refusal to sign—No offence.

An inquest report is not a statement within S. 180 of the Penal Code and refusal to sign such a report is not an offence under the Penal Code. (1910) M.W.N. 366=8 M.L.T. 198=11 Cr. L. J. 500=7 Ind. Cas. 557.

—S. 181—Person making false statement in affidavit.

The mere swearing of the affidavit does not make the statement contained therein a piece of evidence which a Court would be bound to admit in a judicial proceeding within the meaning of S. 3, Evi. Act. In receiving that statement, the Magistrate before whom it is sworn is not receiving something which is intrinsically evidence and is therefore not acting in the exercise of any authority to receive evidence. The Magistrate does not satisfy the definition in S. 4, Oaths Act, of a Court or person authorized to administer oaths and affirmations. Consequently, a person making a false statement in such affidavit is not guilty of an offence under S. 181, Penal Code. A.I.R. 1939 Cal. 657=43 C.W.N. 1033=41 Cr. L. J. 21=I.L.R. (1939) 2 Cal. 459=184 Ind. Cas. 468.

—S. 181—Prosecution under—Power of Appellate Court to change it to one under S. 198.

Where prosecution is legally instituted by the Civil Court under S. 181, Penal Code, the Appellate Court can under S. 423, Criminal P. C., alter the finding to one under S. 193, Penal Code, and convict under it. Even if the prosecution has been launched under an inappropriate section, the Appellate Court has power to do this. A.I.R. 1936 Nag. 263=I.L.R. (1937) Nag. 102=38 Cr. L. J. 455=167 Ind. Cas. 845.

—S. 182.

See also Penal Code, S. 211.

Synopsis.

1. Applicability and scope
2. Essentials of offence
3. Evidence and proof
4. Interpretation—"Gives information"—if restricted to voluntary information
5. Place of trial
6. Prosecution for offence
7. Miscellaneous.

1. Applicability and scope.

(a) General

(b) Ss. 182 and 211.

1 (a). Applicability and scope—General.

—S. 182—Applicability—Cognizable and non-cognizable offences.

Section 182 says nothing about cognizable or non-cognizable offences or anything of the kind. The only question to be considered is whether the report is false and whether it was calculated to induce the public officer to do something or omit something which he ought not to have done or omitted. A.I.R. 1943 All. 96=1942 A.L.J. 576=44 Cr. L. J. 342=1942 A.W.R. (H.C.) 336 (2)=204 Ind. Cas. 639.

—S. 182—Person giving information to Police about non-cognizable offence—Complaint found false.

Section 182 makes no distinction between information relating to a cognizable offence and one relating to a non-cognizable offence; nor is there anything in that section to justify the conclusion that it applies only to cases in which the information given to any public servant relates to a cognizable offence. In that illusts. (a) and (b) to S. 182 show that that section applies as much to information relating to a non-cognizable offence as to one about a cognizable offence. When a false report is made to the Police, the question in deciding as to whether it amounts to an offence under S. 182 is not whether the report is one of a cognizable crime but whether it is of such a nature as might be supposed to lead the Police to make use of their lawful powers to the injury or annoyance of any person.

Hence, where a person makes a complaint to the Police of a non-cognizable offence and it is found that the complaint was false and frivolous, he can be convicted under S. 182. A.I.R. 1940 Oudh 413=1940 O.W.N. 655=41 Cr. L. J. 778=16 Luck. 55=1940 A.W.R. 305=189 Ind. Cas. 655.

—S. 182—False report to police.

In deciding as to whether a false report made to the Police amounts to an offence under S. 182, the question is not whether the report was one of a cognizable crime but whether it was of such a nature as might be supposed to lead the Police to make use of their lawful powers to the injury or annoyance of any person. A.I.R. 1936 All. 313=1936 A.L.J. 253=1936 A.W.R. 273=37 Cr. L. J. 562 (1)=162 Ind. Cas. 338.

—Ss. 182, 498—Complaint to Superintendent of Police of non-cognizable offence.

Where a person merely makes a complaint to the Superintendent of Police of a non-cognizable offence under S. 498, Penal Code, the Police cannot take any action in respect of that offence and no prosecution under S. 182 can be legally maintained in respect of such information whether the information be true or not. A.I.R. 1933 Oudh 374=34 Cr. L. J. 1149=10 O.W.N. 755=145 Ind. Cas. 819.

—S. 182—False report to police—Non-cognizable offence.

False report of a non-cognizable offence made to police officer without expecting any action on his part cannot form the ground of conviction under S. 182. 21 Cr. L. J. 576=18 A.L.J. 636=57 Ind. Cas. 96.

—S. 182—Information to Police about missing of animal.

Where the accused reported to the Police that his buffalo was missing, and the Police directed a case under S. 379, Penal Code and it was subsequently established that he had sold the animal to a person against whom the accused wanted to get up a case:

Held, that the report, not being the report of a cognizable or non-cognizable offence, did not in itself call for any action on the part of the Police Officer to whom it was made, and hence fell short of fulfilling the conditions necessary to justify a conviction under S. 182. A.I.R. 1932 Pat. 170 (1)=13 P.L.T. 83=33 Cr. L. J. 314=136 Ind. Cas. 447 (1).



—S. 182—Applicability—Statements in course of investigation.

The information which is penalised under S. 182, Penal Code, is an information which is intended to cause or known to be likely to cause the public servant concerned to take action. Where information within the meaning of the section had already been given and the law already set in motion, further statements made in the course of investigation would not be further information falling under S. 182. I. P. Code. 1946 P.W.N. 146=13 B.R. 260=228 Ind. Cas. 583=48 Cr. L. J. 264=A.I.R. 1947 Pat. 64.

—Ss. 182 and 500—Applicability Memorial to Government officers.

Dafamatory allegations against Govt. servant—Govt. servant filing complaint stating therein that the charges were false and were made *mala fide* with intention to secure his removal from service and that his reputation was affected—Magistrate taking the complaint on file under S. 182:

Held, that the complaint was under S. 500 and not under S. 182. A. I. R. 1941 Mad. 805=1941 M.W.N. 676.

—S. 182—Withholding of information.

Section 182 makes punishable the positive act of giving false information. There is nothing in the section showing that it intends to punish the withholding of information as distinct from the actual giving of information. A.I.R. 1940 Lah. 15=41 Cr. L. J. 368=42 P.L.R. 771=I.L.R. (1940) Lah. 396=186 Ind. Cas. 703.

—Ss. 182 and 109.

A person instigating another to make a false report can be convicted under S. 182 read with S. 109. A.I.R. 1937 All. 755=1937 A.L.J. 881=39 Cr.L.J. 102=1937 A.W.R. 865=172 Ind. Cas. 23.

—S. 182.

A false charge must be made to an officer who has power to investigate and send it up for trial. A.I.R. 1938 Pat. 83=4 B.R. 274=16 Pat. 571=19 P.L.T. 51=39 Cr.L.J. 314=173 Ind. Cas. 432.

—S. 182—Public Servant—Information to any but a public servant as defined by Code—No offence.

No offence under S. 182, Indian Penal Code can be made out where it is not suggested that false information was given to a public servant as defined by the Indian Penal Code, quite apart from the consideration that it was given without and beyond British India. 77 Ind. Cas. 189=47 Bom. 907=25 Bom. L. R. 772=25 Cr.L.J. 333=A.I.R. 1924 Bom. 51.

—S. 182—Complaint to public servant, whether necessary.

No complaint to a public servant is necessary for a conviction under S. 182, I. P. C. 1 L. W. 847=15 Cr.L.J. 672=25 Ind. Cas. 1000.

—S. 182.

Section 177 has no application to a case in which a false statement has been made to the Police by a person who was under no legal obligation to give that

information. Such a person may be liable for prosecution under S. 182. A.I.R. 1936 All. 788=1936 A.L.J. 1064=1936 A.W.R. 905=38 Cr.L.J. 57=I.L.R. (1937) All. 162=165 Ind. Cas. 769.

—S. 182—Intention.

A driver of a motor car was driving without licence. The Superintendent of Police asked for his name and he gave a false and fictitious name. The effect of the false information was that difficulties and obstacles were put in the way of his prosecution:

Held, that although the effect of the wrong information was merely to obstruct the prosecution of the real offender, yet it is the intention in the mind of the informant, that is important. In giving the false name the driver's intention was to cause the police officer to take steps for the prosecution of a person, who did not exist and to omit to take steps against himself. The false information given by him, therefore, came within the mischief of S. 182 (a). 113 Ind. Cas. 587=7 Pat. 715=10 P.L.T. 244=30 Cr.L.J. 177=11 A.I.Cr.R. 567=A.I.R. 1929 Pat. 4.

—S. 182—Inability to substantiate claim is no offence.

A person who makes a false statement in his petition cannot be held to have committed an offence under S. 182 simply because his claim is not substantiated, even assuming that some false statement, which was not directly the subject of complaint, was made with the object of inducing and that he did induce the Court to take some action, as it cannot be said that the Court was thereby induced to do what it ought not to have done. 109 Ind. Cas. 805=10 A. I. Cr. R. 320=29 Cr.L.J. 613=A.I.R. 1928 Pat. 574.

—S. 182—No offence.

Person identifying before Treasury Officer another as the proper payee of a certain money, rashly and without taking care to ascertain as to the truth of his identity is not guilty under S. 182 or S. 420, where it is held that his intention was not dishonest. 99 Ind. Cas. 57=44 C.L.J. 230=28 Cr.L.J. 25=7 A.I.Cr.R. 177=A.I.R. 1927 Cal. 78.

—S. 182—Applicability.

For a conviction under S. 182, it is not necessary that the false report must be taken down from dictation. 6 A.L.J. 236, Dissented from. 95 Ind. Cas. 598=3 O.W.N. Sup. 96=27 Cr.L.J. 822=A.I.R. 1926 Oudh 448.

—S. 182—Affidavits.

Criminal case—Transfer application by complainant's advocate—Affidavit by third person in support of petition—False information in—Deponent if liable. 83 Ind. Cas. 343=25 Cr.L.J. 1383=1925 M.W.N. 146=20 M.L.W. 624=A.I.R. 1925 Mad. 123=47 M. L. J. 658.

—S. 182—Petition not signed.

An accused may be convicted under S. 182 of the I.P.C. though the petition containing the information given by him is not actually signed by him. 1 C.W.N. 452 (not applied). 3 S.L.R. 132=11 Cr.L.J. 3=4 Ind. Cas. 477.



—Ss. 182, 415, 419 and 511—False representation to a public servant—Production of certificate referring to another man—Offence.

An ex karnam desiring to be reinstated in his post produced a certificate of having passed an examination; in fact, the certificate referred to some other man having the same name. Held, that when the representation is not shown to cause or likely to cause damage or harm to the officer concerned either in body, mind, reputation or property within S. 415, I.P.C., no conviction could be sustained under Ss. 419 and 511, I.P.C., though the facts might constitute an offence under S. 182, I.P.C. 19 M.L.J. 271=4 M. L. T. 324=8 Cr. L. J. 421=3 Ind. Cas. 609.

—S. 182—Scope—Liability of abettor.

A person at whose instance another person makes a false report to the police cannot be tried under S. 182, I.P.C.

A Sub-Divisional Officer is wrong in treating as complaint, a report by police that a certain person made a false report. 6 A.L.J. 236=9 Cr. L. J. 518=2 Ind. Cas. 200.

—S. 182—False information to village magistrate.

A person who gives false information to a village magistrate for the purpose of being passed on to the Station House Officer whose bounden duty it was so to pass is guilty of an offence under S. 182, 4 M. 211 held not to apply to S. 182 under the Code of 1898. (1905) 28 M. 565.

1 (b). Applicability and scope—Ss. 182 and 211.

—Ss. 182 and 211—Section applicable.

Giving false information to the police is an offence under S. 182 as well as S. 211. 10 A.L.J. 429=13 Cr.L.J. 855=17 Ind. Cas. 791.

—Ss. 182 and 211—False report to Police.

An offence falling under S. 182, is included in the more serious offence falling under S. 211, and a prosecution for a false charge may be either under S. 182, or S. 211, though clearly if S. 211 does apply and the false charge is serious a prosecution should be under the more serious S. 211. But this does not mean that where a person makes a false complaint to the Police and the offence under S. 182, is complete, and the Police in conformity with the provisions of S. 195, Criminal P. C., file a complaint and a prosecution is lodged under S. 182, the proceedings under S. 182 must subsequently be quashed if the accused not content with the false report to the Police subsequently makes a false complaint on the same facts to a Magistrate in addition and thereby exposes himself to a prosecution under S. 211, I. P. C. The proceedings under S. 182 cannot be quashed on the ground that the trying Magistrate had no jurisdiction to try the accused without sanction of the Court in which the subsequent false complaint was lodged especially when the accused has raised no such objection to the validity of the proceedings, but does so only after he had been convicted and sentenced under S. 182. Consequently, the conviction under S. 182 is not illegal. A. I. R. 1943 Lah. 31=I. L. R. 1942 Lah. 675=44 Cr.L.J. 305=204 Ind. Cas. 572.

[Overruling 43 P.L.R. 191=A.I.R. 1941 Lah. 216=195 Ind. Cas. 102].

—Ss. 182, 211—Facts disclosing offences under Ss. 211 and 182.

Where all the facts of a complaint taken together disclose an offence under S. 211, I. P. C., the Court is not debarred from enquiring into the offence simply because an offence under S. 182, I. P. C., is also disclosed and for the trial of such an offence a written complaint from the public servant concerned is necessary. A. I. R. 1937 Mad. 8=1936 M. W. N. 641=71 M.L. J. 485=44 M.L.W. 631=37 Cr.L. J. 1134=59 Mad. 1083=165 Ind. Cas. 292.

—Ss. 182 and 211—Graver and minor offences—False report to police and false complaint to Magistrate—Conviction therefor under S. 182—Legality.

It is true that the two complaints, both false in the same particulars, may be regarded as so closely connected that independent prosecutions and convictions for two offences are undesirable; and in the ordinary way if a prosecution takes place, it should be for the more serious of the two offences committed. This may, no doubt, be a good ground for quashing proceedings under the minor section in their early stages, but when there has been no prosecution for the more serious offence and a person has been prosecuted for the minor offence and the whole case is complete, there is no reason for holding that the conviction is illegal.

The accused laid an information to the police charging a person with robbery, which was thrown out as false. Subsequently, the accused filed a complaint making the same allegation and the Magistrate on the police report threw it out under S. 203, Cr. P. Code. Meantime, the police had laid a complaint against the accused under S. 182 and the accused was found guilty and convicted:

Held, that though the offence fell both under S. 182 and S. 211, the conviction under S. 182 could not be regarded as illegal. A. I. R. 1928 Rang. 243, Not Foll. 128 Ind. Cas. 836=8 Rang. 499=1931 Cr. C. 28=A.I.R. 1931 Rang. 12.

—Ss. 182 and 211—Under S. 182, accused must have known or believed information to be false while under S. 211 if he had reasons to believe it to be false it is enough.

Under S. 211 of the Penal Code if the accused makes his complaint without any just grounds and acts without due care or caution it is enough to constitute an offence. But under S. 182 the information given to a public servant should not only be false in fact but it must be false to the knowledge or belief of the informant and the mere fact that the accused had reasons to believe it to be false is not sufficient. 82 Ind. Cas. 718=19 S.L.R. 91=25 Cr.L.J. 1358=A.I.R. 1925 Sind 184.

—S. 182 and 211—Distinction between.

An offence under S. 182 is committed when an information false to the accused's knowledge, is given to a public servant, but under S. 211 the accused should have instituted or caused to be instituted against another some criminal proceedings through a definite accusation and not by a mere expression of a suspicion. (1917) M.W.N. 875=19 Cr.L. J. 28=42 Ind. Cas. 998.

—Ss. 182 and 211—Distinction between—Sanction—Evadion of.

S. 182 is to be interpreted not in isolation but in association with S. 211 and it applies to cases when the



information to the public servant falls short of amounting to the institution of criminal proceedings against a defined person and falls short of amounting to the false charging of a defined person with an offence as defined in the Penal Code. Where the information amounts to such an institution and such false charging, S. 211 will apply. Where a matter comes under S. 211 which requires sanction for prosecution thereunder, it will be an evasion of the salutary provision of law to proceed under S. 182 without sanction. 15 Bom. L.R. 574=14 Cr.L.J. 491=20 Ind. Cas. 747.

—Ss. 182, 211—Proof—Essentials.

**Onus:**—To bring a case under S. 211, it is enough for the prosecution to prove that there was no just or lawful ground for the action taken and that the accused knew it. To bring a case under S. 182, not merely absence of reasonable and probable cause for giving the information, but a positive knowledge or belief of the falsity of the information given in the accused should be established. S. 182 does not impose criminal liability for mere want of caution before giving the information, however reckless and rash might be the conduct of the accused. (1906) 9 Bom. L.R. 33=31 B. 204.

—S. 182—Offence under S. 211 doubtful.

A prosecution for the minor offence under S. 182 when it is doubtful whether the facts alleged constitute a graver offence under S. 211, is legal. 37 All. 110=13 A.L.J. 53=16 Cr.L.J. 159=27 Ind. Cas. 223.

—Ss. 182, 211—False complaint against unknown persons.

An offence, constituted by a false complaint against unknown persons is not one under S. 211, but one under S. 182. It is, therefore, within the competence of the Police authorities concerned to complain of that offence and within the competence of the Magistrate, on receiving that complaint, to issue summons under S. 182. A.I.R. 1941 Cal. 288=42 Cr.L.J. 624=194 Ind. Cas. 799.

—S. 182—Comparative scope.

Sections 182 and 211, Penal Code in reality differ fundamentally as regards the ingredients of the offence concerned.

Section 182 is primarily intended for cases of false information which do not ordinarily involve a particular allegation or charge against a specified and definite person. S. 211 covers cases where there is a definite information or charge with reference to a criminal offence against a particular person. 105 Ind. Cas. 454=29 N.L.R. 136=10 N.L.J. 191=28 Cr.L.J. 934=9 A.L.Cr.R. 87=A.I.R. 1928 Nag. 17.

—Ss. 182, 211.

Accused giving information to Police resulting in arrest of third person on charge of murder—Third person discharged—Accused is responsible for his prosecution and is guilty under S. 211 and not under S. 182. A.I.R. 1939 Sind 274=41 Cr.L.J. 8=184 Ind. Cas. 243.

—Ss. 182 and 211.

Telegrams sent to Deputy Commissioner, etc., alleging offence by Sub-Inspector—Allegations found false on inquiry—No proof that telegrams were sent with a view that authorities should take criminal proceedings against the person charged—No offence under S. 211 is com-

mitted but offence under S. 182 is committed. A.I.R. 1936 Pesh. 66=37 Cr.L.J. 604=162 Ind. Cas. 140.

—Ss. 182 and 211.

Woman demanding investigation and punishment to Sub-Inspector who was alleged to have raped her—Sub-Inspector found not guilty of charge—Complaint by Sub-Inspector against woman for false charge—Held woman was guilty of offence under S. 211 and not under S. 182. A.I.R. 1935 Nag. 69=17 M.L.J. 189.

—Ss. 182 and 211—False report to Police and also false complaint to Magistrate—Proceedings started—Proceedings under S. 211 are appropriate—But proceedings under S. 182 are not illegal.

Where there have been Court proceedings in consequence of a false report to the police, then S. 211 is the appropriate section to apply, and is so in any event, where the case is a serious one.

But this does not of necessity make a prosecution under Section 182 illegal. It is a question of expediency whether the High Court will quash the conviction for the minor offence under section 182 and direct a trial for the graver one under section 211. 64 Ind. Cas. 839=11 L.B.R. 43=A.I.R. 1921 L.B. 43.

—Ss. 182, 211—False charge to police officer—Cognizable offence.

When a false charge is made to the police of a cognizable offence the offence committed by the person making the false charge falls within the meaning of S. 211 and not S. 182 17 C. 570, foll. (1901) 5 C.W.N. 727.

—Ss. 182, 211—Complaint to District Registrar—Departmental enquiry—Judicial proceeding.

See Cr.P.C., S. 195. 11 Cr.L.J. 212=5 Ind. Cas. 721=11 C.L.J. 111.

—Ss. 182 and 211—Different trials under, validity of—Charge in respect of the same offence.

A person cannot be tried separately under S. 182 and under S. 211, I.P.C., when the charge under either section is in respect of the same offence, namely, giving a false information to or lodging a false complaint with the police. (1915) 11 U.B.R. 195=17 Cr.L.J. 177=33 Ind. Cas. 817.

—Ss. 182 and 211—Alternative charge—Subsequent charge.

Offences under Ss. 182 and 211 are quite different. A person charged under S. 182 cannot be charged in the alternative under S. 211, but if he is acquitted under S. 182, this acquittal is no bar to his prosecution subsequently under S. 211. 20 P.R. 1910 (Cr.)=30 P.W.R. 1910 (Cr.)=11 Cr.L.J. 420=140 P.L.R. 1910=6 Ind. Cas. 944.

2. Essentials of offence.

—S. 182—Offence under—Proof required.

In order to establish an offence punishable under S. 182, I.P. Code, it must be established that a person gave information which he knew or believed to be false to a public servant and that he intended thereby to cause such public servant to do something which such



servant ought not to do or that he knew it to be likely that he would thereby cause such public servant to do something which he ought not to do. The words "to do something" which such public servant ought not to do must mean, to do something which the public servant was enjoined to do in his official capacity as public servant. If a person gives false information to a public servant knowing it to be likely or intending that he would do something which had no connection with his office as a public servant then the conduct of the person giving such information would not come within the purview of S. 182, I. P. Code. 51 Cr.L.J. 469=A.I.R. 1950 Cal. 97.

—S. 182—Person giving information must be shown to know or believe it to be false.

To constitute an offence under S. 182, it must be shown that the person giving the information knew or believed it to be false or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. A.I.R. 1937 Pat. 6=38 Cr.L.J. 289=3 B.R. 219=166 Ind. Cas. 738.

—S. 182—Offence under—When complete.

Section 182 is for the prosecution of a person who gives any information which he knows or believes to be false, etc., to a public servant. The offence is complete as soon as the information is given. Whether the public servant omits to take a statement subsequently on oath of the person giving the information for the purpose of taking certain action on it is a matter which will not affect the giving of the information. A.I.R. 1936 All. 469=1936 A.L.J. 592=1936 A.W.R. 396=37 Cr.L.J. 857=163 Ind. Cas. 609.

—S. 182—Essential requisites.

Section 182 requires that information which is false or which is believed to be false should be given to a public servant with a particular intention or knowledge, and if the information is known to be false and is given with the intention of causing a public servant to do or omit to do anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given were known by him, or to use the lawful powers of such public servant to the injury or annoyance of any person, then the offence is committed. The fact that the public servant did not in fact do or omit to do anything or did not use his lawful power in consequence is not a deciding factor. The guilt of the accused lies in his intention or knowledge and a man's intention or knowledge must be judged from his acts and the surrounding circumstances. A.I.R. 1936 Sind 94=90 Sind L.R. 75=37 Cr.L.J. 870=163 Ind. Cas. 910.

—S. 182—Essentials of complaint under.

The allegations in complaint under S. 182, should contain the ingredients of an offence, for it is essential in order to secure a conviction under this section, that the information given by the accused must have been known or believed to be false by him at the time when he gave it. A.I.R. 1935 Rang. 97=37 Cr.L.J. 9 (2)=159 Ind. Cas. 95.

—S. 182—Essentials.

To constitute the offence punishable under S. 182, I.P.C. it is necessary that the information given should be that which the accused person knows or believes to

be false. It is not sufficient that he had reason to believe it to be true, there must have been positive knowledge or belief that it was false. 32 P.R. 1884 Cr. and 29 P. R. 1894 Cr., Foll. 119 Ind. Cas. 230=30 P.L.R. 655=30 Cr.L.J. 1008=1930 Cr.C. 22=11 L.L.J. 495=A.I.R. 1930 Lah. 54.

—S. 182—Essentials.

It is an essential ingredient of an offence under S. 182 that the offender should intend to cause, or should know it to be likely that the information given by him to the public servant will cause the public servant to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given or known by him, or to use the lawful power of such public servant to the injury or annoyance of any person. A.I.R. 1930 Pat. 550=129 Ind. Cas. 87.

—S. 182.

A prosecution under S. 182, I.P.C., will lie quite irrespective of whether the action which a public servant is asked to take on information given to him is a legal one or not. To take the view that if he is not legally entitled to take action a prosecution will not lie will reduce S. 182, I.P.C., to a *reductio ad absurdum*. 75 Ind. Cas. 289=24 Cr.L.J. 913 (Lah.)

—S. 182—Petition before Magistrate for enquiry—Allegation false—Prosecution.

The accused petitioned the Magistrate that a certain person was collecting men to cause him some injury and asked for an enquiry by the police. After the inquiry the Magistrate, holding the petition to be false and vexatious, directed the prosecution of the accused for an offence under S. 182, I.P.C. Held, that the accused having given information to a Magistrate which had been held to be false and which was intended to cause the Magistrate to use his lawful powers to the injury or annoyance of another, the order directing the prosecution of the accused, was legal. 20 Cr.L.J. 821=53 Ind. Cas. 821 (Pat.)

—S. 182—False information to public servant—Essentials of.

S. 182, I.P.C., applies to a case in which it is intended that a public servant should do or omit to do something which he would not be legally justified in doing or omitting to do if he knew the true facts. Asking a public servant to do an act which would be an illegal act, on true facts being stated to him, would not come within the section. 16 A.L.J. 614=19 Cr.L.J. 895=47 Ind. Cas. 91.

—S. 182 — False information — Resignation containing untrue statement.

Where a person resigning his office submitted a petition to the Collector containing allegations against other servants of the Collector without any intention that the Collector should use his powers to the injury or annoyance of those others, Held, he was not guilty of an offence under S. 182, I.P.C. 16 A.L.J. 105=19 Cr.L.J. 257=44 Ind. Cas. 113.

—S. 182—False information—Expression of suspicion.

An expression of suspicion against some persons in a complaint of theft to the police does not amount to the



giving of false information. 27 C.L.J. 230=22 C.W.N. 478=19 Cr.L.J. 336=44 Ind. Cas. 352.

### 3. Evidence and proof.

#### —S. 182—Evidence and proof.

The fact that an information is shown to be false does not cast upon the party who is charged with an offence under S. 182 the burden of showing that when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false. It is necessary for the prosecution to prove, not merely the absence of reasonable or probable cause for giving the information, but a positive knowledge or belief of the falsity of the information given: 26 Mad. 640; 31 Bom. 204; and 35 P.R. 1890 Cr. Foll. 110 Ind. Cas. 785=10 A.I.Cr.R. 557=29 Cr.L.J. 753 (Lah.)

#### —S. 182—Accused selling his horse and giving false information of theft—Offence under S. 182 is made out.

Where the accused gave false information to the police that his horse was stolen when in fact he himself had sold it and subsequently instituted proceedings under Ss. 379 and 411:

**Held**, in making a report the accused clearly gave false information to the police which he knew to be false and he must have known that it was likely that he would thereby cause the police authorities, if they found the horse answering to this description, to take it from the possession of its rightful owner. On these facts an offence under S. 182 is clearly made out. 71 Ind. Cas. 216=44 All. 647=24 Cr.L.J. 88=A.I.R. 1922 All. 272.

#### —S. 182.

The fact that the information is shown to be false does not cast upon the party who is charged with an offence under Section 182, I. P. C. the burden of showing that when he made it, he believed it to be true. The prosecution must make out that the circumstances were such that the only reasonable inference was that he must have known or believed it to be false. 69 Ind. Cas. 81=9 O.L.J. 342=23 Cr.L.J. 641=26 O.C. 44=A.I.R. 1923 Oudh 4.

#### —S. 182—Report of assault—Proof must be given that accused knew information to be false.

It is not sufficient to find for a conviction under the Section 182 that the accused person has given information which he did not believe to be true, but it is necessary that it should be found positively that he knew or believed the information to be false. The accused can only be expected to show upon what facts within his knowledge the information given was founded, but he certainly is not bound to show the information given was in fact true. 35 P.R. 1890 Cr. Foll. 62 Ind. Cas. 327=2 P.L.R. 1922=22 Cr.L.J. 503=A.I.R. 1922 Lah. 313.

#### —S. 182.

In a prosecution under S. 182 of the Penal Code, the burden lies on the prosecution to prove that the accused knew or believed the information to be false. 61 Ind. Cas. 171=22 Cr.L.J. 347 (Cal.)

#### —S. 182—False information of threatened breach of the peace—Onus.

To constitute an offence under S. 182, I. P. C., it is necessary for the prosecution to prove not merely an absence of a reasonable and probable cause for giving the information but a positive knowledge or belief of the falsity of the information given. 6 O.L.J. 457=20 Cr.L.J. 791=53 Ind. Cas. 695.

#### —S. 182—'Giving false information'—Onus of proof.

To constitute an offence under S. 182, it must be shown that the person giving the information knew or believed it to be false or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The onus on the prosecution will not be shifted by merely showing that the information was false. (1903) 26 M. 640.

#### 4. Interpretation—"Gives information"—if restricted to voluntary information.

See also: A.I.R. 1947 Pat. 64 under Note 1 (a).

#### —S. 182—False information given during investigation.

If a witness answers questions because he is compelled to answer by reason of the powers of the Police, that in itself may well be sufficient to negative the guilty intent or knowledge necessary for a conviction under S. 182. The information is then not so much given as taken. But to hold that S. 182 can never apply to false information given to the Police during the course of an investigation, is to go further than the words of S. 182, or the public interest properly allows. A.I.R. 1939 Sind 274=41 Cr.L.J. 8=184 Ind. Cas. 243.

#### —S. 182—Information given during investigation under S. 161, Criminal P. C.

A reasonable interpretation of the words of S. 182, I. P. C., is to include information even if it is given to a Police Officer in the course of an investigation under S. 161, Criminal P. C., in reply to questions put by him. There is no reason to insert in the statutory provisions of S. 182, words that are not there, and thus to restrict unduly the meaning of the words and to reduce the efficacy of the section in dealing with the mischief with which it was designed to deal. The section is not confined to information which is volunteered and which falls under S. 154, Criminal P. C. A.I.R. 1936 Sind 94=30 Sind L.R. 15=37 Cr.L.J. 870=163 Ind. Cas. 910.

#### —S. 182—Statement by witness to Police under S. 161, Criminal P. C.

A statement made by a witness to the Police under the provisions of S. 161, Criminal P. C. is not "an information given to a public servant" within the meaning of S. 182, Penal Code. A.I.R. 1935 Rang. 97=37 Cr.L.J. 9 (2)=159 Ind. Cas. 95.

#### —S. 182—Give information—Meaning—False information to Police Officer.

A statement made to an investigating Police Officer in answer to his question is not giving



information under S. 182, I. P. C. 'Give information' in S. 182 means 'volunteer information'. 35 P.W.R. 1914 Cr.=227 P.L.R. 1914=15 Cr.L.J. 650=25 Ind. Cas. 978.

#### —S. 182—Information during investigation.

Section 182, Penal Code applies to a statement made during the investigation of a case. The word 'information' in the section is used with reference not to a Police Officer in particular but to any public servant. Consequently, the meaning of the word is not restricted to a first information recorded under S. 154, Criminal P. C. A.I.R. 1933 Pat. 555=14 P.L.T. 541=34 Cr.L.J. 1216=146 Ind. Cas. 234.

#### —S. 182—"Gives information."

There is nothing to justify the reading in of the word "voluntarily" before the word "gives" in S. 182.

Where a driver of a motor-car driving without a licence, when asked for his name by the Superintendent of Police gave a wrong name:

**Held**, that the Superintendent of Police was not holding an investigation and the question put to the driver was not put under S. 161, Cr. P. Code, so as to give him benefit of S. 162. He is guilty under S. 182, I. P. C., because the words "gives information" in that section should not be interpreted as necessarily meaning "volunteers information". 113 Ind. Cas. 587=7 Pat. 715=10 P.L.T. 244=30 Cr.L.J. 177=11 A.I.Cr.R. 567=A.I.R. 1929 Pat. 4.

#### —S. 182.

The words "give information" should not be interpreted as necessarily meaning "voluntary information", i.e., that it must be information on some matter which is not already under inquiry by the public servant.

Statements made by persons in the nature of evidence given before an inquiring officer are information as contemplated by the section. 104 Ind. Cas. 712=28 Cr.L.J. 872=9 A.I.Cr.R. 54=9 P.L.T. 342=A.I.R. 1928 Pat. 56.

#### —S. 182.

**Obiter.**—The word "give" in S. 182 cannot be given the restricted meaning of the word "volunteer". 227 P.L.R. 1914 and 2 Cr.L.J. 474, not Foll. 90 Ind. Cas. 316=26 Cr.L.J. 1532=4 Bur. L.J. 261=3 Rang. 577=A.I.R. 1925 Rang. 364.

#### —S. 182—False information on being questioned.

An informant knowingly giving false information to a public servant voluntarily or on being questioned is punishable under S. 182, Penal Code. 1 Lah. 410=58 Ind. Cas. 818.

#### —S. 182—Unfounded allegation against a magistrate in application for transfer—Information to public officer.

The accused applied for transfer of his case from the Thasildar's Court and in the application made certain unfounded allegations against the Thasildar. He was examined by the Sub-Divisional Magistrate and repeated the allegations made in the application: **Held**, that the statement made under such circumstances was not information given to a public officer

within the meaning of the Indian Penal Code and the petitioner could not be prosecuted for that statement in as much as he was in the position of an accused person and the statement was made in answer to questions put by the Sub-Divisional Officer. 12 M. 451, foll. (1910) 7 A.L.J. 1143=33 All. 163=7 Ind. Cas. 914=11 Cr.L.J. 537.

#### —S. 182—Statement of defence witness in departmental enquiry.

The expression 'gives information' in S. 182, I. P. C., means to volunteer information and is not intended to apply to a statement made in answer to questions put by a public servant. Statements made by witnesses to Police Officers under S. 161, Criminal P. C., cannot except in very special circumstances, be regarded as 'gives information to a public servant' within the meaning of S. 182, I. P. C.

If a statement made by a witness to a Police Officer under S. 161, Criminal P. C., cannot in general form the basis for a conviction under S. 182, I. P. C., still less can a statement of witness called for the defence at a departmental inquiry. A.I.R. 1937 Rang. 232=38 Cr.L.J. 980=170 Ind. Cas. 854.

### 5. Place of trial.

#### —S. 182—Information by letter — Jurisdiction to try case.

Under S. 182, I. P. C. the act of giving information consists of something done by the giver and of the knowledge acquired by the person to whom the information is given. The writing and the posting of the letter at one place and the receipt of it at another taken together constitute the giving of information. It follows that the act of giving information partly takes place where the letter is written and posted. Further the intention which is an essential ingredient of an offence under S. 182, I. P. C., is entertained by the person giving the information at the place where the letter is written and posted. Consequently, in a case where the information given to a public servant is contained in a letter posted at one place and delivered at another the offence is committed partly in one local area and partly in another. The Court at the place where the letter is written and posted has jurisdiction to try the case. Even if that Court be supposed to have no jurisdiction, S. 531, Criminal P. C. will cover the case. A.I.R. 1936 All. 105=(1936) A.L.J. 416=37 Cr.L.J. 157=1935 A.W.R. 1476=159 Ind. Cas. 808.

#### —S. 182—Offence under, when complete—Place of trial.

The gist of the offence under S. 182, is the giving of information so as to cause a public servant to act upon it, and the offence is completed when the information reaches the public servant. Consequently, a case under the section has to be tried at the place where the public servant received the information. A.I.R. 1932 Mad. 427=35 M.L.W. 451=1932 M.W.N. 451=33 Cr.L.J. 452(1)=137 Ind. Cas. 333.

#### —S. 182—Jurisdiction.

Person making complaint to police—Police taking no action—Complaint filed in Court of Magistrate—Magistrate ordering preliminary inquiry—Police subsequently filing complaint in Court of another Magistrate against the informant charging him under Ss. 182



and 211—Latter Court cannot take cognizance of complaint filed by police. 115 Ind. Cas. 313=23 S.L.R. 225=30 Cr.L.J. 399=1929 Cr. C. 106=A.I.R. 1929 Sind 115.

### 6. Prosecution for offence.

- (a) Need for complaint by public servant.
- (b) Right of accused to opportunity to prove his case.

#### 6 (a). Prosecution for offence—Need for complaint by public servant.

##### —S. 182—Prosecution under, without complaint of public servant.

The provisions of S. 190 (1) (c), Criminal P. C., are subject to the provisions of S. 195 which follows it and hence, a person cannot be prosecuted and convicted under S. 182, I. P. C., without there being a complaint in writing of a public servant against him as required by S. 195, Criminal P. C. A.I.R. 1940 Oudh 424=1940 A.W.R. 307 (1)=41 Cr.L.J. 787=1940 O.W.N. 917=189 Ind. Cas. 702.

##### —S. 182.

Cognizance of a case under S. 182 cannot be taken against the petitioner except on the complaints, in writing, of the officer before whom the petition was filed or some other public servant to whom he is subordinate. (1938) 67 C.L.J. 583.

##### —S. 182.

Petition of complaint against conduct of Police to District Magistrate—Order 'file', passed on complaint—Subsequent prosecution of petitioner under S. 182—Held, petitioner could claim that sanction of District Magistrate was necessary for prosecution—Proceedings, held, should be quashed. A.I.R. 1937 Sind 209=98 Cr.L.J. 951=31 Sind L. R. 429=170 Ind. Cas. 608.

##### —S. 182.

Application not suggesting that Magistrate should take action—Prayer to take woman from husband's custody—Omission to take deposition of applicant:

Held, that the application was not a complaint and the Magistrate was not bound to take the deposition of the applicant on oath and the omission did not vitiate an order subsequently made by him directing a complaint under S. 182 to be made against the applicant for prosecution under S. 195 (1) (a), Criminal P. C. A.I.R. 1936 All. 469=1936 A.L.J. 592=37 Cr.L.J. 857=1936 A.W.R. 366=163 Ind. Cas. 609.

##### —Ss. 182, 211—Sanction for prosecution under.

It is not permissible for the Magistrate to order an enquiry and to sanction the prosecution of the applicant under Ss. 182 and 211 where he has not examined him on oath. A. I. R. 1935 All. 745=58 All. 129=1935 A.L.J. 1067=1935 A.W.R. 796=36 Cr.L.J. 860 (2)=155 Ind. Cas. 1070.

##### —S. 182—Who can take action.

A made a false report of dacoity. The police did not proceed on his complaint but prosecuted certain persons under S. 324. This offence also was not

brought home to them and the police made a complaint against A requesting his prosecution under S. 182 for making a false report of dacoity. A was convicted:

Held, that the conviction was legal. The complaint was properly made under S. 182. The only persons who could take action in the case were the police and not the Court which not having tried any case of dacoity was not in a position of being able to say a false complaint had been made of dacoity before it: 7 O.W.N. 756=1930 Cr. C. 954=A.I.R. 1930 Oudh 414.

##### —S. 182—Graver and minor offences.

There is no bar to cognizance being taken of an offence under Penal Code, S. 211 on the complaint of the investigating police officer though he is not also an officer referred to under S. 195 (1) (e), Cr. P. Code; but if the charge under Penal Code, S. 211 fails, there cannot by reason of Cr. P. Code, S. 195 (1) (a) be a conviction under Penal Code, S. 182. 117 Ind. Cas. 37=30 Cr.L.J. 710=1930 Cr. C. 74=11 P. L. T. 88=A.I.R. 1930 Pat. 98.

##### —S. 182—Power to prosecute.

The petitioner filed a complaint before the Magistrate who after examining the petitioner sent the complaint to the Sub-Inspector for inquiry and report. The Sub-Inspector reported the case to be maliciously false, recommended the prosecution of the petitioner under S. 211, Penal Code, and preferred a complaint of that offence against the petitioner. The petitioner filed a petition impugning the report and praying the Magistrate to make a judicial inquiry. The Magistrate directed the Sub-Inspector to submit a report for prosecution under S. 182 and on receipt of the "report for prosecution" issued summons on the petitioner under S. 182:

Held, that the order was wrong in law, that S. 195 (i) (a), Cr. P. Code, bars a complaint by the Sub-Inspector of an offence under S. 182 since he was not "the public servant concerned" or the superior of such public servant to whom the false information punishable under S. 182 was given and that S. 195 (i) (b) was a bar to cognizance being taken of it except on the complaint of the Magistrate. 115 Ind. Cas. 882=10 P.L.T. 77=30 Cr.L.J. 545=12 A.I.Cr.R. 363=A.I.R. 1929 Pat. 92.

##### —S. 182—Sanction.

Sanction of the trying Magistrate or of the District Magistrate must be obtained before launching a prosecution under S. 182, I.P.C., in cases where a police enquiry is followed by a trial in Court, but the want of sanction is an irregularity under S. 537 and does not vitiate the trial unless it has occasioned a failure of justice. 74 Ind. Cas. 259=24 Cr. L. J. 755=1 Bur. L. J. 258=A.I.R. 1923 Rang. 135.

##### —S. 182—Offence coming under two Sections—Sanction to prosecute under one, refused—Prosecution under the other is barred.

Where the charge might have been made against the accused under section 182 or Section 211, Held, it seems to be contrary to public policy and to the recognised principles of the administration of the criminal law, when a charge has been launched which requires sanction by a particular authority and that authority has refused sanction, to hold that it is open



to a complainant to alter his election, shift his ground and start a fresh charge on an alternative section which does not require sanction. 68 Ind. Cas. 32=45 All. 11=20 A. L. J. 775=23 Cr. L. J. 496=A.I.R. 1922 All. 502.

—S. 182—False information to police followed by complaint—Complaint by officer to whom information given.

The accused gave information to a police officer that certain persons had committed theft and also complained to a Magistrate to the same effect. The police after investigation found the information false. The Magistrate having called for a report from the police, they reported that the complaint was false. The accused asked for an opportunity to produce his evidence. After examining his witnesses the Magistrate issued a summons to the accused to appear. On the date fixed, prosecution witnesses did not appear and the Magistrate discharged the accused. Thereupon the police officer to whom accused had given information made a complaint and preferred a charge under S. 192 of the Penal Code. Held, that accused making a complaint to a Magistrate and then dropping the proceedings is no bar to the police officer to whom false information has been given making a complaint under S. 182 of the Penal Code. 17 A.L.J. 32=20 Cr. L. J. 114=49 Ind. Cas. 98.

—Ss. 182, 193 and 199—Cr. P. C., Ss. 195 and 537—Sanction—Revision—Conviction under S. 199 if can be converted to one under S. 182.

A declaration under S. 199, I. P. C., must be one which having been made is afterwards receivable in evidence of the fact declared. A conviction under S. 199, I. P. C. for which no sanction is necessary cannot in revision be converted into one under S. 182 which requires a sanction. 15 Cr. L. J. 603=8 Bur. L. T. 82=25 Ind. Cas. 515.

—S. 182—Cr. P. C. (1898), S. 195—Sanction by Police Officer.

A person giving information to a police can have his case determined by the Court before he is called upon to answer a charge of giving a false information. **Obiter.**—The Magistrate should not take cognizance of such a case without a complaint of the public servant to whom the false information was given simply on the sanction of the Inspector of Police. 14 C.W.N. 765=11 Cr. L. J. 354=6 Ind. Cas. 415.

—Ss. 182, 211—Cr. P. C., S. 195—Information given to the Police alleged to be false—Procedure—Notice.

Where a District Magistrate upon a report made by the Police that information given to them charging a person with a specific crime is false, orders the person giving such information to be prosecuted under S. 211 of the Indian Penal Code such order is not an order to which S. 195 (b) of the Code of Criminal Procedure applies; neither is the order passed without jurisdiction if no previous notice to show cause is given to the accused. The more proper course however, would be to let the informant bring his witnesses into Court, hear them out, and then, if the case was considered to be a false case, to pass an order that the informant should be tried under S. 211 of the Indian Penal Code. (1907) 30 A. 32=1907 A.W.N. 288=4 A.L.J. 790.

—S. 182—Cr. P. C., S. 195 (1)—Complaint by a police officer.

One S. made a report at a Police station. On enquiry the investigating Police Officer came to the conclusion that the report was false and that it had been made at the instance of one U. The Sub-Inspector sent a report to the Assistant Superintendent of Police asking that action should be taken under S. 182 against S and U. The Assistant Superintendent of Police declined to take action but sent the report to the Sub-Divisional Magistrate who took cognizance of the offence against S and U, under S. 182. Held, that the Sub-Divisional Magistrate had no jurisdiction to take any action under S. 182. Report of a Police officer was not a complaint under S. 195 (1), Cr. P. C., U not having given the information himself could not be prosecuted under S. 182, I. P. C. 2 A.L.J. 236. Also: (1910) 6 Ind. Cas. 415=11 Cr. L. J. 354=14 C.W.N. 765.

6 (b). Prosecution for offence—Right of accused to opportunity to prove his case.

—S. 182—Complaint of person to be prosecuted must be dealt with according to law.

Where a person when called upon to show cause why he should not be prosecuted under S. 182, I. P. C., challenges the Police report and reiterates the charges made before the Police it is clearly a complaint, and the Magistrate should deal with it under the provisions of S. 203, Criminal P.C. The case under S. 182, I.P.C. cannot be proceeded with until that person's complaint has been dealt with in accordance with law. A.I.R. 1939 Cal. 271=40 Cr. L. J. 644=182 Ind. Cas. 235.

—S. 182—Accused filing *naraji* petition against Police Report—Trial under S. 182 before disposal of petition—Validity.

Where on the Police reporting to be false an information filed against certain persons by the accused, a warrant was issued against him under S. 182, Penal Code and on receipt of the warrant the accused filed a *naraji* petition against the Police Report which was dismissed on the ground that he would have ample opportunity to adduce evidence to prove his case in the proceedings under S. 182, and he was tried and convicted in those proceedings:

Held, that the accused was prejudiced and the Court ought to have enquired into the *naraji* petition first before the accused was tried under S. 182 and that the conviction should be set aside. A.I.R. 1933 Cal. 614=37 C.W.N. 399=34 Cr. L. J. 1077=145 Ind. Cas. 824.

—S. 182—Inquiry into *naraji* petition by complainant.

Where on a Police Report that the case of the complainant was false, he filed a *naraji* petition objecting to the Police Report:

Held, that process cannot be issued against him under S. 182 without enquiring into and disposing of the complainant's *naraji* petition. A.I.R. 1932 Cal. 550=36 C.W.N. 794=33 Cr. L. J. 724=139 Ind. Cas. 217.

—Ss. 182, 211—Issuing process under, without dismissing complaint, legality.

The accused lodged an *ejahar* before the Police bringing a charge of theft against A. The Police enquired into the matter and submitted their report. The accused then



filed a *narazi* petition before the Magistrate who sent the matter to an Honorary Magistrate and the latter submitted his report. The Magistrate without dismissing the *narazi* petition issued process against the accused under Ss. 211 and 182:

**Held**, that the Magistrate was wrong in law when he issued a process against the accused under Ss. 211 and 182 without having dismissed the *narazi* petition which was to be treated as a complaint. A.I.R. 1932 Cal. 383 (1)=36 C.W.N. 15=33 Cr. L.J. 514 (1)=137 Ind. Cas. 849.

—S. 182—Opportunity to accused to prove truth of his case need not be given in every case.

Although where the accused files a *narazi* petition in a case under S. 182, it is a better procedure to give the accused an opportunity of proving the truth of his case before the Magistrate enquires into the case, if the accused is convicted without giving him such opportunity, the trial cannot be said to be illegal. A.I.R. 1933 Cal. 532 =60 Cal. 656=37 C.W.N. 368=34 Cr. L.J. 1059=145 Ind. Cas. 660.

—S. 182—Opportunity to accused to prove his case.

There is no provision in law that before a Magistrate can enquire into a case under S. 182, on the complaint of a Police Officer the accused person must have an opportunity of proving his case. Such a provision is unnecessary and even when the accused asks the Magistrate by a petition that his case might be investigated, conviction without such preliminary opportunity being given, is not illegal; at the most it may amount to error of discretion and is not error of law. A.I.R. 1931 Cal. 634=58 Cal. 1065=35 C.W.N. 378=32 Cr. L.J. 1241=134 Ind. Cas. 919.

—S. 182—Narazi petition.

Where a *narazi* petition against the report of Police has been actually dismissed by the Magistrate under S. 203, Criminal P.C., it is finished and done with, and there is nothing further to prevent the trial under S. 182, I.P.C. A.I.R. 1939 Cal. 340=I.L.R. (1939) 1 Cal. 322=40 Cr. L.J. 647=182 Ind. Cas. 253.

—Ss. 182, 211—False information before Police, offence under S. 182, I.P.C.—Prosecution for laying false information before dismissal of complaint, illegal.

S. 182 and not merely S. 211 of the Indian Penal Code applies to cases in which the false statement charged is made to a Police officer. 5 C.W.N. 727, Foll. The Magistrate has no jurisdiction to order a prosecution for making a false complaint till that complaint has been finally determined. 3 C.W.N. 758, Foll. (1905) 4 C.L.J. 88=4 Cr. L.J. 68.

## 7. Miscellaneous.

—S. 182.

The words "public servant" in S. 182, sufficiently cover a Police Officer. A.I.R. 1936 Sind 94=30 Sind L.R. 75=37 Cr.L.J. 870=163 Ind. Cas. 910.

—Ss. 182 and 211.

Accused persons not taking action under S. 211—Court has authority to complain against the false complaint. 112 Ind. Cas. 770=9 L. R. A. Cr. 71=9

L.R.A.Cr. 78=9 A.I.Cr.R. 446=9 A.I.Cr.R. 475=30 Cr.L.J. 2=A.I.R. 1928 All. 333.

—S. 182—Institution of proceedings—Discretion and power of police.

False report to the police—Similar complaint subsequently to Magistrate—Police can institute proceedings under S. 182—Discretion or power of the police to proceed is not limited in any way by the discretion vested in the Magistrate. 114 Ind. Cas. 189=26 A.L.J. 533=9 L.R.A.Cr. 73=9 A.I.Cr.R. 458=30 Cr.L.J. 272=A.I.R. 1928 All. 342.

—S. 182—Reversal of sentence.

The High Court can convict an accused under Section 182, I. P. C., even though acquitted by the lower Appellate Court; Section 439 (4) does not come in the way for, the meaning of that clause is that, where an accused person has been acquitted on all charges he is not to be convicted. If he has been convicted at all, Section 439 (4) does not apply to him. 69 Ind. Cas. 81=9 O. L. J. 342=23 Cr. L. J. 641=26 O. C. 44=A.I.R. 1923 Oudh 4.

—S. 182—No proceedings after compromise.

The complainant in a complaint of theft should not be proceeded against under S. 182 after the compromise of the complaint. 16 A.L.J. 734=19 Cr.L.J. 730=46 Ind. Cas. 410.

—Ss. 182 and 211—False charge bringing of, before police—Recommendation by police that informant should be prosecuted—Cr. P. Code, S. 532.

The appellant lodged informed a Sub-Inspector of Police that certain persons had beat him and set fire to a house. The Sub-Inspector on enquiry did not believe the story and recommended that the appellant might be prosecuted under Ss. 182 and 211. The prosecution of the appellant was then directed by a Deputy Magistrate. A preliminary enquiry was made and the appellant was committed to the Court of Session and convicted under S. 211; **Held**, that when the accused had been committed for trial to the Court of Sessions, a conviction by that Court could not be set aside simply on the ground of some irregularity in the commitment proceedings, especially when that point was not raised in the first Court, and that S. 532, Cr. P. Code, would cure such a defect. 13 Cr.L.J. 826=17 Ind. Cas. 570 (Cal.).

—Ss. 182 and 193—Cr. P. C. (Act V of 1898), S. 195—Truth speaking witness, when protected.

A truth speaking witness must be protected if he is obliged to speak things which he would hesitate to utter in private life but he cannot be protected if he gives out things voluntarily when no question is asked him in evidence. 4 Bur. L.T. 262=13 Cr.L.J. 56=13 Ind. Cas. 392.

—Ss. 183, 186, 353 and 332—Offences against public servants—S. 195 (1), Criminal P. C.—Applicability.

The offences against public servants in an ascending scale of gravity are: (i) voluntary obstruction (S. 186, I. P. C.); (ii) resistance to their taking of property by lawful authority (S. 183, I. P. C.); (iii) assault or the use of criminal force to them in the execution of their



duty (S. 353, I.P.C.) and (iv) voluntarily causing hurt to them in the discharge of their duty (S. 332, I. P. C.). The offences in (iii) and (iv) unlike those in (i) and (ii) do not require a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate before a Court can take cognizance of them presumably because they are cognizable and the measurement of punishment with which they can be visited makes cases relating to them warrant cases. Although the offences in (i) and (ii) may be present in offences (iii) and (iv), they are ancillary to them and no question of attracting the provision of S. 195 (1), Criminal P. C. would arise unless the prosecution sought to include offence (i) or (ii) or offences (i) and (ii) with the more serious offence or the more serious one of them. Then and only in respect of offences (i) and (ii) would the action contemplated by that sub-section be required. Where the offence is (ii), i.e., under S. 183, I. P. C. the requirements of S. 195 (i), Cr. P. C. will have to be met and the Court cannot evade them by using another section of the I. P. C. The test whether there is evasion or not is whether the facts disclose primarily and essentially an offence for which the complaint of Court is required. A.I.R. 1945 Nag. 210=1945 N.L.J. 239=I.L.R. (1945) Nag. 685=47 Cr.L.J. 175=221 Ind. Cas. 403.

—Ss. 183, 186—Arrest by execution warrant—Judgment-debtor released forcibly—Written complaint to District Magistrate under S. 195, Criminal P. C.—Complaint described as under Ss. 476 and 195, Criminal P. C.—Effect of.

In execution of a decree in favour of P against N and M, warrants of attachment by arrest of the judgment-debtors were issued by the Subordinate Judge. Two process-servers effected the arrest of the judgment-debtors whereupon R and seven others came to the rescue of the judgment-debtors and forcibly got them released. The process-servers made a report to the Subordinate Judge and the Subordinate Judge after issuing notice to all the persons, who rescued the judgment-debtors drew up a complaint under S. 195, Criminal P. C., and forwarded it to the Court of the District Magistrate for necessary action. The District Magistrate forwarded the complaint to a Magistrate of the first Class, and the latter in a summary trial convicted all the accused of an offence under S. 186, Penal Code, and acquitted them of an offence under S. 183, Penal Code. An appeal was filed by R and six others and the Sessions Judge acquitted them all. Two of them did not file any appeal against their convictions by the trial Magistrate of an offence under S. 186, Penal Code, but the Sessions Judge 'suo motu' took action in favour of the two accused and referred their cases to the High Court with a recommendation that their conviction under S. 186 be set aside.

Held, that in the present case the Subordinate Judge filed a complaint as required by S. 195, Criminal P. C. It was true that the Subordinate Judge had described his complaint as one under S. 476 and S. 195, Criminal P. C., regarding offences under S. 183, Penal Code, but the mere fact that he had made a reference to S. 476, Criminal P. C., did not make his complaint any the less one under S. 195, Criminal P. C. The reference, therefore, was entirely misconceived. A.I.R. 1934 Oudh 277=35 Cr.L.J. 990=11 O.W.N. 120=149 Ind. Cas. 377.

—S. 183—Resistance to public servant—Complaint of Civil Court—Sanction.

See Cr.P.C., S. 476. 8 C.W.N. 586=31 C. 664.

—S. 183—Accused merely raising hand objecting to article being seized by constable.

An article in the possession of the accused was during their absence seized by the head constable who had come to investigate a case of theft, and kept loaded in a bandy for the purpose of being taken. The accused hearing about it, came from the north, stood before the bandy and raising their hands said that the bandy should not be driven and they objected to the article being taken:

Held, that a statement by the accused objecting to the constable taking the article accompanied by a pantomime indicating that they were so objecting could not be taken to amount to offering any "resistance" within the meaning of S. 183. Consequently, no offence under S. 183, was committed. A.I.R. 1944 Mad. 45=56 L.W. 599=1943 M.W.N. 711=45 Cr.L.J. 559=210 Ind. Cas. 240.

—S. 183—Bombay Local Boards Act (1923), Ss. 100, 102—Rules made by District Board of Ratnagiri, R. 8—Nakedar levying octroi on board the ship, on goods not landed—Refusal of Tandel—Seizure—Legality of.

The accused who was the tandel of a country ship carried goods consigned to various persons in Jaitapur and Rajapur ports. The ship arrived at the port of Jaitapur which is at the mouth of the creek. The goods which were consigned to Jaitapur traders were landed, and octroi was duly paid in accordance with rules made by the District Local Board. There was no separate octroi Naka for the port of Rajapur, and Nakedar of the Jaitapur Naka went on board the applicant's ship together with a peon and panchas and demanded from the tandel the amount of octroi duty, about Rs. 60, on the goods which he was proposing to take to Rajapur. The tandel declined to pay, firstly because he had not the money to do so, and secondly, because as he said, the Rajapur merchants objected to pay. On his refusal, the Nakedar acting under R. 8, seized part of the cargo. The accused resisted and was prosecuted for an offence under S. 183, I.P.C., that is, for the offence of resistance to the taking of property by the lawful authority of a public servant and was convicted.

Held, that the prosecution had not established that the jurisdiction of the District Local Board to impose taxes extended to goods on board the ship before the goods were landed or that the Local Board had power to make use of R. 8, providing for collection of octroi in the same manner as is provided in the case of a toll by S. 116, Bombay Local Boards Act. The conviction was, therefore, not maintainable. A.I.R. 1936 Bom. 376=38 Bom. L.R. 790=38 Cr.L.J. 37=165 Ind. Cas. 637.

—Ss. 183, 99—Default for irrigation dues—Attachment of property not of defaulter, by person not legally authorised—Resistance—Absence of violence—Offence, committed—Bombay Land Revenue Code, 1879, S. 154.

Section 183, I.P.C., is not a section for the protection of the public servant, but enables him to take the offensive and prosecute anybody who resists the taking of property by lawful authority. Resistance to the act of a public officer acting bona fide though in excess of his authority may well give rise to some charge in the nature of assault, but it cannot afford any foundation for a prosecution under S. 183. The section applies to



resistance to the taking of property by lawful authority of a public servant, and there are no words in that section as there are in S. 99, extending the operation of the section to acts which are not strictly justifiable by law.

B owned certain land in respect of which he was in arrear with his irrigation dues. He had sold the sugarcane grown in that land to one R who had employed the accused to crush the sugar, and the jaggery was being removed in two carts when it was attached by the Talati in respect of the irrigation dues in arrear. The accused subsequently removed the carts from the custody of the Talati, and took them away, but no act of violence was alleged. Though the Talati put in an authority from the Mamlatdar there was no evidence that the Mamlatdar had power to give that authority to the Talati to attach the property, or that the Collector had delegated the authority to act under S. 154, Bombay Land Revenue Code, to the Mamlatdar.

Held that, it was not for the defence to point out to the prosecution any missing link in their chain of proof. The omission to prove the authority of the Mamlatdar was fatal to the conviction:

Held also, that there being no allegation of violence on the part of the accused the accused was entitled to resist peaceably the wrongful act of the Talati in seizing the jaggery which did not in fact belong to the defaulter. A.I.R. 1935 Bom. 233=37 Bom. L.R. 362=36 Cr.L.J. 1259=59 B. 545=157 Ind. Cas. 859.

#### —S. 183.

Attachment of property not belonging to judgment debtor—Resistance by the real owner to the distraint—No offence is committed. 1932 M.W.N. 247.

#### —S. 183—No offence.

Where certain property is entrusted to a firm for sale and subsequently the management of the owner's estate is handed over to the Court of Wards, any refusal by the firm to deliver the property entrusted to them until their general account is settled does not amount to any resistance to the taking of any property by the lawful authority of any public servant, nor voluntary obstruction to a public servant in the discharge of his public functions, by reason of S. 171 of the Contract Act. 92 Ind. Cas. 744=1 Luck. 133=3 O.W.N. 160=27 Cr.L.J. 328=A.I.R. 1926 Oudh 202.

#### —S. 183—Warrants signed by Peshkar—C.P.C., O. 21, R. 24—Resistance.

A warrant for attachment of the applicant's property was signed by the Peshkar of an Assistant Collector. Held, that the Peshkar not being an officer authorised to sign such warrants, the property could not be attached and by removing the property before attachment the accused did not commit any offence. 18 A.L.J. 284=21 Cr.L.J. 372=2 U.P.L.R. (All.) 101=55 Ind. Cas. 852.

#### —Ss. 183, 186 and 353—Warrant—Resistance to execution—Offence.

Resistance to execution of a warrant which directs the attachment of property but does not specify the date on, or before which it is to be executed is not illegal. 37 C. 122, Foll. 40 C. 849, Foll. 1 Pat. L. J. 550=3 Pat. L.W. 64=18 Cr.L.J. 39=36 Ind. Cas. 871.

#### —S. 183 or 186—Resistance to Amin—Attachment withdrawn.

Where the attachment of properties has been withdrawn owing to the deposit of decretal amount in Court, resistance to the Amin thereafter is not an offence under S. 183 or 186, I. P. C., because there is no voluntary obstruction to a public servant in the discharge of his public functions. *In re Arakkal Ahmad Ali Rajah*. 6 M.L.T. 376=10 Cr.L.J. 496=4 Ind. Cas. 97.

#### —S. 183 — 'Lawful authority' — Attachment—Warrant not in the possession of the amin at the time making the attachment.

It is the intention of the law that when a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him; otherwise the taking of the property is not lawful. (1904) A.W.N. 229=1 A.L.J. 595=27 A. 258.

#### —Ss. 183 and 353—Change of conviction under S. 353.

Under S. 423, Cr. P. C., an Appellate Court can alter a conviction from one under S. 353, I. P. C., to one under S. 183, I. P. C. 14 Cr.L.J. 239=(1912) M.W.N. 1110=19 Ind. Cas. 335.

#### —S. 184.

Obstruction to proceeding need not be physical—Accused abusing bidders at auction sale—No further bidding and postponement of sale resulting—Accused held guilty under S. 184. A.I.R. 1938 Nag. 529=1938 N.L.J. 299=39 Cr.L.J. 954=I.L.R. (1939) Nag. 139=177 Ind. Cas. 819.

#### —S. 184—Obstruction to sale adjourned under S. 134, Agra Tenancy Act,

Obstruction to sale held under the Agra Tenancy Act owing to the absence of bidders is no offence under S. 184, I.P.C. 1905 A.W.N. 65=2 A.L.J. 128=27 A. 480.

#### —S. 185—Prosecution under—Sanction required by S. 195, Criminal P. C.—Necessity of.

At an auction sale held by the Excise Officer the highest bid in respect of the licence-fee for liquor was made by the accused. He made default in respect of the earnest money which he had to deposit shortly after his bid was accepted and a notice was issued to him to show cause why he should not be prosecuted for having made default. On his failure to deposit the difference between his bid and the amount secured when the shop was re-sold, he was prosecuted and convicted of an offence under S. 185, Penal Code:

Held, (1) that as no complaint was made by the District Magistrate or the Excise Officer within the meaning of S. 195, Criminal P. C., the conviction of the accused for an offence under S. 185, Penal Code, could not be legally sustained;

(2) that the absence of a complaint as required by S. 195, Criminal P. C., could not be cured by S. 537, Criminal P. C.;

(3) that the accused, who had been doing business of a country liquor vendor for some years, was a bona fide bidder at the auction sale and if he was unable to deposit the earnest money which he was legally bound



to do after his bid was accepted, his inability was due to circumstances over which he really had no control, and that under S. 170, Excise Manual, Vol. I, p. 66 the only legal method of recovering a loss accruing on resale was by a civil suit against the defaulter, and consequently, his subsequent failure to deposit the earnest money due from him could not be made a penal offence punishable under S. 185, Penal Code. A.I.R. 1934 Oudh 186=11 O.W.N. 473=35 Cr.L.J. 789=9 Luck. 594=148 Ind. Cas. 784.

—S. 185—Bidding for right to sell drugs without intention of performing obligation—Offence.

A person who bids at a sale, held by a Collector, of the right to sell drugs without the intention to perform the obligation he lays himself under, is guilty of an offence under S. 185. 37 All. 128=13 A.L.J. 109=16 Cr.L.J. 54=26 Ind. Cas. 646.

—S. 186.

Synopsis.

1. Interpretation
2. Offence under section
3. Resistance to illegal or time-expired warrant
4. Miscellaneous.

1. Interpretation.

- (a) "Voluntarily"
- (b) "Obstructs"
- (c) "Public servant"
- (d) "In the discharge of his public functions".

1 (a). Interpretation—"Voluntarily".

—S. 186—Act done in good faith in the belief that same is right and justified under the law—Offence—"Voluntary obstruction."

To render a person liable for an offence under S. 186, I. P. Code, the prosecution must make out a voluntary obstruction, i. e., the commission of some overt act of obstruction. Where a person causes obstruction to a public servant in the honest belief that he was doing something that was right that cannot come within the mischief of S. 186, I. P. Code, where a person does something in a bona fide belief that he is doing what he is entitled to do under the law, he does not cause "voluntary obstruction" within the meaning of S. 186, and the section cannot apply. 4 A.I.Cr.D. 729.

—S. 186—Passive conduct.

The word "voluntarily" contemplates the commission of some overt act of obstruction; mere passive conduct is not intended to be penalised. 81 Ind. Cas. 209=25 Cr.L.J. 721=A.I.R. 1925 Lah. 139.

—S. 186—Public servant—Voluntary obstruction.

Where a person not only refuses to give up the property but threatens to do harm to the Police Officer if he ventures to carry out the warrant, he commits an offence under S. 186, since the threat is an overt act sufficient in law to constitute voluntary obstruction. (1904) 6 Bom.L.R. 254.

1 (b). Interpretation—"Obstructs".

—S. 186—"Obstruction"—Ingredients of offence—Writ of delivery by Civil Court—Tenant saying that he would vacate on arrival of landlords and not before—Offence.

The "obstruction" contemplated by S. 186, I. P. Code, may be in various ways and physical force is not necessary to constitute obstruction punishable under the section. Where a tenant in possession of premises tells the peon of a Civil Court going to execute a writ of delivery of possession against him, that he was a tenant under two persons who were the owners and that he was prepared to vacate the house on the arrival of those two persons and that he could not vacate unless his land-lords asked him, to do so, and there was neither threat nor violence, on the part of the tenant, and the peon without further words goes back and returns the writ, it cannot be held that an offence under S. 186 is committed. A.I.R. 1950 Pat. 544=4 A.I.Cr.D. 742.

—S. 186—"Obstruction"—Meaning of—If confined to physical obstruction.

"Obstruction" does not mean "physical obstruction". The nature of the obstruction would vary according to the nature of the duty which a public servant is to discharge. Where it was found that in order to prevent the search and seizure of stock of sugar the manager or owner of a factory had locked all the gates of the factory except the main entrance; had placed on the road leading to the factory a huge truck on jacks, with all the four wheels removed in such a way as to block the road leading to the godown; had kept heaps of coal, firewood and tins on the door leading to the godown, making it impossible for any vehicular traffic to reach the godown doors; and had also caused some of the rails and fish plates of the railway siding leading to the godown to be removed; that every attempt was made to resist and obstruct the officers in seizing the stocks of sugar:

Held, that the obstructions found were sufficient to bring S. 186, I. P. Code, into operation and that an offence under S. 186 had been committed. 4 A.I.Cr.D. 405=A.I.R. 1950 Pat. 436.

—S. 186—Actual physical force held not necessary.

During the execution of a warrant of possession the judgment-debtor and his men paraded the place in a defiant and angry mood:

Held, that the act of the judgment-debtor constituted physical obstruction even though no physical force was actually brought into play at the time. It was not necessary for them actually to come to blows. A.I.R. 1943 Nag. 334=1943 N.L.J. 505=45 Cr.L.J. 407=211 Ind. Cas. 442.

—S. 186—Sale Officer of Co-operative Society—Execution of decree—Obstruction by slamming door in face of Officer—Offence under S. 52, Co-operative Societies Act.

A sales officer of a Co-operative Society in execution of a decree went to a certain house in the village with the intention of entering it to seize some movables in the house which were alleged to have belonged to the 2nd accused, against whom the decree was being executed. The first accused, the wife



of the 2nd accused just when the officer was about to enter the house slammed the door in his face and prevented him from entering the house to do his duty:

**Held**, that offence was committed not under S. 52, Madras Co-operative Societies Act, but one under S. 186, Penal Code, but even if there was an offence under section 52 of the Act, an offence under section 186, Penal Code, being more serious it was competent for the Magistrate to try the accused for offence under S. 186, Penal Code:

**Held**, also that shutting the door in the officer's face amounted to obstructing him in the performance of his duty and the accused were liable to be convicted for an offence under S. 186. A.I.R. 1942 Mad. 552 = (1942) 1 M.L.J. 583 = 1942 M.W.N. 375 = 55 L.W. 368 = 43 Cr.L.J. 757 = 201 Ind. Cas. 627.

#### —S. 186—Constable prevented from regulating traffic by threatening language.

Where the constable is prevented by the accused from regulating the traffic, the exact means employed by the accused if he acts intentionally do not matter. Even threatening language is sufficient to constitute "obstruction" within S. 186. A.I.R. 1938 All. 118 = 1937 A.L.J. 1344 = 39 Cr.L.J. 363 (1) = 1937 A.W.R. 1179 = 173 Ind. Cas. 732.

#### —S. 186—Obstruction—What is.

Where there is sufficient indication that force would have been used if the peon having a warrant of attachment had persisted in executing it, it is quite enough to constitute obstruction.

Where the warrant is in order and the officer does not go beyond fulfilment of the instructions given to him in the writ, then a resistance to the public servant is an offence punishable under S. 186. A.I.R. 1937 Pat. 633 = 18 P.L.T. 783 = 4 B.R. 115 = 39 Cr.L.J. 100 = 172 Ind. Cas. 168.

#### —S. 186—Constructive obstruction.

The only bar to a complaint under S. 186, I. P. C. is S. 195 (1) (a), Criminal P. C., which makes cognizance dependent upon a complaint in writing of the public servant who was obstructed in the discharge of his public functions or some other public servant to whom he is subordinate. Section 186 does not contemplate constructive obstruction to a judicial officer in the discharge of his judicial functions even when they are of a quasi executive character or when the proceedings before him are in execution. A.I.R. 1936 Pat. 74 = 16 P.L.T. 808 = 2 B.R. 95 = 37 Cr.L.J. 104 (2) = 159 Ind. Cas. 503.

#### —S. 186.

By obstruction in S. 186 is meant physical obstruction. A.I.R. 1936 Nag. 86 = 19 N.L.J. 120 = 37 Cr.L.J. 587 = I.L.R. (1936) Nag. 50 = 162 Ind. Cas. 308.

#### —S. 186.

Where an octroi officer is acting within his authority in asking the accused to show the goods, refusal to show them amounts to obstruction offered in the discharge of the public functions of the officer which would be punishable under S. 186, and assault on him would make him liable for an offence under S. 332. A.I.R. 1935 Sind 245 = 29 S.L.R. 54 = 37 Cr.L.J. 148 = 159 Ind. Cas. 665.

#### —S. 186—Threat of violence.

The question as to whether an offence under S. 186, has or has not been committed, must depend upon the peculiar facts and circumstances of each case. Threats of violence made in such a way as to prevent a public servant from carrying out his duty might easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing attitude on the part of the person uttering the threats and still more so, if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflicting physical injury. Threats made by a person holding an offensive weapon in his hands must be taken to be just as much an obstruction as that caused by a person actually blocking a gateway or handling a public servant in a manner calculated to prevent him from executing his duty.

Resistance or obstruction to the execution of an illegal warrant is not an offence under S. 186, I. P. C. A.I.R. 1933 All. 759 = 1933 A.L.J. 952 = 34 Cr.L.J. 1211 = 55 A. 985 = 146 Ind. Cas. 183.

#### —S. 186—Mere threat.

It cannot be laid down that a mere threat of violence cannot constitute obstruction within the meaning of S. 186. On the other hand, threats of violence made in such a way as to prevent a public servant from carrying out his duty, might easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing attitude on the part of the persons uttering the threats and still more so if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflicting physical injury.

It is impossible to lay down any hard and fast rule as to what does or does not constitute an obstruction within the meaning of S. 186. Each case must be decided upon its own particular facts and circumstances. A.I.R. 1932 Cal. 871 = 36 C. W. N. 1038 = 60 C. 149 = 34 Cr.L.J. 181 = 141 Ind. Cas. 636.

#### —S. 186—Mere verbal protests.

Where the accused merely sat on a chair by the side of a staircase and verbally objected to a public servant going upstairs for making a search in the discharge of his public functions, and there was no evidence to show that the accused actually obstructed with his hands or blocked the way or did anything that could be interpreted as a threat which was likely to be immediately carried out:

**Held**, that there was no act amounting to an obstruction of the public servant and the accused was not guilty of an offence under S. 186. A.I.R. 1932 Rang. 21 = 9 R. 601 = 33 Cr.L.J. 175 = 135 Ind. Cas. 653.

#### —S. 186—"obstruction".

The word "obstruction" as used in S. 186 means "physical obstruction" i. e., actual resistance or obstacle put in the way of a public servant. The word implies the use of criminal force, and mere threats or threatening language is insufficient. 110 Ind. Cas. 101 = 10 A.I.Cr.R. 486 = 29 Cr.L.J. 645 = A.I.R. 1928 Lah. 827.

#### —S. 186—Escape from custody.

Escape from lawful custody of a process-server does not amount to obstruction to a public servant in the discharge



of his duties, nor does the act of a person in running away and shutting himself up in a room and refusing to come out constitute voluntary "obstruction," but it constitutes an offence under S. 225-B. 2 B.H.C. 128 (F.B.), Foll. 103 Ind. Cas. 833=9 L. L. J. 408=8 A.I.Cr. R. 443=28 Cr. L.J. 753=A.I.R. 1927 Lah. 708.

—S. 186—Resigning membership of Panchayat and instigating others not to accept the membership—No offence.

The accused a member of a village Panchayat when asked to sit with a member of the depressed classes, refused to do so and told the S.D.O. that the Panchayat would cease to exist and instigated his fellow Panchas and other persons not to sit with the members of the depressed classes in the Panchayat:

**Held**, that though the Sub-Divisional Officer was no doubt hampered in the performance of his public duty by the refusal of the applicant and by his instigations, the applicant's conduct did not amount to voluntary obstruction within the meaning of S. 186. 87 Ind. Cas. 514=47 All. 579=23 A.L.J. 352=26 Cr. L.J. 978=A.I.R. 1925 All. 401.

—S. 186.

Where a constable entered a house and found in a room three articles alleged to have been stolen, but before the constable could remove them the accused caused the door of the room to be shut and also threatened to kill the constable if he removed the articles:

**Held**, the acts constitute obstruction of a public servant in the discharge of his public functions. 83 Ind. Cas. 657=1924 M.W.N. 438=20 M.L.W. 717=35 M.L.T. 126=26 Cr. L.J. 97=A.I.R. 1924 Mad. 760.

—Ss. 186 and 224—Mere running away—Whether amounts to obstruction.

A mere running away of a person not charged with an offence, whom an official of a Civil Court tries to arrest under a warrant of that Court, does not amount to obstructing a public servant in the discharge of his functions within S. 186, I.P.C., nor does it come within S. 224, I.P.C. 17 Cr. L.J. 71=32 Ind. Cas. 663 (Mad.).

—Ss. 186 and 225-B—Resistance or obstruction to arrest—Overt Act.

A person ran into his house to avoid his arrest in execution of a Civil Court's warrant: **Held**, that his running away did not amount to intentional resistance or illegal obstruction within S. 225-B; but there must be some overt act of resistance or obstruction to justify a conviction under S. 186 or 225-B. 7 A. L. J. 1174=11 Cr. L. J. 721=8 Ind. Cas. 823.

—Ss. 186, 225 (B)—Resistance or obstruction to arrest—Overt act.

Where a warrant was issued by the civil court for arrest of a judgment-debtor and the judgment-debtor, on seeing the officer, ran into the house and thus avoided arrest; **Held**, that it did not amount to intentional resistance or obstruction to the arrest within the meaning of S. 225-B. There must be an overt act of resistance or obstruction which could justify conviction under S. 186 or S. 225. (1910) 11 Cr. L. J. 721=7 A.L.J. 1174=8 Ind. Cas. 823.

1 (c). Interpretation—"Public servant".

—S. 186—Obstruction to person acting under orders of public servant.

Obstruction offered to a person acting under the orders of a public servant while fixing the boundaries under Cl. 2, S. 119, Bombay Land Revenue Code, is equal to an obstruction offered to the public servant. 31 Bom. L. R. 800=1929 Cr. C. 321=A.I.R. 1929 Bom. 385.

—S. 186—Physical obstruction to person acting under the direction of public servant.

In the case of removing an encroachment, a public servant has ordinarily only to see that the encroachment is removed. He is not, either by Law or practice required to do the whole act of removing the encroachment by his own hands. He can employ agents for such a manual task and if the agent is obstructed in doing what he is legitimately required to do by the public servant actually present at the time of the removal, then there is an obstruction offered to the public servant himself, because what he is doing by the hand of that agent is really, in the eyes of the law, something he is actually doing himself and the person obstructing is guilty under S. 186. 109 Ind. Cas. 353=52 Bom. 286=30 Bom. L.R. 364=10 A.I.Cr.R. 197=29 Cr. L. J. 529=A.I.R. 1928 Bom. 135.

—S. 186—"Public Servant"—Obstruction to helpers of the public officer is not obstruction to public officer.

The Naib-Tahsildar of Income Tax visited the village of the accused where he was told by the Lambardars that the petitioners kept several shops and ought to be assessed. A dispute then took place between the Lambardars on the one side and the petitioners on the other and it was alleged that the Lambardars were in the course of the quarrel assaulted and beaten and thereupon they declined to render any help to the Naib-Tahsildar. **Held**, that the mere fact that the Lambardars so refused to render help to the Naib-Tahsildar, does not amount to obstruction to the Naib-Tahsildar, within S. 186. 73 Ind. Cas. 338=24 Cr. L. J. 594=A.I.R. 1924 Lah. 238.

—S. 186—"Public officer"—Canongoe appointed under S. 45, Bengal Act V of 1875—Survey Act—Appointment in a case not falling within the section, effect of.

Where a settlement officer appointed a canongoe in connection with boundary disputes not falling within S. 45 of Bengal Act V of 1875 the canongoe is not a public officer within the meaning of S. 186, I.P.C. (1901) 6 C.W.N. 120.

1 (d). Interpretation—"In the discharge of his public functions."

—Ss. 186 and 342—Government Firka Supply Officer entering accused's house to seize paddy—Absence of authority to seize—Obstruction to officer and locking him in—Offence.

The accused was a villager, who on the day of the occurrence had in his possession 17½ bags of paddy. The Firka Supply Officer had come to that village to procure the surplus paddy and he had with him a list apparently containing names of persons from



whom he had to procure. The name of the accused was admittedly not in that list. When the officer entered the house of the accused and found the  $17\frac{1}{2}$  bags, he asked the accused if he had a permit and when the accused stated he had none, asked him to surrender the entire quantity. The accused resisted the claim, whereupon the officer recorded the statement of the accused and declaring his intention to seize the stock went inside the house. The accused then locked the outer door and the officer had to stay inside till he was released next morning by the village munsif. The accused was convicted for offences under Ss. 186 and 348 of the Code.

In revision, held, that the conviction under S. 186 cannot be sustained. There was no authority to the officer to seize any paddy in the house of any ryot and there was nothing to indicate that any portion of the  $17\frac{1}{2}$  bags was surplus within the meaning of the rules, and in the circumstances the officer could not be said to be discharging his function as a public servant, when he entered the house with the avowed intention of taking away the  $17\frac{1}{2}$  bags of paddy. But though the accused had the right of private defence of property, in keeping the officer locked up far beyond the limits dictated by the need to protect the property and to prevent criminal trespass, the accused committed an offence under S. 342. 1949 M.W.N. 545=(1949) 2 M.L.J. 335.

—S. 186—Ingredients of offence—Absence of proof of functions of alleged public servant and of authority under which he is acting—Effect—Conviction—Sustainability.

Before a Court can convict a person under S. 186, I. P. Code, it must be proved that there was obstruction to a public servant in the discharge of his functions. Where the writ under which the public servant was acting (e.g., a Commissioner appointed by Court to remove certain obstructions ordered to be removed under a decree to which the accused is not a party), and it is impossible to say what the public functions of the Commissioner were, it would be impossible to hold that there was any obstruction to the public servant (Commissioner) in the discharge of his public functions and in such a case, therefore, a conviction under S. 186 cannot be sustained. 4 A.L.Cr.D. 218.

—Ss. 186 and 353—C. P. and Berar Food Grains Export Restrictions Order (1943)—Notification by local Government prohibiting export of *juar* from district—District Magistrate issuing instructions to local officials to prevent contravention of order—Use of force by official—If protected—Resistance—Offence.

In view of the powers conferred on a District Magistrate by the C. P. and Berar Food Grains Export Restrictions Order (1943) which prohibits, *inter alia*, the export of certain food grains out of certain districts except under a permit issued by the District Magistrate, and the notification of the C. P. and Berar Provincial Government, dated 23-12-1943 prohibiting the export of *juar*, it must be held that the District Magistrate has power to cause such steps to be taken or such force to be used as may be reasonably necessary to secure compliance with or prevention of contravention of the order in respect of the export or transport of *juar*. But unless a particular official is empowered by the District Magistrate to use force to prevent contravention of the order, it cannot be held that that official is acting in the discharge of his duty as a public servant or in the discharge of his public functions within the meaning of Ss. 186 and 353, I. P. Code, when he

uses force to prevent transport of *juar*, without a permit. I.L.R. (1946) Nag. 714=47 Cr. L.J. 636=224 Ind. Cas. 454=1946 N.L.J. 302=A.I.R. 1947 Nag. 60.

—Ss. 186, 21.

Assessor Panch is public servant—Execution by him of warrant to realize arrears of *chaukidari* tax is act done in discharge of his public duties. A.I.R. 1941 Pat. 161=21 P.L.T. 716=6 B.R. 914=41 Cr.L.J. 819=190 Ind. Cas. 98.

—S. 186—Duty of prosecution.

The prosecution have to prove their case when they ask that a person should be convicted for the obstruction of a public servant in the discharge of his public functions. They must show that a public servant was discharging public duties imposed upon him by law. A.I.R. 1940 Sind 42=41 Cr.L.J. 401 (2)=187 Ind. Cas. 127.

—Ss. 186, 379—Receiver appointed by Court taking possession of corn of third Party—Third party re-taking possession peacefully and not allowing Receiver to make *batai*—Offence if committed.

Where the Receiver appointed by Court takes possession of corn in possession of a third-party who subsequently re-takes its possession peacefully and does not allow the Receiver to make *batai* of the corn, the third party cannot be punished under S. 379, I.P.C. because he takes possession only peacefully of his own property. Further, since what the Receiver is trying to do is expressly forbidden by sub-r. (2) of R. 1, O. 40, Civil P.C., it cannot be said that the third party obstructed a public servant even though a Receiver be a public servant within the meaning of S. 186, I. P. C. Section 186, I. P. C. contemplates that the public servant obstructed should be discharging his public functions lawfully, but when there was no legal basis for his acts, the section does not apply. A.I.R. 1939 Sind 333=41 Cr.L.J. 103=L.L.R. (1940) Kar. 105=184 Ind. Cas. 799.

—S. 186.

In Madras it has been consistently held as regards offences both under Ss. 183 and 186 that good faith of the public servant would render the accused's act an offence, though the public servant was acting illegally. 1936 M.W.N. 211.

—S. 186.

Nazir directing removal of huts of judgment-debtors in good faith—Assault and obstruction of further process of Court by the accused falls under S. 186. A.I.R. 1933 Cal. 469=34 Cr.L.J. 826=57 C.L.J. 41=144 Ind. Cas. 817.

—S. 186.

Articles unfit for human consumption—Under S. 286, Bihar and Orissa Municipalities Act, Commissioner alone can seize or remove them—Sanitary Inspector not authorized, seeking to seize—Owner declining to allow removal—Conviction under S. 186, I. P. C. is illegal. A.I.R. 1935 Pat. 73=1 B.R. 286 (2)=154 Ind. Cas. 187.

—S. 186—Resistance to warrant of attachment.

If a Public Officer does no more than act upon the official instructions he has received and if those official



Instructions are not of such a kind as to be obviously and patently illegal, then he acts properly in carrying out such orders, and resistance to a Public Officer carrying out orders which upon the face of them are not open to objection and are in proper form is an offence against the statute.

In cases of obstruction and resistance to legal process, the Court should look at the warrant of attachment and see whether the officer was doing something, which was not contained in the writ of attachment which would have justified reasonable resistance and only such reasonable resistance as was necessary for the purpose of resisting an unlawful act. A.I.R. 1932 Pat. 276=13 P.L.T. 480=34 Cr.L.J. 263=142 Ind. Cas. 144.

**—S. 186—Officer acting beyond jurisdiction—Obstruction to him is not punishable.**

Section 186 does not apply to an officer, who, is acting wholly outside his jurisdiction or authority.

Where a range Forest Officer was acting in perfect good faith, but he had no jurisdiction whatever to seize timber under S. 82 of the Indian Forest Act, or under any other enactment:

**Held**, obstruction offered to such officer is not punishable under S. 186: 15 Bom. L.R. 315, and 13 Bom. 168, Foll.

(Patkar J.)—The public functions mean legal and legitimately authorised public functions and do not cover any act which a public functionary may take upon himself to perform. 103 Ind. Cas. 593=51 Bom. 846=28 Cr.L.J. 705=8 A.I.Cr.R. 346=29 Bom. L.R. 987=A.I.R. 1927 Bom. 483.

**—S. 186—Obstruction to a public servant—Nature of offence.**

Proof that the public servant obstructed, was obstructed in the discharge of his public functions, is necessary before a conviction under the section is sustainable. The functions should be in fact and in law public functions. They would not be public functions if they fall wholly outside the jurisdiction or authority which a public officer possessed. 15 Bom. L.R. 315=14 Cr. L.J. 251=19 Ind. Cas. 507.

**—S. 186—Public functions.**

"Public functions" mean legal or legitimately authorised public functions and do not cover every act undertaken to be performed by public functionary and bona fide belief of the public servant that he is acting in the discharge of his duties does not make resistance or obstruction to him an offence. (10 P. R. 1905 Cr.; 13 Bom. 168; 23 Cal 896, Foll). 81 Ind. Cas. 209=25 Cr.L.J. 721=A.I.R. 1925 Lah. 139.

**—S. 186—Tahsildar's order—Obstruction.**

Per Aikman, J.:—Where under a written order signed by a Tahsildar, the Naib-Nazir was directed to realize certain canal dues, and he, on attempting to do so by attachment and sale of the defaulter's property, was resisted by the owners of the property, it was **Held**, that the conviction was good. The Tahsildar's order though not of a formal nature, was sufficient evidence that the Naib-Nazir was acting as a public servant in the discharge of his duty. 1905 A.W.N. 74=2 A.L.J. 219=27 A. 499.

**2. Offence under section.**

**(a) Need for complaint by public servant**

**(b) What is and what is not.**

**s (a). Offence under section—Need for complaint by public servant.**

—Ss. 186, 183—Amin obstructed while executing decree of District Munsif's Court—Nazarat subject to control of Sub-Judge and not of District Munsif—District Munsif cannot file complaint under Ss. 183 and 186. A.I.R. 1943 Mad. 170=(1942) 2 M.L.J. 615=55 M.L.W. 745=1942 M.W.N. 819=44 Cr.L.J. 326=205 Ind. Cas. 88.

**—S. 186.**

Where the Court convicted the accused under S. 186, when the prosecution under S. 353 against him was started on the oral complaint by the process-server to the Police Officer:

**Held**, that there was no "complaint" and that the conviction was illegal. 1942 N.L.J. 335.

**—S. 186—Absence of written complaint by public officer—Conviction under S. 186, legality of.**

Under S. 195, cognizance of an offence under S. 186, cannot be taken in the absence of a written complaint by the public officer concerned. Where the public officers concerned, the District Magistrate who issued the warrant, and the Assessment Officer to whom the warrant was addressed, have not filed a complaint and all that was done was that information was given by the person to whom the warrant was endorsed and this did not amount to a complaint under S. 195, there can be no conviction under S. 186. A.I.R. 1935 Pat. 214=16 P.L.T. 295=36 Cr.L.J. 714=1 B. R. 446=155 Ind. Cas. 421 (1).

**—Ss. 186 and 225-B—Offence under S. 186—Conviction under S. 225-B—No complaint by public servant—No complaint in writing by the public servant.**

**Held**, that the conviction is illegal and it is not enough that the District Munsif gave sanction to prosecute for an offence under S. 186, I. P. C. 1934 M.W.N. 498.

**—S. 186.**

Warrant of attachment by Small Cause Court—Obstruction—Notice for prosecution under S. 186, I. P. C.—Transfer of proceedings to Additional Judge—Complaint by latter:

**Held** that the complaint was good. A.I.R. 1931 Lah. 530=37 Cr.L.J. 964=13 L. 16=33 P.L.R. 401=132 Ind. Cas. 842.

**—S. 186—Procedure.**

In the Central Provinces a complaint in respect of an offence under S. 186, I. P. C., in respect of a process-server, can be made by a Nazir, or a District Judge, or the Judicial Commissioner, but not a Sub Judge nor an Additional Judicial Commissioner. 96 Ind. Cas. 866=27 Cr.L.J. 1010=A.I.R. 1926 Nag 485.



## —S. 186—Sanction.

District Munsif cannot dispense with an enquiry in granting sanction under S. 186, I.P.C. 83 Ind. Cas. 702 = 19 M.L.W. 392 = 1924 M.W.N. 358 = 26 Cr.L.J. 142 = A.I.R. 1924 Mad. 615.

## —S. 186—Prosecution under—Sanction.

A prosecution under S. 186 of the Code for obstructing a peon is bad if no sanction was obtained therefor. 17 C.W.N. 980 = 14 Cr.L.J. 462 = 20 Ind. Cas. 622.

—S. 186 — Obstructing public servant in discharge of public functions—Absence of complaint or sanction—Defect of jurisdiction:—See Cr.P.C., S. 537. 1904 A.W.N. 266 = 1 A.L.J. 693 = 27 A. 305.

## 2 (b). Offence under section—What is and what is not.

## —S. 186.

Search order legally passed under Essential Supplies (Temporary Powers) Act, 1946—Obstruction to execution—Offence. See Essential Supplies (Temporary Powers) Act (1946), S. 3 (1) And 3 (2) (f) (j). A.I.R. 1950 Pat. 436.

## —S. 186.

U. P. District Boards Act, 1922, S. 38—It is duty of attaching officer to weigh goods actually and not to give approximate weight—Owner preventing officer from removing articles unless actual weight is given, is not guilty of offence under S. 186, I. P. C. A.I.R. 1941 All. 244 = 1941 A.W.R. 250 = 1941 A.L.J. 419 = 42 Cr.L.J. 877 = I.L.R. (1941) All. 639 = 196 Ind. Cas. 477.

## —Ss. 186, 147.

Assembly of five or more—Common object being resisting process of law—If actual resistance is offered, separate offence of resistance of the process of law under S. 186 is committed apart from one under S. 147. A.I.R. 1938 Pat. 548 = 19 P.L.T. 665 = 5 B.R. 104 = 40 Cr.L.J. 71 = 17 Pat. 680 = 178 Ind. Cas. 487.

## —S. 186.

Peon entrusted with warrant of attachment satisfying that goods belonged to person concerned—Execution resisted by son of such person—Held, son committed offence under S. 186. A.I.R. 1937 Pat. 633 = 18 P.L.T. 783 = 4 B.R. 115 = 39 Cr.L.J. 100 = 172 Ind. Cas. 163.

## —S. 186.

Execution of distress warrant against person assessed to income tax—Peon attaching property and giving custody to surety—Another peon sent to sell it with direction to attach other property failing the one first attached—Surety denying custody and fact of suretyship—Other property attached—Resistance to such attachment is offence under S. 186. 119 Ind. Cas. 386 = 30 Cr.L.J. 1099 = 1929 Cr.C. 255 = A. I. R. 1929 Pat. 503.

## —S. 186—No offence.

The refusal of a patwari to allow the Kanungo to go through his books and to check them is only an

act of insubordination and is not a criminal act. 85 Ind. Cas. 821 = 26 Cr.L.J. 597 = 6 L.R.A.Cr. 43 = A.I.R. 1925 All. 409.

## —S. 186 — Warrant addressed to Nazir—Delegation—Resistance.

It is improper for a Nazir to depute one of his assistants to execute a warrant for the delivery of possession directed to him personally. But the assistant is sufficiently clothed with authority to execute the warrant and any person offering resistance or obstructions to its execution is guilty under S. 186, I. P. C. 54 Ind. Cas. 977 (Pat.)

## —S. 186—Obstruction to warrant—Decree for—Restitution of conjugal rights.

A decree for restitution of conjugal rights sought was executed more than a year after its date by taking a warrant against the wife who obstructed the execution of the warrant. Held, that the wife was guilty of an offence under S. 186, I. P. C. 19 Cr.L.J. 976 = 47 Ind. Cas. 876 (Cal.)

## —Ss. 186 and 225-B — Obstructing public servant—Resistance to lawful apprehension—Order directing accounts under a preliminary decree—Disobedience.

In a suit for account, a preliminary decree was passed ordering defendant to furnish an account within a specified time. He failed to do so, and together with two companions, resisted a peon sent by the Court to arrest him under O. 21, R. 32 of the C. P. Code. Held, that the arrest was unlawful and that the conviction of himself and his two companions of offences under Ss. 186 and 225-B, I. P. C., could not stand. The order for furnishing the accounts was not an injunction within O. 21, R. 32. 3 Pat. L. J. 106 = 19 Cr.L.J. 385 = 44 Ind. Cas. 737.

## —S. 186—Obstructing public servant to pass through accused's own property.

No offence under S. 186 was committed by the accused in not allowing a Munsiff to pass through their private property while the Munsiff was going in connection with a suit to which accused were no parties. 20 C.W.N. 857 = 18 Cr.L.J. 62 = 37 Ind. Cas. 46.

## —Ss. 186 and 434 — Obstruction to public servants — Survey and Boundaries Marks Act (xv of 1897), S. 17 (a)—Removal of landmarks fixed by surveyor outside authorised area—Offence.

A surveyor empowered by a notification under S. 17 (a) of the Survey and Boundaries Marks Act to survey certain lands, in good faith and under colour of his office entered upon the lands of the accused and fixed demarcation stones on them and the accused obstructed him in measuring the lands and removed the demarcation stones. Held, that the accused were guilty of offences under Ss. 186 and 434 though it is proved that the land on which the surveyor carried on his operations was not actually included in the notification. 31 M.L.J. 305 = (1916) 2 M.W.N. 183 = 4 L.W. 377 = 17 Cr.L.J. 481 = 36 Ind. Cas. 161.



—S. 186 — Process-server — Obstruction to attachment.

Where a process-server was seriously obstructed, insulted and jostled in the execution of his duty, the persons doing so were guilty under S. 186, I. P. C. 30 P.W.R. (Cr.) 1915=16 Cr.L.J. 700=30 Ind. Cas. 748.

—S. 186 — Municipal Overseer — Unlawful obstruction.

A Municipal Inspector finding the accused exposing vegetables for sale on a public road, directed him to remove the basket from the road, and on the latter's refusing to do so commenced to take away the basket to the Municipal Office, when the accused snatched it away. Held, that the accused could not be convicted of an offence under S. 186 as no authority was pointed out to justify the action of the complainant who was clearly doing an illegal act. (1902) 4 Bom. L.R. 437.

—S. 186—Inducing tenants not to pay rents to a receiver appointed under Bengal Land Registration Act VIII of 1876, S. 56.

When the receiver is not present is not an offence under S. 186, I. P. C. (1901) 6 C.W.N. 141=29 C. 236.

3. Resistance to illegal or time-expired warrant.  
See also Note 1 (d).

—S. 186—Resistance to illegal warrant.

Resistance to execution of warrant alleged to have been issued under S. 27, Ben. Village Chaukidari Act, but which is not valid, is not an offence. A.I.R. 1945 Cal. 48=I.L.R. (1944) 1 Cal. 309=47 C.W.N. 935=218 Ind. Cas. 371.

—S. 186.

Resisting execution of bad warrant is not offence—Warrant issued by Assessor Panch under S. 27, Bengal Village Chaukidari Act (VI of 1870) — Omission of any authorization to any one to execute it—Assessor Panch executing it himself—Warrant held bad—Defect held could not be cured by S. 34, Bengal Village Chaukidari Act—Accused rescuing cattle attached under such warrant held not guilty under S. 186. A.I.R. 1941 Pat. 161=21 P.L.T. 716=6 B.R. 914=41 Cr.L.J. 819=190 Ind. Cas. 98.

—Ss. 186, 353—Warrant, if should be legal.

Sections 353 and 186 do not presuppose the existence of a legal warrant. There is no duty laid upon the Bill Collectors and other persons executing warrants to make independent enquiries regarding the validity of the warrant. A.I.R. 1938 Mad. 659=47 L.W. 673=1938 M.W.N. 418=39 Cr.L.J. 879=177 Ind. Cas. 448.

—Ss. 186, 147—Resistance to defective warrant under O. 21, R. 22, Civil P. C., if offence.

If there is no jurisdiction to issue a warrant, resistance to the execution of such an illegal warrant is no offence. But for a mere failure to record reasons under O. 21, R. 22 (2), Civil P. C., for issuing process at once without waiting for a notice under O. 21, R. 22, Cl. (1), the warrant must not be deemed to be without jurisdiction and every resistance to such warrant is an

offence under the Penal Code. A.I.R. 1936 Pat. 37=16 P.L.T. 872=2 B.R. 214=37 Cr.L.J. 319=160 Ind. Cas. 450 (1).

—S. 186.

Where it appears that no legal warrant was issued under O. 38, R. 5, Civil P. C., conviction under S. 186, I. P. C., cannot be upheld, although the facts proved may otherwise amount to an offence under the section. A.I.R. 1933 All. 759=1933 A.L.J. 952=34 Cr.L.J. 1211=55 A. 985=146 Ind. Cas. 183.

—S. 186—Resistance not more than what was justifiable to resist an unlawful proceeding.

A writ of attachment directed the attaching officer to attach the articles belonging to the judgment-debtor as identified by the plaintiffs. The attaching officer found the goods in the physical possession of a stranger A, but on the attaching officer attempting to seal up A's ware-house, he was resisted by A and in consequence A was prosecuted under S. 186, and convicted on the ground that the possession he claimed was not *bona fide*. It appeared that the actual physical resistance offered by A was not more than he was justified in using in resisting an unlawful proceeding:

Held, that A had committed no offence and that consequently the conviction should be set aside. A.I.R. 1932 Pat. 279=11 Pat. 49=33 Cr.L.J. 883=13 P.L.T. 689=139 Ind. Cas. 834.

—S. 186.

Attachment under invalid writ—Attached property claimed by owner judgment-debtor from attaching peon's possession—Peon delivering possession of property—Judgment-debtor is not guilty under S. 186. 93 Ind. Cas. 146=5 Pat. 216=7 P.L.T. 30=27 Cr.L.J. 418=A.I.R. 1926 Pat. 237.

—S. 186—Illegal warrant.

Prayer for symbolical possession only—Warrant issued for actual possession—Warrant is illegal—Obstruction by person in possession not bound by decree—No offence is committed.

Obstruction to illegal warrant is not unlawful. 85 Ind. Cas. 286=26 Cr.L.J. 750=21 M.L.W. 82=A.I.R. 1925 Mad. 613=48 M.L.J. 97.

—S. 186.

Person is not guilty of offence under S. 186 where the warrant was directed by Magistrate to a place beyond his jurisdiction. 39 C.L.J. 35=A.I.R. 1924 Cal. 501.

—S. 186—Obstruction to public servant—Obstruction to execution of invalid warrant—No offence.

Where in execution of a decree for restitution of conjugal rights, a warrant was issued directing the executing peon to seize the wife and deliver her to her husband, failing which, to bring her under arrest before the executing Court, and the peon was resisted and the woman was snatched away, Held, that the warrant, the execution of which was resisted, was illegal and therefore no offence was committed under S. 186. 22 C.W.N. 814=19 Cr.L.J. 968=47 Ind. Cas. 868.



—S. 186—Time expired warrant.

When the date fixed in a warrant of attachment has expired, then the warrant is no longer in force and capable of execution, and if any person offers resistance to execution, purporting to be made under the time expired warrant then he is not guilty of any offence under S. 186; 10 Cal. 18; 37 Cal. 122; 31 Cal. 424 and 1 Pat. L.J. 550, Foll. 99 Ind. Cas. 413=2 Luck. 40=4 O.W.N. 43=28 Cr.L.J. 157=7 A.I.Cr.R. 56=A.I.R. 1927 Oudh 91.

—S. 186—Attachment after returnable date of warrant.

Where the returnable date fixed in the writ of attachment was the 2nd April but the attachment was sought to be made on the 8th of April, the execution of the writ is absolutely illegal and resistance to the attachment not being illegal, the conviction under S. 186, I.P.C. is bad. 1 Pat. L.T. 654=1920 P.H.C.C. 285=60 Ind.Cas. 334.

—S. 186.

The execution of a writ of attachment after the date fixed for its return has expired, is illegal and therefore resistance to such an execution is not an offence under S. 186. 60 Ind. Cas. 334=1 Pat. L.T. 654=22 Cr.L.J. 222=1920 P.H.C.C. 285.

—S. 186—Resistance to execution of warrant—Time expired—Warrant.

Resistance to a warrant, which is out of date and overdue, or to one, which is not endorsed with the name of the person executing it or executed by a person not authorised, is not an offence under S. 186. 37 Cal. 122=14 G.W.N. 282=11 Cr.L.J. 128=5 Ind. Cas. 409.

—S. 186—Resistance to the execution of warrant under the Public Demands Recovery Act after the date specified in the warrant—Civil procedure Code (Act V of 1908) O. 21, R. 24—Extended date not specified in the warrant—Execution by person not expressly authorised—Warrant under Chowkidari Act (VI of 1870, B.C.) S. 45—Delegation of authority to execute.

A warrant issued under the Public Demands Recovery Act (1 of 1895) was made, returnable on the 26th July and it was alleged by the prosecution that the warrant was extended to the 8th of August. The accused resisted the execution of the warrant on the 2nd August and were charged with an offence under S. 186, I.P.C. Held,—That under Order 21, rule 24, of the Civil Procedure Code the day on or before which the warrant was to be executed should have been specified in the warrant. Even assuming that the warrant had been extended to 8th August, the warrant on the date of its execution, viz., the 2nd August, was not a good warrant inasmuch as the extended date did not appear on the warrant and therefore the accused did not commit any offence under S. 186 by offering resistance to its execution on the 2nd August. Resistance to the execution of a warrant issued under the Public Demands Recovery Act, by a person on whom the warrant on the face of it does not confer any authority to execute it does not constitute an offence under S. 186, I.P.C. The person against whom the warrant is sought to be executed is entitled to see the warrant not only for the purpose of satisfying himself as to the amount but also for the purpose of satisfying himself that the person who seeks to execute the warrant is legally authorised

to do so. Where a warrant issued under S. 45 of the Chowkidari Act (VI of 1870, B.C.) was directed to the Naib nazir who made it over to one of his subordinates for execution; Held, that the resistance to the execution of the warrant by the latter person to whom the warrant was made over did not constitute an offence under S. 186, I. P. C. The warrant issued under S. 45 of the Chowkidari Act must contain the name of the person who is to execute it and only that person who is named in the warrant as charged with execution can lawfully execute it. The words of S. 45 of the Chowkidari Act are sufficient stringently to override any general power of delegation which the Naib-nazir might have in cases of execution of warrants in which his power has not been specifically limited by statute. 11 Cr. L. J. 128=14 G.W.N. 282=5 Ind. Cas. 409=37 C. 122.

4. Miscellaneous.

—S. 186.

The Judge cannot refrain from taking action under S. 186 because subsequent to the assault the judgment-debtor has taken proceedings under Ben. Agri. Debtors Act, with the possible result that the debt in connection with which the warrant was issued would become non-existent, when on the point of fact at the time of assault, there was no question of any proceedings under Agri. Debtors Act. A.I.R. 1942 Cal. 414=43 Cr. L.J. 410=1 L.R. (1942) 2 Cal. 108=198 Ind. Cas. 617.

—S. 186—Charge under S. 186 framed widely.

Where a charge under S. 186, had been widely framed—framed against all the six accused and in respect of all the six days—and yet it was impossible to gather from the judgments of the lower Courts in respect of which of these days two alone out of the six accused were found guilty and where the evidence was not specifically considered in respect of any particular dates or offenders regarding any obstruction offered by them on any particular day:

Held, that the conviction under S. 186 was not warranted. A.I.R. 1941 Pat. 136=7 B. R. 326=42 Cr.L.J. 251=22 P.L.T. 662=192 Ind. Cas. 177.

—S. 186—Sentence.

The defiance of the processes of law is a serious offence, as it hampers the administration of justice. If allowed to be committed with impunity, the prestige of the Court is lost and hence, the sentence should not be lenient. A.I.R. 1938 Pat. 548=19 P. L. T. 665=5 B.R. 104=40 Cr.L.J. 74=17 Pat. 680=178 Ind. Cas. 487.

—Ss. 186 and 189—Separate conviction and sentence—Lagality.

Separate convictions under both sections are bad when the accused is found to have refused to follow the Court peon when arrested under civil warrant and threatened to use violence—Whole occurrence falls under S. 189, Penal Code. 82 Ind. Cas. 163=25 Cr.L.J. 1237=A.I.R. 1925 Pat. 183.

—S. 186—Offence—Written authority need not be shown.

A public servant need not actually show to the accused the written authority under which he acts but he should have it with him ready to be shown. 5 O.L.J. 112=19 Cr.L.J. 641=45 Ind. Cas. 833.



—S. 187—Refusing to sign search list.

Per Varma and Manohar Lall, JJ. (Chatterji, J., dissenting).—The word 'assistance' in the first part of S. 187, is *eiusdem generis* with the various forms of assistance specified in the latter half of the section. Assisting a search officer by attending and witnessing a search has been made *eiusdem generis* by the Legislature with the kind of assistance referred to in the second part of the section. But again it is the refusal to attend and witness the search that has been made penal and not the signing of the search list. A refusal to sign search list by a witness to search cannot by itself be deemed to be an offence under S. 187, I. P. C. A.I.R. 1938 Pat. 403=19 P.L.T. 461=4 B.R. 772=39 Cr.L.J. 756=17 Pat. 632=176 Ind. Cas. 787 (F.B.)

—S. 187—"Assistance"—Refusing to sign search list—No offence—Cr.P.C., S. 103 (1).

Refusing to sign a search list though intentionally is not an offence under S. 187, the "assistance" referred to in the former part of S. 187, is *eiusdem generis* with the various forms of assistance specified in the latter half. The "assistance" must have some direct personal relation to the execution of the duty by the public officer. The word "assistance" as used in the section implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself. 26 M. 419 (F.B.)

—S. 187—Refusal to aid arrest.

Where a person when arrested by a Police Officer lay down on the ground and refused to move, and the Police Officer sought for the help of the accused to remove him and the accused refused aid:

Held, that as the person lay down in order to secure his eventual escape from being taken to the *thana* and the assistance of the accused was consequently demanded to prevent his escape, the refusal of the accused to offer the aid, made him liable for conviction under S. 187. A.I.R. 1932 All. 506=33 Cr. L. J. 736=139 Ind. Cas. 106.

—S. 187—Police holding a search to trace certain person—Cr.P.C., S. 42.

No person refusing to join the police in a search to trace out the whereabouts of a person who might be arrested consequently, is criminally chargeable. 42 All. 314=18 A.L.J. 169=2 U.P.L.R. (All.) 88=58 Ind. Cas. 673.

—S. 187—Search under S. 103, Cr. P. Code—Refusal to assist—Salt Inspector holding a search.

A person was called upon by a Salt Inspector to assist in a search held under S. 103, Cr.P.C., but refused to do so. He was thereupon convicted under S. 187, I.P.C. Held, that the conviction was right. 38 M.L.J. 27=11 L.W. 58=(1920) M.W.N. 110=12 Cr.L.J. 33=54 Ind. Cas. 241.

—S. 188.

Synopsis.

1. Applicability of section
2. Disobedience of order
3. Essentials for conviction
4. Interpretation—"Promulgated"
5. Prosecution for offence—Complaint by public servant—Need for
6. Miscellaneous.

1. Applicability of section.

—S. 188—Disobedience of order under S. 36 (4), Legal Practitioners' Act.

Proceedings under the Legal Practitioners' Act are quasi-criminal proceedings, and S. 188, I. P. Code, applies to the disobedience of an order under S. 36 (4), Legal Practitioners' Act, excluding a person from the precincts of a Court by reason of inclusion of his name in the list of touts. I. L. R. (1950) Nag. 449=A.I.R. 1950 Nag. 158=4 A.I.Cr.D. 366=51 Cr. L. J. 1007=1950 N.L.J. 215.

—S. 188—Order of injunction by Civil Court—Disobedience of—Offence—Prosecution—Complaint by Court—Necessity—Cr. P. Code, S. 195 (1).

S. 188, I.P. Code, only applies to orders made by public functionaries and for public purposes, and not to an order made in a civil suit between party and party, such as an order of injunction restraining a party from executing a decree. Such an order is not one for public purposes, and hence disobedience of such an injunction order is not an offence under S. 188, I. P. Code, so as to render a complaint by Court necessary for prosecution of the person disobeying the order of injunction under S. 195 (1), Cr. P. Code. 6 Cal. 445, Foll. A. I. R. 1949 Cal. 349=3 A. I. Cr. D. 332=50 Cr.L.J. 632.

—S. 188—Orders contemplated by.

S. 188, I. P. Code, is confined to orders promulgated by public functionaries for public purposes and in the public interest. I. L. R. (1947) All. 722=A.I.R. 1948 All. 50=48 Cr. L. J. 982=1947 A. L. J. 304=1947 A.W.R. (H.C.) 196 (2).

—S. 188—Applicability—Order by attaching Court to produce property—Order disobeyed—S. 188 does not apply.

S. 188 is intended to apply to orders passed by the public functionaries in the public interest or to prevent a breach of the peace or other unlawful disturbance and not to orders made in a civil suit between party and party, for the breach of which a remedy has been provided by the Code of Civil Procedure.

The order issued by the attaching Court to the custodian to produce the property entrusted to him in Court on a certain date for sale by auction is in substance an order issued by the Court to a person who held the property in trust for that Court, and the disobedience of such an order might delay the sale but cannot be deemed to cause any obstruction, annoyance or injury or risk of obstruction, annoyance or injury to any person lawfully employed or to produce any of the other results specified in the section. S. 188 of the Penal Code cannot be applied to such a case. 6 Cal. 445 and 4 Ind. Cas. 824, Foll. 61 Ind. Cas. 237=24 O.C. 18=22 Cr.L.J. 381=A.I.R. 1921 Oudh 123.

—S. 188—Injunction issued by a Civil Court—Promulgated—Meaning of—Disobedience.

The word 'promulgated' in S. 188 of the I.P.C. refers to orders passed under the Cr. P. Code, and disobedience to an injunction issued by a Civil Court is not punishable under that section. 6 C. 445, Foll. 39 Mad. 543=17 M.L.T. 391=2 L.W. 410=16 Cr.L.J. 592=30 Ind. Cas. 144.



—S. 188—Disobedience to injunction to a guardian not to marry ward.

The operation of S. 188 is limited to the promulgation by public servants of the public orders relating to safety, health or convenience of the public. A guardian disobeying an injunction of a Court not to marry a ward does not fall within the section. 17 Bom. L.R. 676=16 Cr.L.J. 668=30 Ind. Cas. 652.

—S. 188—Order in civil suits between party and party.

The disobedience of a prohibitory order issued under (O. 21, R. 46) S. 268, C.P.C., is not punishable under S. 188, as the section does not apply to orders in civil suits between party and party. 11 Cr.L.J. 56=4 Ind. Cas. 824 (U. Bur.).

## 2. Disobedience of order.

- (a) Illegal orders
- (b) Orders under S. 144, Cr.P.C.
- (c) Other orders.

### 2 (a). Disobedience of order—Illegal orders.

—S. 188.

The words 'to abstain from a certain act' in S. 144, Criminal P.C., do not empower Magistrates to make a positive order requiring a person to do a particular thing. This order, being without jurisdiction, the subsequent order summoning the person under S. 188, Penal Code, for disobeying the order under S. 144, Criminal P.C., is without jurisdiction. (1936) 164 Ind. Cas. 434=61 C.L.J. 579=37 Cr.L.J. 936=39 C.W.N. 1053.

—S. 188.

In proceedings under S. 144, Criminal P. C., a Magistrate is only entitled to make a restrictive order preventing the opposite party from doing an act, but it does not enable him to make a mandatory order directing the opposite party to do some act. When such a mandatory order is passed, it is beyond the Magistrates power, and the opposite party is under no obligation to obey it. Consequently, disobedience of such an order is not punishable under S. 188, Penal Code. A.I.R. 1933 Cal. 724=34 Cr.L.J. 1192=63 Cal. 11=38 C.W.N. 115=146 Ind. Cas. 169.

—S. 188—Proceedings under S. 133—Legality of order if can be raised in trial.

A question as to the validity of the final order made in proceedings under S. 133, Criminal P. C., cannot be raised at the trial of the accused for an offence under S. 188, Penal Code, for disobedience of the order. Where in the proceedings no objection has been raised that a co-sharer was not made a party, it cannot be raised in subsequent proceedings under S. 188, Penal Code. A.I.R. 1934 Cal. 242=60 Cal. 1336=35 Cr.L.J. 778=148 Ind. Cas. 808

—S. 188—Legality of order.

The determination of question whether an offence is committed in disobeying an order does not depend on its legality. 73 Ind. Cas. 801=45 All. 526=24 Cr.L.J. 689=A.I.R. 1923 All. 606.

—S. 188—Order under S. 144, Cr. P.C.—Provision for questioning its legality—Prosecution for disobedience—Legality—Contesting of.

An order under Cr. P. Code, S. 144 was passed. A revision was taken to the High Court. But the High Court dismissed the application because the period of the order had elapsed and because it was stated when the order was passed that its legality could be questioned in a prosecution under S. 188, I.P.C., if there should be one for disobedience of the order. Then there was a prosecution under Penal Code, S. 188.

Held, that the legality of the order under Cr.P. Code, S. 144, could be gone into. 67 Ind. Cas. 200=34 C.L.J. 578=A.I.R. 1921 Cal. 258.

—S. 188 — Criminal Procedure Code, S. 550 — Order by Sub-Inspector of Police on a Station Master to detain goods suspected to be stolen—Legality of—Proper procedure to be adopted.

An order issued by a Police Sub-Inspector to a Station Master directing him to detain certain goods suspected to be stolen is irregular. The Sub-Inspector should in such cases act under S. 550 of the Cr.P. Code and seize the suspected goods. 16 O.C. 371=15 Cr.L.J. 177=22 Ind. Cas. 753.

—S. 188—Grantee — Order directed to person other than grantee of land—Burma land Revenue Act II of 1847.

An order directing persons other than the grantee of the land to take certain order with buildings on the land is unwarranted by the Burma Land Revenue Act and the rules thereunder, and therefore such persons are not liable under S. 188, Penal Code. 7 Bur. L. T. 25=7 L.B.R. 75=15 Cr.L.J. 22=22 Ind. Cas. 166.

—S. 188—Order under S. 145, Cr. P. Code—Legal order—Disobedience.

Where an order under S. 145, Cr. P. C., is illegal by reason of the Magistrate not complying with the provisions thereof, a person disregarding the order cannot be punished under S. 188, I.P.C. 16 P.W.R. 1913 (Cr.) =92 P.L.R. 1913=14 Cr.L.J. 63=18 Ind. Cas. 351.

—S. 188—Order forbidding entry into Railway premises—Summary trial—High Court's power to interfere.

Where there is no order by a public servant lawfully empowered to promulgate such order, a conviction under S. 188, I.P.C., though obtained at a summary trial should be set aside. An order forbidding persons to enter railway quarters except for purposes of travelling, is an illegal order as the public has a right to go to Railway premises for many purposes other than travelling. 35 All. 136=11 All.L.J. 92=14 Cr.L.J. 122=18 Ind. Cas. 682.

—Ss. 188 and 430—Overseer of the P.W.D. empowered to promulgate an order.

The accused, ryots of a certain village, were convicted by the Dy. Magistrate of offences under Ss. 430 and 188 for damming a certain *odal* and feeding the tank against the order of the P. W. D. Overseer. The Sessions Judge reversed the conviction under S. 430 but confirmed the conviction under S. 188. It was contended on behalf of the accused, that the Overseer's order did not come within S. 188, the contention was



valid. The order of the Overseer could not operate to make an act unlawful which was lawful before its promulgation. (1910) M. W. N. 616=9 M.L.T. 42=11 Cr.L.J. 621=8 Ind. Cas. 302.

—S. 188—Disobedience of order under S. 144, Cr.P.C., prohibiting collection of rent is no offence under S. 188, I.P.C., as such order is illegal. (1905) 9 C.W.N. 392.

—S. 188—Lawful order—Promulgation.

An order by a District Magistrate directing that certain plots of land are not to be cultivated is not such an order that its disobedience is punishable under S. 188. (1904) 1 A.L.J. 615. Also 1904 A.W.N. 233.

Nor an order made by a Receiver not to pay rents to any other persons. Disobedience of such an order is not an offence under S. 188 as it did not cause annoyance, etc., as required by S. 188. (1901) 6 C.W.N. 141=29 C. 236.

## 2 (b). Disobedience of order—Orders under S. 144, Cr. P. C.

—S. 188—Disobedience of order under S. 144, Cr.P. Code—Irregularity in method of service—Validity of proceedings.

Where the accused had actual knowledge of the order under S. 144, Cr.P. Code, by reason of the fact that he acknowledged service of the order on him, the failure to leave duplicate copy with him does not affect the validity of the proceedings under S. 188, I. P. Code. 16 C. 9, Foll. 54 C.W.N. 256=51 Cr.L.J. 59=A.I.R. 1949 Cal. 677.

—S. 188—Irregularity in promulgation of order under S. 144, Criminal P. C.

Even if there has been irregularity in the method of promulgation of the order under S. 144, Criminal P.C., that in itself would not make it *ultra vires*, so as to prevent the conviction of any person who, being proved to have had knowledge of the order, nevertheless disobeyed it. It is not enough in such cases to prove that the order has been duly promulgated. There must also be positive evidence that the accused had knowledge of the order which he is charged with disobeying. A.I.R. 1940 Pat. 446=6 B. R. 425=41 Cr.L.J. 414=21 P.L.T. 231=187 Ind. Cas. 135.

—S. 188—Disobedience of order under S. 144, Cr.P. Code—Trial for—Propriety of order—Power of Court to consider.

It is not open to the Court trying an accused for disobedience of an order under S. 144, Cr. P. Code, to decide whether it would have passed such an order in the circumstances of the case. It has to take the order as a good and valid order unless it is shown that the order was a nullity by reason of the fact that the Magistrate had no jurisdiction, or by reason of some other similar circumstance. The Court is not to superimpose its view on the propriety of the order. 54 C.W.N. 256=51 Cr.L.J. 59=A.I.R. 1949 Cal. 677.

—S. 188.

Magistrate's order prohibiting persons from going on land under S. 144, Criminal P.C., is not illegal—Breach of such order is punishable under S. 188. A.I.R. 1944 Pat. 213=46 Cr. L. J. 18=11 B. R. 70=215 Ind. Cas. 152.

—S. 188.

Order under S. 144, Criminal P. C., directing petitioner to cut *bundh* or show cause against order—Magistrate not satisfied on cause shown—Failure to comply with order:

**Held**, order under S. 144, Criminal P.C., was not without jurisdiction and offence held committed under S. 188. A.I.R. 1937 Cal. 406=41 C. W. N. 897=38 Cr.L.J. 915=65 C.L.J. 460=I.L.R. (1937) 2 Cal. 475=170 Ind. Cas. 499.

—S. 188.

Order under S. 144, Criminal P. C., prohibiting persons from organising or holding or attending any meeting or procession, etc., picketing at toddy shops, and also prohibiting public from taking any part in such activities—Accused closing his own shop and exhorting his neighbours to close their shops:

**Held**, no offence committed under S. 188, Penal Code. 1932 M.W.N. 1073.

—S. 188—Disobedience long after order.

Orders passed under S. 144, Cr. P. Code, being intended to provide for cases where a speedy remedy was desirable, do not have more than a temporary operation. Where an order had been passed on 7th February 1873 presumably under the said section prohibiting religious processions with music in any but certain specified thoroughfares in Bareilly City, a person could not now be convicted under S. 188 of the Penal Code for disobedience of that order long after. 59 Ind. Cas. 34=22 Cr. L. J. 2=18 A.L.J. 857.

—S. 188—Disobedience to order of officer—Cr.P.C., S. 144—Order temporarily suspending exercise of private rights, legality of.—See Cr.P.C., S. 144. 5 C.W.N. 329.

## 2 (c). Disobedience of order—Other orders.

—S. 188.—Disobedience of order of Collector under S. 3 (2) of the Madras Buildings (Lease and Control Act). See **Madras Buildings (Lease and Rent Control) Act** (XV of 1946), Ss. 3 (2) and 16. (1950) 1 M.L.J. 201=A.I.R. 1950 Mad. 599.

—S. 188—Prohibitory order against marriage of a minor girl without Court's permission.

Where the marriage of a minor girl was performed with the person having knowledge of prohibitory order, the breach of the order committed was not merely technical but constituted deliberate defiance of the Court. The defiance of the authority of the Court, if not severely dealt with, is calculated to nullify the law which empowers it to take timely and proper measures for the welfare and protection of minors. Both the parties are liable to be dealt with for defiance of the authority of the Court which is an offence. A.I.R. 1940 Nag. 203=1940 N.L.J. 157=41 Cr.L.J. 803=I.L.R. (1942) Nag. 45=189 Ind. Cas. 813.

—S. 188 (2)—Crop raised, cut and removed before order for possession under S. 145, Criminal P. C.—Person removing crop is not punishable under S. 188, I.P.C. A.I.R. 1942 Mad. 275=1941 M.W.N. 1030.



## —S. 188.

Unsuccessful party's act of surreptitious or forcible cultivation of land in possession of successful party in proceedings under S. 145, Criminal P.C., would amount to an offence punishable under S. 188, Penal Code. A.I.R. 1939 Pat. 611=18 Pat. 544=6 B.R. 203=41 Cr.L.J. 191=21 P.L.T. 45=185 Ind. Cas. 529.

## —S. 188—What is offence under—Order under Cr.P.C., S. 145—Resistance to.

Where a person was not only aware of proceeding<sup>s</sup> under S. 145 but has acted in collusion with one party in order to deprive the other party of the fruits of their success in S. 145 case:

**Held**, that the order under S. 145 was binding on such person and any resistance to execution of the order will justify conviction under S. 188. 33 C.W.N. 1002=1930 Cr.C. 15=A.I.R. 1930 Cal. 63.

## —S. 188.

Person ordered under S. 147, Criminal P.C., not to proceed with wall being built—He neither proceeding to build nor demolishing it—He cannot be convicted under S. 188. A.I.R. 1938 Nag. 297=1938 N.L.J. 139=39 Cr.L.J. 584=I.L.R. (1938) Nag. 580=175 Ind. Cas. 234.

## —S. 188.

Court ordering Anglo-Indian lady to deliver custody of child to its father—Deliberate disobedience of order—Lady held guilty of contempt of Court. A.I.R. 1938 Cal. 38=39 Cr.L.J. 466=174 Ind. Cas. 785.

## —S. 188.

Court declaring lease by Secretary of State illegal and granting injunction—Lessee inducted by Secretary of State continuing working on leased property. **Held**, on facts both Secretary of State and lessee not guilty of contempt. A.I.R. 1938 P.C. 295=1938 O.W.N. 1256=5 R.R. 171=68 C.L.J. 488=43 C.W.N. 197=1939 M.W.N. 18=49 L.W. 10=17 Pat. 770=41 Bom.L.R. 136=(1939) 1 M.L.J. 715=41 P.L.R. 168=1938 A.W.R. 216=I.L.R. (1939) Kar. P.C. 42 Sup.=19 P.L.T. 867=178 Ind. Cas. 490 (P.C.).

## —S. 188.

Person digging his mine and allowing debris to fall out—Inspector of mines if can prohibit him from so doing—Disobedience—Such a person cannot be convicted under S. 188, Penal Code. A.I.R. 1938 Rang. 223=39 Cr.L.J. 701=176 Ind. Cas. 186.

## —S. 188.

Injunction against Government not to interfere with possession—Persons having knowledge of injunction but not parties to suit continuing working in quarry with permission of Government—Government and such persons, held guilty of contempt. A.I.R. 1937 Pat. 65=3 B.R. 248 (2)=18 P.L.T. 95=16 Pat. 159=166 Ind. Cas. 966 (S.B.).

## —S. 188—Order restraining party from proceeding with certain proceedings in other province.

Where a party to a suit is served with a prohibitory order restraining him from proceeding with certain proceedings in other province with respect to the subject-matter of the suit, the party prohibited is not justified in

disobeying the order merely because he is advised or thinks that the order is wrong in law. A.I.R. 1937 Cal. 601=39 Cr. L.J. 654=175 Ind. Cas. 872.

## —Ss. 188, 141, 145.

Leading procession in contravention of order under Bombay District Police Act, S. 42—Assembly declared unlawful and ordered to disperse—Disobedience—Case held was covered by the latter part of S. 188 read with S. 141, the assembly was unlawful and conviction under S. 145 should be sustained. A.I.R. 1931 Bom. 520=33 Bom. L.R. 1169=55 Bom. 725=33 Cr. L.J. 64=134 Ind. Cas. 1226.

## —S. 188.

Breach of a lawful order issued by the Police Commissioner under S. 62-A (4) of the Calcutta Police Act and S. 39-A of the Suburban Police Act is an offence under S. 188, Penal Code, if such disobedience causes or tends to cause annoyance or injury or risk as such, to any person lawfully employed or causes or tends to cause danger to human life, health or safety or causes or tends to cause a riot or affray. A.I.R. 1931 Cal. 410=35 C.W.N. 716=32 Cr. L.J. 844=58 Cal. 1303=132 Ind. Cas. 174.

## —S. 188—Order under Bombay City Police Act—Disobedience of, is offence under section.

The offence of disobedience of an order duly promulgated by a public servant under certain prescribed conditions is an offence under S. 188, I.P.C. and S. 23 (3) enlarges the ambit of the existing offence under S. 188, I.P.C. by including an act prohibited by S. 23 (3) within it. Though the disobedience of the order of the Police Commissioner under S. 23 (3) is an offence punishable under S. 127, yet it would be equally punishable under S. 188, I.P.C., if all the conditions laid down by that section are fulfilled. 1929 Cr.C. 545=31 Bom. L.R. 1151=A.I.R. 1929 Bom. 433.

## —S. 188—Order to remove obstruction—Disobedience—Order to show cause against prosecution—Petitioner pleading that he has removed obstruction—Order for prosecution is bad.

The petitioner was alleged to have obstructed a roadway. Apparently he maintains that at the time the roadway was not public. Proceedings were accordingly commenced against the petitioner under Section 133 on the 25th of May, 1922. The petitioner, as he had a right to do, applied to the Magistrate for a Jury under section 134. The Jury was accordingly appointed and instructed to report on a certain day; but they did not report on the appointed day and on that day the Magistrate without any further ado made the conditional order which he had previously made absolute, ordering the alleged obstruction to be pulled down. Apparently the order directed the petitioner to pull the obstructions down by the 5th of August. For some reason or other he did not do so and some days later, the fact that he had not done so was brought to the notice of the Magistrate who directed him to show cause why he should not be prosecuted for an offence against the provisions of Section 188 of the Indian Penal Code. However, a little later on, the petitioner came and told the Magistrate that he had removed the alleged obstructions; but nevertheless, the Magistrate had directed that he should still be prosecuted. **Held** the order was illegal and must be set aside. 73 Ind. Cas. 327=4 P.L.T. 13=1 Pat.L.R.Cr. 22=24 Cr. L.J. 583=A.I.R. 1923 Pat. 131.



—S. 188, Cr.P.C., Ss. 133 and 137—Verbal order to remove obstruction—Disobedience.

A verbal order to remove an obstruction under S. 133 of the Cr.P.C. has not the effect of a final order under S. 137 of Cr.P.C., and a person disobeying such an order is not guilty of an offence under S. 188 of the Penal Code. 16 Cr.L.J. 24=26 Ind. Cas. 328 (Cal.)

—S. 188.

Non-compliance with the order passed by the Deputy Commissioner under S. 219 of the G. P. Land Revenue Act of 1917 is punishable under S. 188, I.P.C. 64 Ind. Cas. 499=23 Cr.L.J. 19=17 N. L. R. 88=A.I.R. 1922 Nag. 209.

3. Essentials for conviction.

—S. 188—Conviction under—Likely consequences of breach of order—Need for proof.

Under S. 188, I. P. Code, there can be no conviction unless the likely consequences of the breach of the order are proved. If the prosecution leads no evidence to prove this, the gap cannot be filled up by resort to judicial notice. 58 C. 971, Rel. on. I.L.R. (1949) Nag. 976=51 Cr.L.J. 254=4 A.I.Cr.D. 165=1950 N. L. J. 211=A.I.R. 1950 Nag. 12.

—S. 188—Disobedience of order under S. 144, Cr.P. Code—When punishable.

It is clear from S. 188, I. P. Code, that mere disobedience of an order under S. 144, Cr. P. Code, is not punishable under that section. The disobedience of the order must cause or tend to cause danger to life, health or safety, or cause or tend to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed. 54 C.W.N. 256=51 Cr.L.J. 59=A.I.R. 1949 Cal. 677.

—S. 188—Disobedience of order under S. 144, Cr. P. Code—If per se offence punishable under S. 188.

A mere disobedience of an order passed under S. 144, Cr. P. Code, does not amount to an offence punishable under S. 188, I. P. Code. To establish an offence under S. 188, I. P. Code, the prosecution has to prove that the disobedience caused or tendered to cause danger to human life, health or safety, or caused or tended to cause a riot or affray. A disobedience per se of an order promulgated under S. 144, is not an offence. 231 Ind. Cas. 224=48 Cr.L.J. 747.

—S. 188—Essentials for conviction under S. 188.

For a conviction under S. 188, there must clearly be something more than mere disobedience of the order. It must also be shown that obstruction, annoyance or injury, danger to human life, etc., have been caused or might have been caused. Where there is a finding that the disobedience of the order was risky to the public peace the conviction of the accused under S. 188 is justified. A.I.R. 1940 Pat. 446=21 P.L.T. 231=41 Cr.L.J. 414=6 B. R. 425=187 Ind. Cas. 135.

—S. 188.

It is not necessary for a conviction under S. 188 that there should be a definite finding of the Magistrate that the action of each accused led to or caused a breach of the peace. A.I.R. 1934 Oudh 162=11 O.W.N. 384=35 Cr.L.J. 699=9 Luck. 543=148 Ind. Cas. 518.

—S. 188.

Where the accused, on being served with a notice under S. 144, Criminal P. C., to abstain from constructing or proceeding with the construction of a certain work, disobeyed the order, and was charged under S. 188, Penal Code, and the Magistrate in convicting him condemned such conduct as tending to cause an affray:

Held, that the Magistrate erred in arguing from general to the particular, whereas he ought to have come to the conclusion from the actual facts of this case as to whether or not there was a tendency for an affray to be caused. A.I.R. 1932 Cal. 868=36 C.W.N. 792=33 Cr.L.J. 829=139 Ind. Cas. 739.

—S. 188—Ingredients of offence.

Under S. 188, mere disobedience of an order does not constitute an offence in itself. There must be a disobedience of the order and then it must be shown that the disobedience has a certain consequence or tends to some result.

In the case of offence under S. 188, there must be some definite evidence to justify the Court in classifying them under one group or another of the cases with which that section deals. They cannot be classified in the graver category merely upon the general consideration that now-a-days if any person is arrested it may lead to a riot or affray. A. I. R. 1931 Cal. 122=32 Cr.L.J. 511=35 C.W.N. 257=53 C.L.J. 461=58 Cal. 971=130 Ind. Cas. 241.

—S. 188—Evidence and proof.

Section 144 makes provision for a contingency that local and temporary orders may, at times, be made without there being a real danger of breach of the peace or other reason justifying it. Accordingly, under that section it has to be proved that the accused not merely disobeyed the lawful order but that the act of disobedience was such as caused or involved the risk of a breach of the peace or other danger or trouble. 1930 Cr. C. 131=A.I.R. 1930 Cal. 131.

—S. 188—Essentials.

In order to constitute offence under S. 188 it is not sufficient merely to find that a person was a member of a crowd which disobeyed a lawful order but it must further be found that the disobedience of the crowd of which that person was a member, tended to cause danger to human life, health or safety, or caused or tended to cause a riot or an affray. 111 Ind. Cas. 461=10 Lah. 231=29 P. L. R. 647=29 Cr. L. J. 877=11 A.I.Cr. R. 137=A.I.R. 1929 Lah. 378.

—S. 188.

Where having regard to the circular issued by the accused and his admissions that he convened the meeting, there is adequate ground for drawing the inference that the accused knew that the disobedience of the order of the Commissioner of Police would at least result in a conflict with police the disobedience of the order under S. 23 (3) in such a case fulfils all the conditions necessary to constitute an offence under Penal Code, S. 188. 1929 Cr. C. 545=31 Bom. L. R. 1151=A.I.R. 1929 Bom. 432.

—S. 188.

In the absence of a finding to the effect that the disobedience was likely to cause or tended to cause



obstruction, annoyance or injury or risk of obstruction, annoyance or injury to any person or any one of the things mentioned in Cl. 3, the mere disobedience of a duly promulgated order is not an offence under S. 188. 109 Ind. Cas. 606=1928 M.W.N. 70=29 Cr.L.J. 590=10 A.I.Cr.R. 258=1 M. Cr. C. 30=A.I.R. 1928 Mad. 591.

—S. 188.

Sale of arrack in contravention of an order promulgated by the District Collector is not punishable under S. 188 in absence of proof of causing or tending to cause obstruction, annoyance or injury to any one. 90 Ind. Cas. 436=22 M.L.W. 98=1925 M.W.N. 396=26 Cr.L.J. 1556=A.I.R. 1925 Mad. 856=48 M.L.J. 605.

—S. 188.

Disobedience of order under S. 144—Offence only when, annoyance, injury or obstruction is caused thereby. 67 Ind. Cas. 205=1922 P.H.C.C. 204=3 P.L.T. 268=23 Cr.L.J. 381=A.I.R. 1922 Pat. 84.

—S. 188—Disobedience of order under S. 144, Cr. P. C.

There can be no prosecution under S. 188, Penal Code for disobedience of an order under S. 144, Cr. P. C., where no such disturbance as is prohibited by the order, is caused. 22 C.W.N. 599=19 Cr.L.J. 739=46 Ind. Cas. 515.

—S. 188—Order—Picketing, prohibition of—Public place—Promulgation of—Disobedience to the order.

A number of young men, including the accused were found preventing and patrolling the roads near the liquor shops in the Belgaum City some shouting "don't drink" and using offensive language in addition to those words such as "If you drink it will be as if you drink the blood of your children." The District Magistrate thereupon issued orders under S. 144 of the Criminal Procedure Code prohibiting these acts; but the persons warned continued to do them from the verandah of a private house adjoining a public place:

**Held**, (1) that objectionable language such as "If you drink, you will be drinking the blood of your children" speaks for itself. No further evidence than the words used is required to prove that it has a tendency to cause annoyance to persons lawfully employed under S. 188 of the Indian Penal Code. (1908) 10 Bom. L.R. 1047.

—S. 188—Breach of the peace, likelihood of, necessary to support conviction.

To support a conviction under S. 188, some evidence that the disobedience is likely to cause a breach of the peace is necessary. 4 C.W.N. 226, Foll. (1904) 8 C.W.N. 781=31 C. 990.

Definite evidence on record necessary. (1905) 32 C. 793=2 Cr.L.J. 760.

—S. 188—Offence under Police Act, 1861, S. 32 and S. 188, Penal Code—Knowledge of order is a necessary ingredient.

Knowledge of the order is a necessary ingredient of the offences punishable under S. 188, Penal Code, and S. 32, Police Act. There is no foundation for a distinc-

tion between S. 188, Penal Code, and S. 32, Police Act, so far as the element of knowledge as an essential ingredient of the offence is concerned. A.I.R. 1937 Mad. 535=1937 M.W.N. 172=45 L.W. 400=(1937) 1 M.L.J. 473=38 Cr.L.J. 620=168 Ind.Cas. 848.

—S. 188—Requirements of.

The requirements of S. 188, are satisfied only on proof that a person having knowledge of the order and being thereby directed to abstain from a certain act has disobeyed such direction. It is not enough that he has failed to prove that the disobedience of the order by another person was without his consent. There does not lie upon the accused person the burden of proving any such thing. A.I.R. 1933 Sind 93=34 Cr. L. J. 362=142 Ind. Cas. 591.

—S. 188—Disobedience of notice.

Without a finding on the plea of the accused, there is no legal basis for convicting the accused for disobedience of the order. 1933 M.W.N. 223.

—S. 188—Promulgation of order is not sufficient—Accused must be proved to have knowledge of the order.

Section 188 requires that it should not merely be proved that there was an order which was duly promulgated under S. 134, Cr.P. Code, but also that the accused person who is going to be convicted under the section was aware of it. The promulgation of the order is not sufficient to establish this knowledge. 99 Ind. Cas. 36=54 Cal. 152=28 Cr.L.J. 4=44 C. L. J. 250=A.I.R. 1927 Cal. 28.

—S. 188.

It is not sufficient in order to affect a person with the knowledge of an order under S. 144 and to render him liable to conviction under S. 188 to show that the order had been duly promulgated. It is necessary to prove by positive evidence that he has the knowledge that the order has been made. 100 Ind. Cas. 830=31 C.W.N. 340=45 C.L.J. 202=28 Cr. L. J. 350=7 A.I.Cr.R. 540=A.I.R. 1927 Cal. 306.

—S. 188.

It is the duty of the prosecution in every case under S. 188 to prove by positive evidence that the accused had knowledge of the order with the disobedience of which he is charged. The proof of general notification promulgating the order does not satisfy the requirements of the section. 63 Ind. Cas. 865=22 Cr. L. J. 705 (Lah.).

4. Interpretation—"Promulgate."

—S. 188—"Promulgate"—Meeting convened against order of Police Commissioner—Order held duly promulgated under S. 188.

On 19th July 1920, the Commissioner of Police issued an order, styling it a "notification" under S. 23 (3) of Bombay City Police Act prohibiting the President, the Secretary, the members of the managing Committee and the members of the Girni Kamgar Union from holding, convening, or calling together any assembly of mill hands or employers of the textile mills of Bombay for one week from the date of the order. The notification was duly promulgated in the mill area. On 13th July, 1929, a circular was issued purporting to be



signed by six persons including the accused inviting the strikers to attend the meeting. The meeting was held in the evening and in consequence the accused were placed before a Magistrate who convicted them under I.P.C., S. 143:

**Held**, that in issuing the order under S. 23 (3) the Commissioner of Police properly exercised his discretion for the preservation of the public peace and safety and that it was lawfully promulgated within the meaning of Penal Code, S. 188.

**Held further**, that the order in writing was not vitiated by the mis-description as a notification. 1929 Cr. C. 545=31 Bom. L. R. 1151=A.I.R. 1929 Bom. 433.

—S. 188.

**Per Walsh, Ag. C. J.—Prima facie** "promulgate" seems to indicate, if not a formal document printed or written, at any rate some form of publication. The view that it must be printed or written may be rejected. 85 Ind. Cas. 823=47 All. 205=22 A. L. J. 1049=26 Cr.L.J. 599=3 L.R.A. Cr. 1=A.I.R. 1925 All. 165.

**5. Prosecution for offence—Complaint by public servant—Need for.**

—S. 188.

A Magistrate, passing an order under S. 144, Criminal P. C., cannot take cognizance of an offence under S. 188, Penal Code, for disobedience of his own order. (1936) 164 Ind. Cas. 434=61 C.L.J. 579=37 Cr. L. J. 936=39 C.W.N. 1053.

—S. 188 — Injunction passed under S. 144, Cr. P. Code, without inquiry—Disobedience.

A Magistrate who has passed an injunction under S. 144, Cr. P. Code, without inquiry, cannot take cognizance of an offence under S. 188. 20 C.W.N. 981=17 Cr.L.J. 464=36 Ind. Cas. 144.

—S. 188—Prosecution under—When proper.

Prosecution under S. 188 should not be sanctioned unless all elements necessary for conviction are proved. 57 Ind. Cas. 915=21 Cr.L.J. 675 (Cal.).

—S. 188—Disobedience of order under S. 144 of Cr. P. Code—Cr. P. Code, Ss. 195 and 487.

Cognizance of a case under S. 188, I.P.C., cannot be taken except in accordance with the S. 195, Cr.P.C. Under S. 487, Cr. P.C., the Magistrate whose order is disobeyed is not competent to try the case. 23 C.W.N. 520=29 C.L.J. 382=20 Cr.L.J. 557=51 Ind. Cas. 845.

—S. 188—Disobedience of order under S. 144 of the Code of Criminal Procedure (Act V 1898)—Sanction to prosecute, essentials for granting.

A Magistrate should not sanction a prosecution under S. 188, Penal Code, unless he thinks that all the elements necessary for a conviction are present. Where the order sanctioning a prosecution under S. 188, Penal Code, for an alleged disobedience of an order under S. 144, Cr.P.C., did not show that the disobedience caused or tended to cause obstruction, annoyance or injury or a riot, the High Court set it aside in revision. 5 Ind. Cas. 154=11 Cr.L.J. 49=14 C.W.N. 234.

—S. 188—Prosecution for disobedience to order promulgated by Government—No sanction necessary.—See Cr.P.C., S. 195. 24 M. 70.

**6. Miscellaneous.**

—S. 188—Carrying out of State, of goods contrary to Ruler's order—Recovery of customs penalty—Prosecution if dispensed with.

Where persons carry out of the State goods contrary to orders of the Ruler and customs penalty is recovered from him at the outpost, that cannot dispense with the prosecution of the accused for an offence under S. 188, I.P. Code, which they have committed by their act. 51 Cr.L.J. 1330=A.I.R. 1950 Kut. 62.

—S. 188—Prior proceedings under S. 291, I.P. Code—Acquittal—Subsequent proceedings for offence under S. 188—Bar.

Where a person has been proceeded against under S. 291, Penal Code, for flagrant disobedience of an order of the Court to discontinue a nuisance and acquitted before anything can be done against such a person under S. 188, Penal Code, a complaint is necessary under S. 195, Cr.P. Code and S. 403 is no bar to such proceedings. 1930 Cr.C. 1231=A.I.R. 1930 Lah. 1055.

—S. 188—Interference with property under Receiver in spite of Court's order—Act also punishable under Penal Code.

Where a Receiver had been appointed by the Court, and an order had been passed giving him possession of the property and the Court had decided that the tenants from the mortgagor-defendant had no right to take the crops, nor had they any right to remain on the land, the cutting and taking away of crops on such land by such tenants is contempt of Court. The fact that these acts are punishable under the Penal Code, does not make the contempt punishable under the Code, and consequently, it cannot be said that the High Court has no right to take cognizance of such contempt.

In initiation of contempt proceedings, in the above circumstances, the proper procedure is that the plaintiff should apply to the Court to obtain the protection of the Court after the appointment of a Receiver rather than that the Receiver should make the application himself. A.I.R. 1935 Cal. 684=37 Cr.L.J. 65=40 C.W.N. 413=159 Ind. Cas. 180.

—S. 188—Refusal to file complaint—Appeal.

No appeal lies against the refusal of a public servant to file a complaint under S. 188. A.I.R. 1939 Mad. 336=1939 M.W.N. 119=49 L.W. 387 (1)=40 Cr.L.J. 568 (2)=181 Ind. Cas. 557.

—S. 188—Duty of Crown to abide by law.

It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the executive in cases of doubt to ascertain the law in order to obey it, not to disregard it. A.I.R. 1937 Pat. 65=3 B.R. 248 (2)=16 P.L.T. 95=16 Pat. 159=166 Ind. Cas. 966 (S.B.).

—S. 188—Interpretation.

**Per Sulaiman, J.**—To be justified in directing a certain act to be done or not to be done is one thing,



and be legally empowered to order its commission or omission, with the consequence of the disobedience being punishable under Section 188 of the Indian Penal Code, is quite another. 85 Ind. Cas. 823=47 All. 205=22 A.L.J. 1049=26 Cr.L.J. 599=6 L.R.A.Cr. 1=A.I.R. 1925 All. 165.

—S. 189—Applicability—“Threat of injury”—What amounts to.

S. 189, I. P. Code, can have no application to a case where there is nothing to show that the accused held out any threat of injury to a public servant. To amount to a threat there must be a declaration of an intention to inflict injury, loss or pain to another. In the absence of such a declaration amounting to a threat, there can be no prosecution under S. 189, I.P. Code. 4 A.I.Cr.D. 729.

—S. 189—Mere threat uttered as exhibition of bad temper.

It is of the essence of an offence under S. 189, Penal Code that the threat or injury should have been held out for the purpose of inducing a public servant to do any act or to forbear or delay the doing of an act. A mere threat, uttered as an exhibition of bad temper or in the course of an altercation, is not necessarily an offence under S. 189. A.I.R. 1936 All. 171=37 Cr.L.J. 212=1936 A.W.R. 28=(1936) A.L.J. 195=160 Ind. Cas. 17.

—S. 189.

Defendant's written statement containing defamatory matter regarding plaintiff's son—Plaintiff applying to Court for striking out these matters—Notice on defendant, by plaintiff's son, demanding payment of damages within certain time or else he would institute action for defamation—Application and notice held no contempt of Court. A.I.R. 1940 All. 114=1939 A.L.J. 1157=41 Cr.L.J. 390=1939 A.W.R. 887=187 Ind. Cas. 65.

—S. 189—Person addressing threatening notice to counsel demanding withdrawal of certain allegations of fact made in written statement of his client.

A person addressed a notice to a counsel demanding that certain allegations in the written statement of his client should be withdrawn unconditionally and an apology tendered on pain of legal proceedings being taken against him. Another letter was sent by him or some one interested in him to the client complaining against the counsel for his refusal to withdraw the allegation described as foolish;

Held, that in sending the letter containing threats to the applicant's counsel the person made a clear invasion of the counsel's right to represent his client's case loyally and properly and further interfered with the due performance of his duty towards his client. The addressing of the notice and the letter was, therefore, calculated to interfere with and to obstruct or divert the course of justice. The sender was, therefore, clearly guilty of contempt of Court. A.I.R. 1940 Nag. 110=1939 N.L.J. 461=I.L.R. (1940) Nag. 69=41 Cr.L.J. 709=189 Ind. Cas. 58.

—S. 189.

Where the accused simply threatened the public servant not to go through the door which was not the proper entrance and did not threaten him not to attach

the cattle, he cannot be convicted under S. 189. 1939 M.W.N. 1271.

—S. 189—Essentials of offence.

Two Police constables went at night to the house of a *dagi* who was under surveillance under the Bengal Police Regulations and called him out from a public street. The accused who was a brother of the *dagi* came out with a *lathi* in his hand and enquired why they came. After the facts were explained the accused threatened the constables with breaking their heads. While this happened the *dagi* came out and stood by:

Held, that the accused was guilty of an offence under S. 189. A.I.R. 1931 Cal. 448=58 C. 392=32 Cr.L.J. 1181=134 Ind. Cas. 536.

—S. 189—Elements of offence—Threat of injury to public servant necessary.

Before an offence under S. 189 can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public functions. A process-server has no right to enter into a house without obtaining permission of the owner. Merely abusing the process-server therefore will not constitute an offence under S. 189. I.P.C. 39 Mad. 561=28 M.L.J. 505=2 L.W. 463=17 M.L.T. 398=(1915) M.W.N. 365=16 Cr.L.J. 477=29 Ind. Cas. 109.

—S. 189—Injury, what is.

Injury in S. 189 implies an illegal harm; but the mere threat to bring a legal complaint either before a Court or before a constable's superiors is not an injury. 93 Ind. Cas. 48=6 Lah. 558=27 Cr.L.J. 400=27 P.L.R. 87=A.I.R. 1926 Lah. 139.

—S. 189—Separate convictions.

Separate convictions under both sections are bad when the accused is found to have refused to follow the Court peon when arrested under civil warrant and threatened to use violence—Whole occurrence falls under S. 189, Penal Code. 82 Ind. Cas. 163=25 Cr.L.J. 1297=A.I.R. 1925 Pat. 183.

—S. 190—Injury, what is.

A threat for the institution of a civil suit for a mere declaration of right against a person who is objecting to that right cannot be said to be an injury within S. 190. 92 Ind. Cas. 863=24 A.L.J. 314=27 Cr.L.J. 351=7 L.R.A.Cr. 51=A.I.R. 1926 All. 277.

—S. 191.

See also S. 193.

Synopsis.

1. Basis for prosecution
2. Charge
3. Contradictory statements
4. Declarations and verified statements
5. Essentials of offence
6. Evidence
7. Expediency of prosecution
8. Retracted statement
9. Several false statements
10. Time for prosecuting
11. Miscellaneous.



## 1. Basis for prosecution.

—S. 191 and Cr. P. Code (V of 1898), S. 360—**Prosecution for perjury on deposition not read over to witness.**

It cannot be said that if a deposition is not read over it cannot be found to be false. Its falsity or otherwise does not depend upon its being read over or not. The sole object behind the provision under S. 360, Cr.P. Code, requiring the deposition to be read over is only to have an accurate record of the deposition. If it is not read over it is only an irregularity. So even if a deposition is not read over, if it is false, the deponent can be prosecuted for perjury. 1950 A.W.R. 323=A.I.R. 1950 A. 501=51 Cr.L.J. 1346=1950 A.L.J. 277.

—Ss. 191 and 193—**Memorandum of evidence taken under Special Criminal Courts Ordinance 2 (II) of 1942 not read over to witness—Prosecution for perjury would not be expedient.**

Where the memorandum of evidence taken down by the Special Judge was in no case read over to the witness who gave evidence, the protection given by the law to the witness is lost and it would be judicially inexpedient to prosecute the witness for perjury. A.I.R. 1946 Nag. 38=I.L.R. (1945) Nag. 788=(1945) N.L.J. 551.

—Ss. 191 and 193—**Deposition not read over to witness, can't be basis of prosecution.**

Where the provisions of Order 18, Rule 5 of the Civil Procedure Code have not been fully complied with, e.g., when the deposition of a witness has not been read over to him after it is recorded it is not permissible to prosecute the witness on his previous statement thus informally recorded and to supplement such omission by means of extrinsic evidence, although every departure from the letter of the law not offending against the spirit of it, should not derogate from the evidentiary value of a record of Court. 42 Cal. 240, Foll. 28 Mad. 308, Foll. 81 Ind. Cas. 803=51 Cal. 236=25 Cr.L.J. 1027=A.I.R. 1924 Cal. 705.

—Ss. 191 and 193.

For the purpose of a prosecution under S. 193 depositions to which the procedure laid down in S. 360 has not been applied, cannot be properly used. S. 360 applies equally to accused as well as witnesses. 62 Ind. Cas. 584=2 P.L.T. 300=22 Cr.L.J. 568=1921 P.H.C.C. 139=A.I.R. 1921 Pat. 149.

—Ss. 191 and 193—**Deposition not read—Conviction bad.**

If the deposition is not read to the witness and acknowledged by him to be correct, it is bad to convict him under S. 193. The omission to read is more than irregularity. The deposition is the only evidence admissible of the statements alleged to have been made by a witness. (1918) M.W.N. 239, not Foll. 42 Mad. 561=36 M.L.J. 296=9 L.W. 349=(1919) M.W.N. 183=25 M.L.T. 356=20 Cr.L.J. 379=50 Ind. Cas. 987.

—Ss. 191 and 193—**Perjury—Evidence Act, Ss. 80 and 91—Deposition not read over—Sanction.**

Deposition not read over to the deponent, cannot be used in sanction proceedings as it will be evidence

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under S. 80, Evidence Act only if it is taken in accordance with law. S. 91 of the Evidence Act prevents other evidence being given. 13 Cr.L.J. 569, 12 C.W.N. 845, 28 M. 308, 36 Ind. Cas. 955, Foll. 11 Bur. L.T. 202=18 Cr.L.J. 960=42 Ind. Cas. 326.

—Ss. 191 and 193—**Deposition not taken in accordance with law—Cr.P.C., S. 360.**

A conviction for perjury in respect of statements made in a deposition not read in the presence of the parties as required by law when the deposition has been agreed by party as having been made by him is not bad in law. 28 M. 308, diss. from. 7 Ind. Cas. 414=34 Mad. 141=8 M.L.T. 117=11 C.L.J. 432=20 M.L.J. 943.

—Ss. 191 and 193—**Statement in deposition not read over to witness in presence of accused or his pleader—Cr.P.C., S. 360, non-compliance with effect of.**

A witness cannot be convicted under S. 193, for having made false statement in his deposition before a Criminal Court when the deposition was not read over to him in the presence of the accused or his pleader in accordance with the provisions of S. 310, Cr.P.C. 28 M. 308, Foll. 12 C.W.N. 845.

—Ss. 191 and 193—**Deposition in civil case—Perjury conviction for—C. P. C., S. 183, non-compliance with—Inadmissibility of deposition—Secondary evidence.**

A conviction for perjury cannot be sustained where the statement alleged to constitute the perjury is contained in a deposition in a civil case not taken in accordance with the provisions of the C. P. C., neither the deposition nor any secondary evidence of the statement being admissible in evidence in such a case. Where the witness was taken aside by the clerk and his evidence has read over to him in a place where neither the judge nor the vakils were present:

**Held**, that no conviction could be had for perjury on any statement contained in a deposition so taken. (1904) 28 M. 308=2 Cr.L.J. 756.

—Ss. 191 and 193—**Hearsay evidence.**

When the evidence is hearsay evidence, a Magistrate should not record it, and if under a mistake of law he records it, such evidence cannot form the basis of criminal prosecution. A.I.R. 1936 Lah. 828=38 P.L.R. 16=37 Cr.L.J. 1043=164 Ind. Cas. 1057.

—Ss. 191 and 193—**Hearsay evidence.**

Hearsay evidence given by witnesses cannot be made the subject of a prosecution under S. 193, nor can the Magistrate be justified in taking action under S. 476, Cr.P.C. 7 A.L.J. 618=11 Cr.L.J. 351=6 Ind. Cas. 390.

—Ss. 191 and 193—**Perjury case written complaint, no basis for—But examination on oath can be basis.**

As a written complaint is not verified nor is it required by law to be verified it cannot by itself be used as a basis for prosecution for perjury. But the examination of the complainant under S. 200 being taken on oath and signed by the complainant can be so used though it does not bear any certificate by the



Magistrate that the same was read over to the complainant. The evident object of getting this substance of the examination of the complaint signed by him or her is to make use of it, in case of need, as against the complainant's subsequent deposition as a witness for starting against him, if need be, a prosecution for perjury on the ground that the two statements contradict each other. 89 Ind. Cas. 713=26 Cr.L.J. 1401=A.I.R. 1926 Nag. 141.

—Ss. 191 and 193.

Where a pardon has been tendered, not during an inquiry under the Criminal Procedure Code, and the approver makes a statement under the pardon, such statement cannot form the basis of an alternative charge of an offence punishable under Section 193 of the Indian Penal Code, 1860. 64 Ind. Cas. 40=46 Bom. 61=23 Bom. L.R. 884=A.I.R. 1922 Bom. 138.

—Ss. 191 and 193—Statement recorded under S. 164.

Although a statement recorded under S. 164, Cr. P. C., is not evidence in a stage of a judicial proceeding, it comes within the meaning of the words 'evidence in any other case' in S. 193, Penal Code. It can be linked with a statement which is evidence in a stage of the judicial proceeding following on the investigation so that the two can be said to be a series of acts on which an alternative charge can be framed under S. 236, Cr. P. Code of intentionally giving false evidence. 60 Ind. Cas. 593=45 Bom. 834=23 Bom. L.R. 1=22 Cr.L.J. 241=A.I.R. 1921 Bom. 3 (F.B.)

—Ss. 191 and 193—False evidence—Prosecution in the alternative in respect of statements made under S. 164 of the Criminal Procedure Code and subsequently as a witness in Court.

A complaint was made to the police charging T, S and a third person with having committed an offence under S. 420 of the Indian Penal Code. During the investigation T was examined on oath by a Magistrate under the provisions of S. 164 of the Code of Criminal Procedure. As the result of the police investigation S was placed on his trial, and T appeared as a prosecution-witness and made a statement which appeared to the Court to be contradictory of his statement previously made under S. 164. Held, that there was no legal objection to the prosecution of T on a charge in the alternative under S. 193 of the Indian Penal Code. 22 A. 115, Foll. 1908 A.W.N. 73. See also 28 B. 533.

—Ss. 191 and 193—Basis for prosecution—Recital in judgment if can take place of deposition.

The prosecution must prove conclusively that the statement made by the accused was necessarily a false statement, before a conviction can be sustained under S. 193, I. P. C. The recital in a judgment of a statement made by a witness is not the same thing as a record of the deposition of the witness. Nor can such recital be accepted as evidence under S. 80 of the Evidence Act and it, therefore, cannot form the basis of a prosecution under S. 193, I. P. C. 21 Cr.L.J. 500=56 Ind. Cas. 660 (Pat.)

—Ss. 191 and 193—Basis for prosecution—Confession.

A 'confession' cannot be made the basis of a prosecution for perjury.

Whether a statement is taken as a statement or as a 'confession' the record can be used only for the purpose for which it was taken. A statement cannot be used as a 'confession', i. e., as an admission of the truth of the facts set out in it. 39 Mad. 977=20 M.L.T. 21=17 Cr.L.J. 195=34 Ind. Cas. 307.

—Ss. 191 and 193—Statement made to police officers under S. 162, Cr. P. C., cannot be made the foundation of a prosecution under S. 193, I. P. C. —See: Cr. P. C., S. 476. 1908 A.W.N. 22=4 A.L.J. 811.

—Ss. 191 and 193—False evidence—Statement to police officer:—See 5 C.W.N. 65=28 C. 348.

## 2. Charge.

—Ss. 191, 193, 196, 471.

Fact showing offence under Ss. 196, 471, 193, Penal Code and its abetment:

Held, that it is immaterial that no other section except S. 193 has therein been cited.

Also held (Obiter).—That even on a pure and a simple complaint of an offence under S. 193, the Court could take cognizance and convict the accused of an offence under S. 196 or S. 471, if the facts disclosed it. A.I.R. 1944 Nag. 192=1944 N.L.J. 174=I.L.R. (1944) Nag. 589=46 Cr.L.J. 80=215 Ind. Cas. 265.

—Ss. 191, 193, 467—Complaint under S. 193—Conviction under S. 467 also—Legality.

Where the accused against whom a complaint is lodged only under S. 193, is convicted also of an offence under S. 467, the conviction is irregular and made without jurisdiction in view of S. 195, Criminal P. C. A.I.R. 1937 Pesh. 67=1937 Pesh. L.J. 67=38 Cr.L.J. 748=169 Ind. Cas. 44.

—Ss. 191, 193, 471 — Production of forged receipts in Court to support defence.

The defendants in a suit handed over a number of receipts to their Vakil along with their written statement and these receipts were filed in Court but they did nothing further. The receipts were held to be forgeries and the Judge filed a complaint for an offence against S. 193, I. P. C. The defendants were found guilty under Ss. 193 and 471:

Held (i), that it was not open to the Appellate Court on finding that the accused were not guilty of an offence under S. 193, to convict them for abetment of an offence under that section on the same charge;

(ii) that it was open to the Sessions Judge to convict the appellants under S. 471 even though the Civil Court had only referred to S. 193 in its complaint. A.I.R. 1936 Mad. 280=1935 M.W.N. 1346=70 M.L.J. 109=43 L.W. 226=37 Cr.L.J. 421=161 Ind. Cas. 196.

—Ss. 191 and 193.

Where prosecution is legally instituted by the Civil Court under S. 181, I. P. C., the Appellate Court can under S. 423, Criminal P. C., alter in proper cases the finding to S. 193, I. P. C., and convict



under it. A.I.R. 1936 Nag. 263=38 Cr.L.J. 455=1.L.R. (1937) Nag. 102=167 Ind. Cas. 845.

—Ss. 191 and 193—Complaint under Ss. 193 and 211, I. P. C.—Provisions of S. 198, Cr. P. Code complied with—Magistrate can frame charge under S. 500, I. P. C.

Where the complaint purported to be under Ss. 193 and 211, Indian Penal Code, but the Magistrate, after hearing the evidence, framed the charge of defamation, under S. 500, Indian Penal Code, and convicted the accused under that section:

**Held:** It is quite sufficient that the complainant shall state the true facts in his own language, and it is for the Magistrate to apply the law to those facts. If, in the opinion of the Magistrate, the offence disclosed fell under S. 500, Penal Code, the Magistrate was at liberty to proceed and frame a charge under that section, provided the complainant satisfied the conditions of S. 198 of the Cr. P. Code whatever may have been the section of the Penal Code recited in the complaint. 23 P. R. (Cr.) 1895, Foll. 95 Ind. Cas. 305=6 Lah. 375=26 P. L. R. 552=27 Cr. L. J. 769=A.I.R. 1925 Lah. 631.

—Ss. 191 and 193—Charge must set out the specific answer alleged to be false.

A charge under S. 193, was as follows: "That you intentionally gave false evidence in answer to certain of the following questions put to you in the course of your evidence before the said Court." Then followed the 50 questions and the answers thereto. Which answers were alleged to be false did not appear in the charge sheet:

**Held,** that no accused person reading such a charge could say what he was called on to answer. 76 Ind. Cas. 417=25 Cr.L.J. 177=38 C.L.J. 163=A.I.R. 1924 Cal. 104.

—Ss. 191 and 193—Perjury—Details of charge—Duty to state.

The object of specifying the offence and the occasion when the offence is committed is to give not only notice to the accused, but also to the trying Court of specific offences against the accused. In a case under S. 193 of the I. P. C. for perjury when the prosecution is based upon the certain statements being false made by the accused, it is essential to set out the exact statements in detail upon which the prosecution wants to proceed. (1918) P.H.C.C. 13=4 Pat. L.W. 44=19 Cr.L.J. 169=43 Ind. Cas. 585.

—Ss. 191 and 193—Contradictory statements.

Where a charge is made against a person for making two contradictory statements not absolutely irreconcilable, when the charge does not set forth the contradictory statements, and accused is not allowed to adduce evidence, the trial is irregular and the charge is defective and insufficient. If the deposition recorded does not appear to be read over to the witness in the presence of the accused, it is not admissible in evidence. (1917) P.H.C.C. 299=2 Pat. L. W. 176=18 Cr.L.J. 1039=42 Ind. Cas. 783.

—Ss. 191 and 193—False evidence—Charge—Specific allegations.

See Criminal Procedure Code, S. 477. 5 C.W.N. 615.

—Ss. 191, 193, 467 and 471—Separate charges when necessary—Separate acts of perjury and forgery—Charges to be separate.

Every item of forgery or perjury must be separately charged by independent evidence of user in each document. 14 C.L.J. 652=13 Cr.L.J. 62=13 Ind. Cas. 398.

—Ss. 191 and 193—Separate charges, when necessary.

The making of any number of false statements in the same deposition, is one aggregate case of giving false evidence. A separate charge need not be drawn in respect of every single utterance of the accused which is alleged to be false. 36 Cal. 808=9 C.L.J. 690=13 C.W.N. 942=10 Cr.L.J. 150=2 Ind. Cas. 697.

—Ss. 191 and 193—Alternative charge of prejury.

Per **Aston, J.**—A conviction is legal on an alternative charge of perjury under S. 193, I. P. C. 6 Bom.L.R. 379=28 B. 533.

### 3. Contradictory statements.

—Ss. 191 and 193 and Cr. P. Code (V of 1898), S. 476—Contradictory statements by witnesses—Explanation that they were threatened by the police at one stage and prisoners at another—No evidence of such threat—Should be proceeded against for prejury.

In a capital case where irreconcilable or totally contradictory statements are made by witnesses and the only explanation offered is that at one stage they were threatened by the prisoners and at another stage by the police and there is no evidence of such threats, the witnesses in such a case should proceeded against under S. 193, I. P. Code, read with S. 476, Cr. P. Code and complaint should be made in order to determine whether they are liable to be convicted of the offence of perjury. 1948 M.W.N. 85=61 L.W. 100=A.I.R. 1948 Mad. 471=49 Cr.L.J. 713=(1948) 1 M.L.J. 116.

—Ss. 191 and 193—Affidavit read out to person and signed by him while drunk—If can be prosecuted under S. 193 for giving contrary evidence.

Where an affidavit prepared for a person and read out to him while he is drunk is signed by him, its contents cannot be said to have been properly understood by him and he cannot, therefore, be prosecuted for perjury under S. 193, I. P. C., for giving evidence contrary to the allegations in the affidavit. A.I.R. 1940 Rang. 148=41 Cr.L.J. 687=188 Ind. Cas. 795.

—Ss. 191 and 193—Evidence.

An accused who was a witness in a criminal case made two conflicting statements on oath, one of which was admittedly false. He was convicted under S. 191, I. P. C. The Magistrate framed no charge in the alternative under S. 236, Criminal P. C. He came to the conclusion that one of the statements was false, on the statements of the accused himself, who, in his opinion, was a liar. Besides the statement of the accused himself there was no other evidence to show as to which of the statements was true:

**Held,** that in the circumstances of the case the accused could not be convicted. A.I.R. 1939 Sind 170=1.L.R. (1939) Kar. 280=40 Cr. L. J. 707=182 Ind. Cas. 914.



**—Ss. 191 and 193—Contradictory statements by approver.**

In a case where contradictory statements have been made on different occasions, sanction to prosecute cannot be refused unless it is established that the approver made one of the two statements under undue influence. A.I.R. 1933 Lah. 868=35 Cr. L. J. 111=146 Ind. Cas. 461.

**—Ss. 191 and 193—Contradictory statement.**

In every case of contradictory statements it is not desirable to prosecute a witness. A prosecution in these circumstances should be undertaken when it appears to Court that it is expedient in the interest of justice that a complaint should be made under S. 476, Cr. P. Code. 33 C.W.N. 664=1929 Cr. C. 26=A.I.R. 1929 Cal. 390.

**—Ss. 191 and 193—Two depositions contradictory—They must be wholly irreconcilable to prove perjury.**

Where two depositions of a witness contradict each other, in order to establish the charge of perjury it is necessary to prove that the two statements are wholly irreconcilable.

There are cases in which a person might honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time he might be convinced that he was wrong and swear to the reverse, without meaning to swear falsely on either of the two occasions. 107 Ind. Cas. 100=29 P. L. R. 14=29 Cr. L. J. 212=9 A.I.Cr.R. 305=A.I.R. 1928 Lah. 125.

**—Ss. 191 and 193—Contradictory statements.**

No person should be convicted under S. 193, I.P.C., unless it be proved that it is impossible that the statements of the accused made on oath can be true. 5 Pat. L. J. 23=54 Ind. Cas. 633.

**—Ss. 191 and 193—Contradictory statements.**

A charge of perjury based on two contradictory statements can be successful only if the statements are necessarily and irreconcilably contradictory of each other. (1915) M. W. N. 34=16 Cr. L. J. 14=26 Ind. Cas. 318.

**—Ss. 191 and 193—Contradictory statements.**

A sanction to prosecute for perjury should not be given on the basis of two contradictory statements where the two statements are reconcilable, and every possible presumption must be in favour of such reconciliation. 7 A. 44, Foll. 7 S.L.R. 108=15 Cr. L. J. 488=24 Ind. Cas. 576.

**—Ss. 191 and 193—Contradictory statements—Presumption.**

Where a charge for perjury is based on two contradictory statements, every possible presumption in favour of their reconciliation should be made. 7 S.L.R. 96=15 Cr. L. J. 379=23 Ind. Cas. 747.

**—Ss. 191 and 193—Contradictory statements—When a person can be convicted.**

A person should not be convicted under S. 193 for contradictory statements when the statements are not

absolutely irreconcilable with each other. 5 S.L.R. 129=13 Cr. L. J. 23=13 Ind. Cas. 215.

**—Ss. 191 and 193—Contradictory statements—If conviction can be on strength of other statements than the one in question.**

A conviction under S. 193 in respect of a particular statement cannot be had merely on the strength of other contradictory statements made by the accused previously. 5 S. L. R. 136=13 Cr. L. J. 28=13 Ind. Cas. 220.

**—Ss. 191 and 193—Contradictory statements—Gist—Irreconcilable.**

The gist of the offence under S. 193 is that the meaning of the word in the two statements taken in the most ordinary and natural way in the light of the contest, must be irreconcilable. An accused cannot be convicted of perjury if at the time of making the second statement, he was not asked to explain his first deposition in the light of the second. 8 M.L.T. 86=11 Cr. L. J. 353=(1910) M. W. N. 397=6 Ind. Cas. 409.

**—Ss. 191 and 193—Contradictory statements—Perjury—Conviction for.**

Per **Jenkins, C. J.**—To convict an accused of giving false evidence it is necessary to show not only that he has made a statement which is false, but also that he either knew or believed it to be false or did not believe it to be true. In the case of contradictory statements, although the Court may believe that on the one or the other occasion the prisoner swore that was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse and without meaning to swear falsely either time. Per **Chandavarkar, J.**—In the case of perjury arising out of contradictory statements the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consist in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another there can be no perjury unless he has on oath stated facts on which his first statements was based and then denied those facts on oath on a subsequent occasion. Per **Aston, J.**—In a case of perjury what the Court has to consider is merely the evidence, and any explanation the accused may offer and not every possible explanation which ingenuity may imagine after the trial is over. (1904) 6 Bom. L.R. 379=28 B. 533.

**—Ss. 191 and 193—Contradictory statements in one and the same deposition—Deposition in one trial but on different dates—Deposition of each date signed separately—Legality of conviction—Alternative charge—Criminal Procedure Code, S. 236, ill. (b).**

Per **Bhashyam Aiyangar, J.**—A witness cannot be convicted under S. 193 of the Penal Code for intentionally making contradictory statements in one and the same deposition, though the portions containing the statements are deposed to on different dates and signed by the witness separately, 10 C. 937, opinion



of **Norris, J.**, approved. The doctrine that a witness can be convicted of perjury simply on the ground that one or other of two contradictory statements intentionally made by him must be false without proving which of them is false as applicable to cases where the statements are contained in different depositions discussed. The above doctrine cannot be applied to cases of contradictory statements contained in the same deposition. Per **Benson and Moore, JJ.**—A conviction for intentionally making contradictory statements in the same deposition is legal. (1902) 26 M. 55.

—**Ss. 191 and 193.**

Where one of the two contradictory statements was made by the witness after the accused was discharged from the case:

**Held**, that that statement cannot be availed of by the accused for applying for prosecution of the witness for perjury. 89 Ind. Cas. 713=26 Cr.L.J. 1401=A.I.R. 1926 Nag. 141.

—**S. 191 and 193—Contradictory statements—One statement not taken in proper form—Effect of—Conviction—Legality of.**

A conviction cannot be had under S. 193 in respect of two contradictory statements where one of those statements has been made by the accused in the course of examination as a complainant under S. 200 of the Code of Criminal Procedure, but does not bear his signature in accordance with the provisions of that section. The record not being made in accordance with the law, cannot be used as evidence of the statement made. (1902) 6 C.W.N. 840.

—**Ss. 191 and 193—Contradictory statements—Perjury—Conflicting statements.**

Every possible presumption should be made in favour of good faith. It is undesirable that the witness should be afraid to correct mistakes for fear of being prosecuted for perjury. He should be allowed to correct innocent mistakes as otherwise the object of cross-examination will be frustrated.

It is doubtful whether contradictory statements made in one and the same deposition can be the subject of a prosecution for perjury. 9 S.L.R. 202=17 Cr.L.J. 240=34 Ind. Cas. 656.

—**Ss. 191 and 193.**

There is no provision of law which requires that a witness should be given an opportunity to explain discrepancies in his evidence. But it is open to a witness if he wishes to do so to explain at the time when the deposition is read out to him. 33 C.W.N. 664=1929 Cr.C. 26=A.I.R. 1929 Cal. 390.

—**Ss. 191 and 193—Contradictory statements—Essentials of conviction.**

Under S. 193, I. P. C., an attention of a person charged with giving false evidence should be drawn to his previous statements so as to enable him to reconcile his statement with the true state of things, since intentional false evidence is essential under S. 193, I.P.C. (1917) P.H.C.C. 267=18 Cr.L.J. 772=41 Ind. Cas. 148.

**4. Declarations and verified statements.**

—**Ss. 191 and 193.**

A man who voluntarily and officially verifies a statement, when the law does not want him to do so does not render himself liable to punishment.

But a person is under a legal obligation to verify the allegations of fact made in the plaint and pleadings. If he verifies falsely, he comes under the clutches of S. 191 and is liable to be punished under S. 193, for giving false evidence.

A Court of Justice cannot use any declarations as evidence, unless they are of the nature of declarations contemplated in O. 19, Civil P. C., i. e., in the form of affidavits. It is only when the Court orders any fact to be proved by the affidavit of any witness, that it could be used as evidence, not otherwise.

The declarations or verified statements are of two kinds: (i) Declarations which a person is bound by law to make such as the verification of pleadings under the Civil P. C., (ii) Declarations which a person makes for the purpose of their being used as evidence such as affidavits filed under O. 19, Civil P. C. Of these, the second kind of declaration alone can be used as evidence and can, therefore, found a conviction of the offence under S. 193, I. P. C. When a person who is called upon to produce a document in his possession under O. 16, R. 6, Civil P. C. submits a verified statement that he is not in possession or control of the document, such a statement does not come under second kind described above. Nor is it of the first kind but even if it were it cannot be used as evidence. This voluntarily verified statement does not render him liable to punishment. A. I. R. 1943 Nag. 17=1942 N.L.J. 547=44 Cr.L.J. 313=I.L.R. (1943) Nag. 547=204 Ind. Cas. 605.

—**Ss. 191 and 193—Written statement in suit—False verification to—Liability.**

Since under O. 6, R. 15, C. P. Code there is an express provision of law requiring the defendant to confirm the truth of the statement made by him in the preceding clauses of his written statement, if he does so knowing that that verification is false, he is declared by legislature in S. 191 as giving false evidence thereby making him liable under S. 193. 1930 A.L.J. 955=A.I.R. 1930 All. 490.

—**Ss. 191 and 193.**

A person presenting a verified petition for substitution of parties, containing a false statement of the death of a defendant cannot be considered to fall within the mischief of S. 193, as verification is not required for a petition for substitution of parties. 102 Ind. Cas. 214=6 Pat. 184=8 P.L.T. 412=28 Cr.L.J. 518=8 A.I.Cr.R. 99=A.I.R. 1927 Pat. 197.

—**Ss. 191 and 193—Scope of.**

S. 191, I. P. C., was framed in the way in which it stands only with the intention of bringing verifications of statements in pleadings by a person knowing them to be untrue within S. 193, I. P. C. 43 Cal. 1001=20 C.W.N. 1192=34 Ind. Cas. 235.

—**Ss. 191 and 193—Pleadings—False verification—Intent to defraud.**

The offence under S. 193 of the Code is one against public justice and an intentionally false verification in



pleadings is an offence under S. 193 whether the accused did or did not intend to defraud the judgment-debtor. 16 W.R. Cr. 37, 26 A. 509, 6 A. 626, App. 7 S.L.R. 25 = 14 Cr.L.J. 456 = 20 Ind. Cas. 616.

—**Ss. 191 and 193—Land Registration Act (VII B. C. of 1876), S. 88—Application for mutation of names—False verification, whether giving false evidence.**

The rules under S. 88 of the Bengal Land Registration Act as to verification of an application for Registration have the force of law, and a false verification in such an application is giving false evidence within the meaning of Ss. 191 and 193, I.P.C. 38 Cal. 368 = 12 Cr.L.J. 411 = 11 Ind. Cas. 595.

—**Ss. 191, 193, and 199.**

Person accused before Union Bench moving the Sub-Divisional Officer for transfer of the case and swearing an affidavit before a First Class Magistrate as to his appearance before the Union Bench—Affidavit found to be false—Conviction of person under Ss. 193 and 199, I. P. C., held bad. A.I.R. 1944 Cal. 283 = 48 C.W.N. 469 = 45 Cr.L.J. 748 = 214 Ind. Cas. 229.

—**Ss. 191, 193, 199—Reckless accusation against Magistrate, etc., in affidavit.**

Where in an affidavit an accused person has made a reckless accusation against the Magistrate as well as the Government Advocate and the Deputy Superintendent of Police, it is expedient in the interests of justice that he should be called upon to show cause why he should not be prosecuted under S. 193, read with S. 199, I.P.C., for affirming a false affidavit. A.I.R. 1937 Lah. 411 = I.L.R. (1937) Lah. 114 = 39 P.L.R. 643 = 38 Cr.L.J. 955 = 170 Ind. Cas. 586.

—**Ss. 191 and 193.**

A person renders himself liable to prosecution for false statements made in an affidavit in support of an application under S. 439, as required by S. 530-A. 99 Ind. Cas. 600 = 28 Cr.L.J. 168 = 7 A.I.Cr.R. 386 = A.I.R. 1927 Sind 128.

—**Ss. 191 and 193—Affidavits.**

A person making an affidavit containing a false statement made in support of an application for transfer of a case is guilty under S. 191. 99 Ind. Cas. 341 = 28 Cr.L.J. 133 = A.I.R. 1927 Sind 113.

—**Ss. 191 and 193—Transfer petition—False statement in.**

An application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by S. 342 of the Cr. P. Code, upon answers to questions put to the accused by the Court trying the case. A.I.R. 1922 Lah. 113, Foll. 89 Ind. Cas. 457 = 26 Cr.L.J. 1369 = A.I.R. 1926 Lah. 12.

—**Ss. 191 and 193—Transfer petition in Criminal Case—False statement in.**

The provision in Section 342 (4) that no oath shall be administered to the accused has reference only to the statement made by him in answer to questions put by the Court in accordance with Sub-section (1) of that section. It does not preclude him from making

an affidavit in support of an application for transfer under Section 526 and there is no bar to his being prosecuted under Section 193, I.P.C., for making false statements. 67 Ind. Cas. 351 = 3 Lah. 46 = 23 Cr. L. J. 399 = 88 P.L.R. 1922 = A.I.R. 1922 Lah. 113.

—**Ss. 191 and 193—False evidence—Affidavit of accused person in support of an application for transfer—Cr.P.C., S. 528.**

Where, an accused person applies for the transfer of the case pending against him to some other court, supporting his application by an affidavit, he cannot, or at least ought not to be prosecuted under S. 193 in respect of statements made therein. 19 A. 200, Foll. 1906 A.W.N. 42 = 3 A.L.J. 98 = 28 A. 331.

—**Ss. 191 and 193—Affidavits.**

Affidavits are not evidence and cannot be the subject of a charge under S. 193 and no sanction for the persons swearing the affidavits can be granted. 5 S.L.R. 102 = 12 Cr. L.J. 563 = 12 Ind. Cas. 651.

—**Ss. 191 and 193 — Petition containing false statements — Plea that signature was affixed to a blank paper.**

Signing and verifying a petition containing false statements is an offence punishable under S. 193, I.P.C., and it makes no difference that at the time when the signature and verification were appended the petition was blank. (1904) 6 Bom. L.R. 886.

## 5. Essentials of offence.

—**S. 191 — Offence under — False evidence on matter not material to enquiry.**

It is only S. 192, I. P. Code, which requires that the fabricated false evidence should affect a point material to the result of the proceeding in which it appears. This provision is omitted in S. 191, I. P. Code, which defines the offence of giving false evidence and nowhere lay down the above restrictive proviso. If the statement made is designedly false the accused is liable irrespective of the fact whether the statement had a material bearing or not upon the matter under enquiry before the Court. The materiality or immateriality can have a bearing upon the sentence to be passed. I.L.R. (1949) Nag. 355 = 3 A.I.Cr.D. 389 = 50 Cr. L. J. 842 = A.I.R. 1949 Nag. 303 = 1949 N.L.J. 90.

—**Ss. 191 and 193—Element of materiality of evidence is material not for conviction but for determining expediency of prosecution.**

The element of materiality of evidence to the trial of a case does not enter into the definition of the offence of perjury under S. 191, Penal Code, and a person is liable to be convicted of the offence even if his statement is not material. But that becomes a material consideration for deciding whether or not a prosecution for perjury should be launched. A.I.R. 1946 Nag. 38 (41) = I.L.R. (1945) Nag. 788 = (1945) N. L. J. 551.

—**S. 191.**

So far as the language of S. 191 goes, it is not strictly necessary that the statement should be material to the inquiry, so long as it was made by a person who was bound by oath to state the truth. A.I.R. 1933 All. 318 = 34 Cr. L. J. 686 = 144 Ind. Cas. 194.



## —S. 191.

If the statement made is designedly false the accused is liable irrespective of the fact whether the statement had a material bearing or not upon the matter under enquiry before the Court. The materiality or immateriality can have a bearing upon the sentence to be passed. 120 Ind. Cas. 122=30 Cr.L.J. 1154=1930 A.L.J. 251=1929 Cr.C. 664=A.I.R. 1929 All. 936.

## —S. 191—Perjury—Materiality of evidence—English law.

The law of England requires that a false statement in order to support a charge should be material to the question in dispute, but this qualification is not imposed by the Penal Code. (1904) 6 Bom. L. R. 324=28 B. 479.

## —S. 191—Materiality of statement—Statement which ought not to have influenced the Judge.

The fact that a statement should not have influenced the judge's decision does not *ipso facto* make it immaterial. (1904) A.W.N. 52=26 A. 371.

## —S. 191—False evidence—Perjury not necessarily on a point material to the case.

**Semble:**—To constitute the offence defined by S. 191 it is not necessary that the false evidence should be concerning a question material to the decision of the case in which it is given; it is sufficient if the false evidence is intentionally given, that is to say, if the person making that statement makes it advisedly knowing it to be false, and with the intention of deceiving the court and of leading it to be supposed that that which he states is true. But if the false evidence does not bear directly on a material issue in the case, being relative to or incidental to trivial matters only that would be a matter to be taken into consideration in fixing the sentence. (1904) A. W. N. 115=26 A. 509=1 A.L.J. 236.

## —Ss. 191 and 193—Perjury.

For a conviction under S. 193, it is a material element that the false evidence should be given so as to cause the person who in such proceedings is to form an opinion on evidence to entertain an erroneous opinion touching any point material to the result of such proceedings. 1903 A.W.N. 68.

## —S. 191—Falsity of contents of affidavit sworn to and certified on "personal knowledge and belief"—If an offence under S. 191.

Unless it is proved that a person who has sworn to an affidavit and certified generally on "personal knowledge and belief" has deliberately made the statements which are false to his knowledge no offence is committed under S. 191, I. P. Code. I.L.R. (1947) All. 155=228 Ind. Cas. 169=1946 A.L.J. 499=48 Cr.L.J. 106=A.I.R. 1947 All. 235=1946 A.L.W. 485=1941 A.W.R. (H.C.) 548=1946 A.Cr.C. 141.

## —Ss. 191 and 193—Rash and credulous statements.

A person cannot be punished for perjury or abetment thereof for being merely rash and credulous of facts alleged by him to be true. A.I.R. 1944 Sind 155=I.L.R. (1944) Kar. 133=46 Cr.L.J. 223=217 Ind. Cas. 182.

## —Ss. 191 and 193.

In order to sustain the conviction the statement must be intentionally false. (1934) 36 P.L.R. 527.

## —Ss. 191 and 193—Intention.

The intention of the accused is an essential ingredient in the constitution of the offence of perjury. The question of intention goes to the root of the matter and when the accused has proved that he did not intentionally make any false statement, he is entitled to an acquittal on the charge. A.I.R. 1934 Oudh 65=35 Cr.L.J. 390=11 O.W.N. 87=147 Ind. Cas. 395.

## —S. 191—Essentials.

In order to sustain an indictment for perjury the prosecution must establish, *inter alia*, two things: (1) that the statement was false; and (2) that it was known or believed to be false or not believed to be true. In other words, the statement must be intentionally false. 107 Ind. Cas. 100=29 P.L.R. 14=29 Cr.L.J. 212=9 A.I.Cr.R. 505=A.I.R. 1928 Lah. 125.

## —Ss. 191 and 193.

There can be no offence if a statement though false was made without an intention to make it, and it is only the intentional making of a false statement that the law condemns and punishes. 89 Ind. Cas. 713=26 Cr.L.J. 1401=A.I.R. 1926 Nag. 141.

## —Ss. 191 and 193—Statement capable of reasonable construction—No perjury.

The intention to commit perjury must be clearly present before a person charged with that offence can properly be convicted of it and a statement capable of being construed in any reasonable way in such committing that it does not show a clear intention of committing perjury or a deliberate attempt to make a false statement, does not *per se* contain the elements of the offence. 72 Ind. Cas. 887=1 Pat. L.R. Cr. 17=24 Cr.L.J. 471=A.I.R. 1924 Pat. 381.

## —Ss. 191 and 193.

To support a conviction under S. 193, there must be absolute certainty about the falsity of the statement and the accused's lack of full faith in his own words. 72 Ind. Cas. 161=4 P.L.T. 683=1 Pat.L.R. Cr. 142=24 Cr.L.J. 321=A.I.R. 1924 Pat. 276.

## —Ss. 191 and 193—Suppression of circumstances.

In the case of perjury the statement must be literally false. Mere suppression of circumstances when fact stated is true is no perjury. 9 S.L.R. 170=17 Cr.L.J. 96=32 Ind. Cas. 688.

## —Ss. 191 and 193—Perjury—Charge—Essentials.

See: 13 G.W.N. 685=19 M.L.J. 324 (P.C.).

## —Ss. 191 and 193—Essentials for conviction.

The gist of the offence under S. 193, is that the two statements, of which one is alleged to be false must be irreconcilable. (1910) 8 M.L.T. 86=11 Cr.L.J. 353=1910 M.W.N. 397=6 Ind. Cas. 409.

See also 28 B. 533.



—**Ss. 191 and 193—For offence of perjury to be complete deponent must leave Court under lie with which he begins by deceiving it.**

The gist of an offence of perjury is the fact that it amounts to an attempt to mislead and deceive the Court. For the offence to be complete the deponent must leave the Court under the lie with which he began by deceiving it.

Where a witness makes a statement in his examination-in-chief contradictory to his previous deposition but in his cross-examination goes back to his previous position, the whole evidence must be read together and no offence of perjury is committed. A.I.R. 1927 Nag. 189, Affirmed. 117 Ind. Cas. 210=30 Cr.L.J. 724=1929 Cr.C. 456=A.I.R. 1929 Nag. 279.

—**S. 191—"Legally bound".**

False evidence to be punishable must have been given in a proceeding in which the accused was bound by law to speak the truth. 65 Ind. Cas. 434=23 Cr.L.J. 82=6 P.W.R. 1922 Cr.=A.I.R. 1922 Lah. 133.

## 6. Evidence.

- (a) Admissibility
- (b) Proof of oath
- (c) Proof of offence.

### 6 (a). Evidence—Admissibility.

—**Ss. 191 and 193.**

A person was charged of having given false evidence in a will case.

**Held:** that the judgment in the will case and the depositions of other witnesses in the will case are not admissible against the accused in the perjury case, the depositions would be relevant only to corroborate the statements of the same witnesses at their trial. 76 Ind. Cas. 417=25 Cr.L.J. 177=38 C.L.J. 163=A.I.R. 1924 Cal. 104.

—**Ss. 191 and 193—Evidence Act, S. 91—C. P. Code, O. XVIII, R. 5.**

S. 91 of the Evidence Act bars the admission of the secondry evidence in proving a witness's statement where it was not read over to him according to requirements of the Rule 5 of the order XVIII of the C.P.C. 1 Lah. 461=58 Ind. Cas. 830=21 Cr.L.J. 830.

—**Ss. 191 and 193—Perjury—Deposition not read over—Cr. P. Code, S. 360—Evidence Act, S. 80.**

A deposition should not have been treated as a nullity on a trial for perjury merely because of the irregularity in not reading over to the deponent in the presence of the accused or his pleader, if could be proved by other evidence, e.g., by evidence that the witness admitted it to be correct when it was read over to him and the evidence of the Judge or Magistrate who recorded it. S. 80 of the Evidence Act contemplates that the deposition which it is proposed to use as evidence should have all the guarantee of authenticity which the law prescribes, one of them being that the Magistrate shall have signed it only after it has been read over to the witness in the presence of the accused or his pleader, in order that the witness and the accused may have an opportunity of pointing out mistakes. 12 Bur L.T. 167=20 Cr.L.J. 506=10 L.B.R. 16=51 Ind. Cas. 666.

—**Ss. 191 and 193—Deposition—Not noted to have been read over to accused—Effect—Presumption—Evidence Act, S. 80.**

A person may be convicted of the offence of having given false evidence before a Civil Court though the Court had made no note in writing to the effect that the evidence has been read out to the deponent. In the absence of evidence that the deposition was not read out, the Magistrate ought to assume that the Judge of the Civil Court complied with the provisions of O. 18, R. 5 of the C. P. Code. 28 P.R.Cr. 1918=39 P.W.R. Cr. 1918=16 P.L.R. 1919=19 Cr.L.J. 972=47 Ind. Cas. 872.

—**Ss. 191 and 193—Irregularity in taking down deposition—Effect of C. P. Code, O. 18, R. 5.**

Where a deposition is read out by a clerk to the witness in an adjoining hall from where the Judge was visible though at a distance from him, the deposition is admissible in evidence in a prosecution under S. 193, I.P.C. 28 M 303, not Foll. Irregularity in regarding a deposition goes to its weight not to its admissibility. (1918) M. W. N. 239=7 L. W. 435=19 Cr. L.J. 603=24 M.L.T. 242=45 Ind. Cas. 507.

—**Ss. 191 and 193—Statements to be read out.**

For the conviction of a person under S. 193 for making declarations on oath, which may be before or after issues in a civil suit, such statements when recorded are to be read out to be deponent as required by law. 12 P.R. 1917 Cr=15 P.W.R. 1917 Cr.=18 Cr.L.J. 607=39 Ind. Cas. 847.

—**Ss. 191 and 193—Evidence—Previous deposition.**

In a trial for giving false evidence, the record of a previous deposition given by the accused is relevant and necessary evidence. Such record is not inadmissible under S. 145 of the Evidence Act, which has no application to the case, nor because the actual vernacular words were not taken down. In an appeal by the local Government under S. 417, Criminal Procedure Code, the High Court is a Court of appeal on matters of fact as well as of law, and must decide questions of fact from the whole of the evidence on record. (1908) 9 C.L.J. 378=10 Cr.L.J. 499=4 Ind. Cas. 124.

—**Ss. 191 and 193—False statement in a deposition—Deposition not in form—Proof by extraneous evidence.**

Where a person is accused of a false statement in a deposition and the deposition cannot be put in as it was not in the form required by law. **Quaere:**—Whether it can be proved by extraneous evidence. (1902) 6 C.W.N. 840.

### 6 (b). Evidence—Proof of oath.

—**Ss. 191 and 193.**

The law requires the Magistrate to examine witness on affirmation or oath, and under Ill. (c) to S. 114, Evidence Act, there is a presumption that the proper procedure was followed. It may, therefore, be presumed that the statement of a witness was made on affirmation. Even if it was made on affirmation, S. 14, Oaths Act requires the witness to state the truth when giving



evidence, and being so required he commits the offence defined in S. 191 if he makes a statement that he knew to be false. 1939 Nag. L. Jour. 396.

—Ss. 191 and 193—Proof of oath.

In perjury cases, the administration of oath to the accused should be proved by the prosecution like any other fact. 20 Cr.L.J. 370=50 Ind. Cas. 978 (All.).

—Ss. 191 and 193—Proof of oath—Perjury—Evidence of—Evidence Act, S. 91.

The only evidence in a case under S. 193, I.P.C., regarding the statement made by witnesses including the fact of their having been taken an oath, is the record of deposition prepared by the Magistrate. That record only is admissible under S. 91 of the Indian Evidence Act read with S. 80 of that Act. (1918) P.H.C.C. 13=4 Pat. L.W. 44=19 Cr.L.J. 169=43 Ind. Cas. 585.

6 (c). Evidence—Proof of offence.

—Ss. 191 and 193—Circumstantial evidence.

Circumstantial evidence would be sufficient to convict a person under S. 193. A.I.R. 1944 Sind 155=I.L.R. (1944) Kar. 133=46 Cr.L.J. 223=217 Ind. Cas. 182.

—Ss. 191 and 193—One man's oath.

A conviction for perjury can be sustained on the strength of one man's oath against another only when it is impossible to conceive of him telling a lie or the person's word is so strongly corroborated that no reasonable Judge could do otherwise than believe him. 1942 N.L.J. 327.

—Ss. 191 and 193—Testimony of single witness, whether sufficient.

The rule of the English Common Law that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a safe guide for the Indian Courts which are bound by the statute law of India. A.I.R. 1931 All 362=32 Cr.L.J. 780=53 A. 598=131 Ind. Cas. 594.

—Ss. 191 and 193—Inspector not sending a person for trial—Statement by eye-witness incriminating him—Whether amounts to perjury.

From the mere fact that an investigating Sub-Inspector or possibly some unknown superior of his has chosen not to send up a person for trial, it cannot be said that any eye-witness who makes some statement about such a person that directly or indirectly incriminates him, has committed perjury. A.I.R. 1936 Pesh. 106=37 Cr.L.J. 619=162 Ind. Cas. 300.

—Ss. 191 and 193—Perjury trial—Opinion of handwriting expert and judge's opinion—Conviction bad.

Where in a trial for perjury in respect of a promissory note which the accused said on oath was in his handwriting, the Magistrate admitted in evidence the opinion of a handwriting expert against the accused without his being examined on oath

and also had his own opinion after comparing the handwriting of the promissory note with various other handwritings, that the writing was not of the accused:

Held, that a conviction under S. 193 based on these materials is bad. The proposition that a Judge should not impart his personal knowledge into his judgments and that if he wishes to rely on facts within his knowledge, he must go to the witness box and depose to them on oath is no doubt correct in the main, but it does not apply to facts of which a Judge is permitted to take judicial notice and nowhere in the Indian Evidence Act is it laid down that a Judge must not look at exhibits produced in Court or partly base his judgment on them. 11 W.R.Cr. 25, Foll.

No man can be convicted of giving false evidence except on proof of facts which, if accepted as true, shew not merely that it is incredible, but that it is impossible that the statements of the party accused made on oath can be true. If the inference from the facts proved, falls short of this, there is nothing on which a conviction can stand; because assuming all that is proved to be true, it is still possible that no crime was committed. 76 Ind. Cas. 425=1 Rang. 290=25 Cr.L.J. 185=A.I.R. 1924 Rang. 17.

—Ss. 191 and 193—Statements by accused should be proved to be impossible and not merely incredible.

In the case of an offence under S. 193, it must be shown that it was impossible that the statements made by the accused could be true. It is not sufficient to show that the statements were incredible. A.I.R. 1942 Nag 80=1942 N.L.J. 257=43 Cr.L.J. 649=I.L.R. (1942) Nag. 695=201 Ind. Cas. 170.

—Ss. 191 and 193.

In a prosecution under S. 193, it is incumbent on the prosecution to show first that the statement made by the accused was false and secondly, that they knew it or believed it to be false or did not believe it to be true at the time they made the statement. A.I.R. 1938 Pat. 145=4 B.R. 327=39 Cr.L.J. 358=173 Ind. Cas. 738.

—Ss. 191, 193, 199—Duty of prosecution.

In prosecutions under Ss. 193 or 199, it is sufficient for the prosecution to show that the statement is false and thus throw the burden of proof on the accused to establish good faith as a defence, but the prosecution must show affirmatively the knowledge of the accused that the evidence given or declaration made was false or his belief in its being false or absence of a belief in its truth.

The real question in such cases is of the state of mind of the accused at the time of filing the declaration. A.I.R. 1934 Pat. 133=34 Cr.L.J. 917=144 Ind. Cas. 1011.

—Ss. 191 and 193.

From the fact that a person is guilty of culpable cowardice it is not safe to infer that he is not only a coward but also a perjurer. A.I.R. 1934 Sind 6=35 Cr.L.J. 736=148 Ind. Cas. 672.



—Ss. 191 and 193—False statement—Intention—Presumption.

Where accused's statement is proved to be false, it can be presumed that he "intentionally" gave false evidence—Accused in execution Court making statement that decree against him was adjusted on certain dates—Dates material factor for trial of case—In trial Court accused never suggesting that he gave those dates on mistaken belief—Held, statement was false and accused did not believe it to be true while making it. 22 O.C. 236, Foll. 116 Ind. Cas. 643=30 Cr.L.J. 655=1929 Cr. C. 83=13 A.I.Cr.R. 78=A.I.R. 1929 Nag. 193.

—Ss. 191 and 193—False evidence—Conclusive proof of the charge—Necessity.

During the proceedings of a certain case, a witness stated that he had no knowledge of the fact that his son was proceeded against and avoided conviction by apologizing. Proceedings were then taken against him under S. 193, I. P. C., for false evidence. During the trial it was not conclusively proved that he was present in the village at the time of arrest of his son:

Held, that the conviction was illegal. The mere fact that the accused heard of the arrest of his son between certain periods was not sufficient to warrant his conviction on the charge laid against him. 106 Ind. Cas. 98=9 L.L.J. 414=28 Cr.L.J. 1010=A.I.R. 1927 Lah. 874.

—Ss. 191 and 193.

No man can be convicted for giving false evidence except on proof of facts which, if accepted as true, show not merely that it is incredible, but that it is impossible that the statement of the party accused made on oath can be true. If the inference from the facts proved, falls short of this, there is nothing on which a conviction can stand; because assuming all that is proved to be true, it is still possible that no crime was committed. 76 Ind. Cas. 425=1 Rang. 290=25 Cr.L.J. 185=A.I.R. 1924 Rang. 17.

—Ss. 191 and 193.

Mere malice or absence of reasonable enquiry as to the facts alleged is not sufficient for a conviction under S. 193 of the Code. It must be proved that the statement must be false to the knowledge of the person or that he did not believe the facts to be true. 61 Ind. Cas. 521=22 Cr.L.J. 393=L.R. 2 A. (Cr.) 94 (All.)

—Ss. 191 and 193—Suit on promissory note—Presumption as to passing of consideration for promote—Applicability to criminal trial.

In a prosecution for perjury under S. 193 of the Code arising out of a civil suit on a promissory note in which the accused denied the receipt of consideration it is for the prosecution to prove the passing of consideration, as the presumption of law under the Negotiable Instruments Act as to the passing of consideration for a promissory note is not applicable to a criminal trial. 59 Ind. Cas. 198=22 Cr.L.J. 54=18 A.L.J. 1151.

—Ss. 191 and 193—Falsity of statement—Degree of proof.

To justify a conviction for perjury, it is not necessary to prove that the statement of the party accused is impossible. It is sufficient to prove that it is incredible. 22 O.C. 236=21 Cr.L.J. 12=54 Ind. Cas. 60.

—Ss. 191 and 193—Duty of prosecution to prove specific statements false.

In a case under S. 193 of the Penal Code, it must be proved beyond all reasonable doubts that the particular portion of the statement alleged to have been made by the accused is false. 20 Cr.L.J. 519=51 Ind. Cas. 679 (Lah.)

—Ss. 191 and 193—Grounds for conviction—Statement admitted to be false.

A witness who deliberately gives false evidence and when confronted with incontestible proof of his falsehood admits it to be false, is guilty of perjury. 13 Cr.L.J. 752=17 Ind. Cas. 64 (Mad.)

—Ss. 191 and 193—Three different statements.

A person making three different statements at three different stages of proceedings should not necessarily be prosecuted for perjury. All the circumstances of the case should be looked to. 3 Bur. L.T. 119=11 Cr.L.J. 734=8 Ind. Cas. 947.

—Ss. 191 and 193—Perjury—Evidence sufficiency of.

In a suit for ejectment from a certain house, defendant pleaded that he was the owner of the house, plaintiff produced two Kirayanamas executed by the defendant, which showed that he was a tenant. Defendant said that he had left his signature on blank papers on which plaintiff subsequently filled up the contents of the Kirayanamas; he, however, subsequently endorsed on the back of the documents Tahrir Tasliam Hai and on the strength of the endorsement he was charged for perjury. Held, that the endorsement alone was not sufficient for conviction. 11 Cr.L.J. 485=7 Ind. Cas. 420 (Cal.)

—Ss. 191 and 193—Grounds for conviction—Cr. P. C. (Act V of 1898), S. 195.

The primary consideration for prosecution for perjury is that a false statement should be made intentionally, and where it is not found that a false statement was made intentionally, it was held that sanction to prosecution was illegal especially when the statement does not affect the credibility of the witness, and is wholly irrelevant. 13 C.W.N. 422=9 Cr.L.J. 282=1 Ind. Cas. 287.

—Ss. 191 and 193—Evidence—Appreciation—Criminal case.

A Criminal trial is not a litigious proceeding. When there is unmistakable conflict in the evidence of a witness for the prosecution the alternative most unfavourable to the accused is not to be accepted as a necessity merely because the witness has not been asked which version he prefers. (1907) 9 Bom. L.R. 212=5 Cr. L. J. 202.



—Ss. 191 and 193—Statement as to benami nature or otherwise of a transaction—Proof.

A prosecution for perjury in regard to a statement as to the benami nature of a transaction or otherwise should not be allowed to go on. Suspicion, however strong, is not equivalent to proof. In order to convict a person of perjury, it must be shown that the statement said to have been false could not but be false. (1906) 4 C.L.J. 558=10 C.W.N. 1099.

—Ss. 191 and 193—Prosecution, duty of—False statements—Knowledge.

In a charge, under S. 193, I. P. C., of intentionally giving false evidence, the prosecution is bound to prove affirmatively by clear and positive evidence, that the statement made by the accused is false and was made by him with the knowledge that it was false. In this case the evidence having failed to establish that, the High Court, as a court of revision, interfered in the interests of justice. (1905) 2 C.L.J. 101=2 Cr.L.J. 455.

—Ss. 191 and 193—Long statement—Mode of proof—False evidence—Cr. P. C., S. 162.

It is irregular in a charge of intentionally giving false evidence to put the whole of a long statement bodily to a witness at once, and in such a case no conviction can properly be had except on proof that the accused person had made to the police officer each and every one of the statements contained in the document. (1900) 5 C.W.N. 65=28 C. 348.

## 7. Expediency of prosecution.

—Ss. 191 and 193 and Cr. P. Code (V of 1898), S. 476—Prosecution witness in murder trial making conflicting statements—Prosecution for perjury—Delay in filing complaint under S. 476—Materiality.

Where a prosecution witness in a murder trial makes statements which are clearly conflicting in regard to the occurrence and it is not possible to reconcile them, it would be expedient in the interest of justice that he should be directed to be prosecuted under S. 193, Penal Code. The fact that there was a delay in filing the application under S. 476, Cr. P. Code, would not be material in such circumstances. 51 Cr.L.J. 1187=A.I.R. 1950 Ajmer 37 (2).

—Ss. 191 and 193—Prosecution under—Desirability—Statement under S. 164, Cr. P. Code, before Taluk Magistrate by illiterate accused—Denial in the preliminary enquiry.

Where the accused who were illiterate persons gave a statement under S. 164, Cr. P. Code, that they had actually witnessed the assault which eventually resulted in the death of the deceased person, but later before the preliminary enquiry they varied their statements denying the earlier story and saying they were forced to make the earlier statement before the Taluk Magistrate as they were coerced by the Police:

Held, that the prosecution of the accused for an offence under S. 193, I. P. Code, would not be

in the interests of justice, as they being illiterate it could not be ruled out that they were forced to make the statements which they did under S. 164, Cr. P. Code and spoke the truth before the Court. 1948 M.W.N. 815=A.I.R. 1949 Mad. 502=50 Cr.L.J. 775=(1948) 2 M.L.J. 558.

—Ss. 191 and 193—Prosecution when inadvisable.

It is inadvisable to prosecute under S. 193, if a witness reverts to the truth in the course of a trial, more especially when the witness was not a willing witness or the previous statement was given under circumstances indicating that pressure might have been used. A. I. R. 1934 Sind 155=36 Cr.L.J. 10=152 Ind. Cas. 254.

—Ss. 191 and 193—No reasonable probability of conviction—Prosecution is not expedient.

Where the basis for the prosecution is very flimsy and there is no reasonable probability of conviction the prosecution of witnesses for perjury is not judicially expedient. A. I. R. 1946 Nag. 38=I.L.R. (1945) Nag. 788=(1945) N.L.J. 551.

—Ss. 191 and 193—False evidence—Sanction to prosecute should not be granted unless there are chances of conviction.

Sanction ought not to be given unless the Court giving the sanction has satisfied itself that there are very favourable chances of obtaining a conviction.

When sanction is given to prosecute for giving false evidence, the actual statements, which are alleged to be false, should be mentioned in the sanction. 65 Ind. Cas. 640=24 Bom. L.R. 45=23 Cr. L.J. 176=A.I.R. 1922 Bom. 38.

—Ss. 191 and 193—Statement made with view to appropriate credibility—Cause of justice not hampered.

Where the complainant made an inaccurate statement that he had been acquitted in a certain case, with a view to appropriate some credibility for himself and the statement did not hamper the course of justice:

Held, that it was not a case in which the interest of justice would be advanced by prosecuting the person. A.I.R. 1945 Pat. 295=26 P.L.T. 216=12 B.R. 131=47 Cr. L.J. 177=221 Ind. Cas. 407.

—Ss. 191 and 193—Complaint when should be lodged.

Though it is ordinarily in the interest of justice to bring the perjurer to book and check such offences it is the duty of the Court to see whether it would ultimately promote the interests of justice if the perjurer is prosecuted. Where it is transparent that the criminal case is calculated to hamper the fair trial in the Civil Court, no prosecution for perjury should be lodged till after the case is decided by the Civil Court. A.I.R. 1940 Nag. 72=41 Cr. L.J. 182=(1939) N.L.J. 562=185 Ind. Cas. 400.



—Ss. 191 and 193 — Complaint when to be made.

It is only when a Civil, Revenue or Criminal Court, is of opinion that it is expedient in the interests of Justice that an enquiry should be made into any offence referred to in S. 193 sub-s. (1), Cl. (b) or Cl. (c), Criminal P.C., which appears to have been committed in or in relation to a proceeding in that Court, that such Court may, after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof and shall forward the same to a Magistrate of the first class having jurisdiction to try the complaint:

Held, that it was not expedient in the interests of justice that the accused should be prosecuted for an alleged offence of perjury. A.I.R. 1936 Oudh 373=37 Cr. L.J. 885=1936 O.W.N. 763=164 Ind. Cas. 107.

—Ss. 191 and 193.

Matter in dispute one in which it is difficult to arrive at certainty — Criminal prosecution against witness should be discouraged. A.I.R. 1936 Pat. 162=2 B.R. 112=37 Cr. L.J. 193=159 Ind. Cas. 817.

—Ss. 191 and 193

Though every act of perjury is an offence, it does not follow that every perjurer should be charged. 1934 M.W.N. 243.

—Ss. 191 and 193—Every perjurer not to be charged though perjury is an offence.

Perjury is a concomitant of a Court of law, the question always being one of degree. Every act of perjury is in strict law, an offence, but it does not follow that on that account every perjurer should be charged. A.I.R. 1933 Mad. 230=34 Cr. L.J. 948 (1)=145 Ind. Cas. 371.

—Ss. 191 and 193 — A prosecuting B for perjury—B acquitted and A prosecuted for the same offence upon the Magistrate's complaint —A found not guilty—A applying that B should be again tried for perjury — It is improper to continue such cycle of prosecution.

There is no such invariable rule that justice must ultimately be done. Cases occur where a matter is left in doubt and real justice is not done. It is inadvisable that in following such a will o-the-wisp as absolute justice parties should be put to enormous expense and the time of Courts should be wasted.

On the motion of A, B was prosecuted under S. 477-A, Penal Code and was acquitted by the Magistrate upon whose complaint A was tried for perjury. The Magistrate holding the enquiry came to the conclusion that A was not guilty and he was acquitted. Thereupon A applied that B should be tried for perjury:

Held, that such cycle of cases should be stopped and it was improper to continue such criminal prosecution. 110 Ind. Cas. 816=26 A.L.J. 137=9 L.R. A.Cr. 137=10 A.I.Cr.R. 442=29 Cr. L.J. 784= A.I.R. 1928 All. 548.

—Ss. 191 and 193 — Perjury — Slight discrepancy—Confusion of mind.

A prosecution for perjury under S. 193 of the Penal Code should not be ordered where the statements complained of, are discrepant owing to inaccuracies of mind and are not deliberately false. 19 Cr. L.J. 230=43 Ind. Cas. 822 (Cal.)

## 8. Retracted statement.

—Ss. 191 and 193—Retracted statement.

Section 288, Criminal P. C., enables a Magistrate to bring on record as substantive evidence, the evidence of a witness who falsely resiles in the Court of Session from his former statement and the question of witness's prosecution for perjury can be considered after. A.I.R. 1936 Sind 140=37 Cr.L.J. 1045=164 Ind. Cas. 1036.

—Ss. 191 and 193 — Witness deliberately deceiving Court—Subsequent application weeks after to correct statements—Held, prosecution proper.

Although witnesses should be encouraged to speak the truth and not bound down to falsehoods, this purpose will not be achieved if a witness is allowed to leave the witness-box, having deliberately deceived the Court by his false evidence, with the knowledge that he can weeks after, if he fears a prosecution for perjury, be recalled to correct his false statements. To say that in no case should a witness be prosecuted if at any stage in the course of a trial, however prolonged, he be recalled on his own application or on the application of any one else to speak the truth is, to go too far.

Where, therefore, a witness who deliberately deceived the Court by giving false evidence is prosecuted under S. 193, I. P. C., and after some weeks he applies to the Court to be examined again to correct certain incorrect statements made by him:

Held, that it is true a witness must be allowed a locus poenitentia in the interests of justice, but there must be some reasonable limit as to its extent, and in this case, that reasonable limit has been far exceeded. A.I.R. 1937 Sind 116=31 S.L.R. 77=38 Cr.L.J. 873=170 Ind. Cas. 360.

—Ss. 191 and 193—Retracted statements.

Where the accused retracts his false statements, made on solemn oath in a witness-box, only when he discovers that his fraud has been detected, no Court can infer from the subsequent correction or retraction that there is no intention to give false evidence. 120 Ind. Cas. 507=1930 Cr. C. 125=24 S.L.R. 7=31 Cr.L.J. 135=A.I.R. 1930 Sind 61.

—Ss. 191 and 193.

It is inadvisable to prosecute a man under S. 193 if he has reverted to the truth in the course of the trial. 112 Ind. Cas. 468=29 Cr.L.J. 1044=11 A.I.Cr.R. 398 (Lah.).

—Ss. 191 and 193—Retracted statements in same deposition—No conviction for perjury.

If a witness makes a statement and later in the course of the same deposition contradicts it and says it was untrue, the whole deposition amounts to no more than the second statement. He cannot



be convicted of perjury in the alternative, in one or the other of the two statements, and if the first can be proved to be false he cannot be convicted of more than attempt to commit perjury. 103 Ind. Cas. 101=23 N.L.R. 35=28 Cr.L.J. 645=A.I.R. 1927 Nag. 189.

—Ss. 191 and 193—Witness withdrawing his previous statement in same deposition as being false—No offence is committed.

A witness should be given a *locus penitentiae* and an opportunity to correct himself, and if he corrects himself immediately afterwards, or on a second thought in the same deposition, a prosecution for perjury would not lie. The essence of the offence of perjury consists in an attempt to mislead and deceive the Court. 96 Ind. Cas. 505=27 Cr.L.J. 953=A.I.R. 1926 Pat. 517.

—Ss. 191 and 193.

When a false statement is made and is at once retracted by the witness and is admitted by him that he made it through mistake, he must not be convicted under S. 193. 34 P.W.R. 1911 (Cr.), Foll. 89 Ind. Cas. 1028=26 Cr.L.J. 1460=A.I.R. 1925 Lah. 646.

—Ss. 191 and 193.

A witness is not guilty of perjury if he corrects a statement of his, previously made in the same deposition. 83 Ind. Cas. 490=26 Cr. L. J. 10=11 O.L.J. 309=A.I.R. 1924 Oudh 373.

—Ss. 191 and 193—Retracted statements—Immediate retraction on fresh thought is no perjury.

A witness is entitled to *locus penitentiae* and an opportunity, to correct himself and if, when he gets that opportunity, he recalls to his mind any fact about which he had made a statement which was not quite accurate, a prosecution for perjury will hardly be desirable. No statement made by a witness in a deposition can be regarded as completed statement until the deposition is finished and corrected, if necessary, for till then it is open to the witness to qualify any statement or to correct it himself. 16 O.C. 81, Foll. 74 Ind. Cas. 443=21 A.L.J. 673=24 Cr. L. J. 779=A.I.R. 1924 All. 83.

—Ss. 191 and 193—Retraction by witness of a statement in the same deposition—No inference of perjury.

It is open to a witness to correct himself on second thought or on being reminded of any fact which might have escaped his memory, and the subsequent correction or retraction by a witness of his statement in the same deposition does not necessarily predicate the existence of an intention to give false evidence with regard to the statement so corrected or retracted, if the correction or retraction can be otherwise satisfactorily explained. 16 O.C. 81, followed. 69 Ind. Cas. 92=25 O.C. 139=23 Cr.L.J. 652=A.I.R. 1922 Oudh 198.

—Ss. 191 and 193—Subsequent correction of mistakes.

Perjury being an attempt to mislead and deceive the Court, a witness who after being

informed of various circumstances by Court, acknowledges the falsity of his previous statement, and corrects it, is not guilty of perjury, as a witness is always given a fair opportunity to correct his answer by reading over the deposition as a whole. 12 P.R. 1917 Cr.=15 P.W.R. 1917 Cr.=18 Cr.L.J. 607=39 Ind. Cas. 847.

—Ss. 191 and 193—Retracted statements—Contradictory statements in the same deposition—Intention.

It is desirable to give witnesses a *locus penitentiae* and an opportunity to correct themselves and if they do correct themselves immediately afterwards or on second thought the same deposition, a prosecution for perjury would hardly be desirable. Intention to give false evidence is necessary to constitute offence under S. 193. This will be gathered from the surrounding circumstances and the subsequent correction or retraction by a witness of his statement in the same deposition might negative the existence of such intention. 16 O.C. 81=14 Cr.L.J. 280=19 Ind. Cas. 712.

—Ss. 191 and 193—Retracted statements—False statement by witness—Immediate retraction—Prosecution whether desirable.

It is undesirable to prosecute a person for giving false evidence, where immediately after making a false statement he retracts it. 34 P.W.R. 1911 Cr.=230=P.L.R. 1911=12 Cr. L. J. 405=11 Ind. Cas. 589.

## 9. Several false statements.

—S. 191—Offence under—Several false statements.

The offence of perjury is intimately connected with the statements made. There would be as many different offences as there are false statements. 111 Ind. Cas. 122=10 A. I. Cr. R. 269=9 L.R.A.Cr. 121=29 Cr.L.J. 794=A.I.R. 1928 All. 706.

—S. 191.

False statements by a witness at different times and on different subjects during one deposition—Each statement is separate offence. 100 Ind. Cas. 981=7 A.I.Cr.R. 505=28 Cr.L.J. 373=51 Bom. 310=29 Bom.L.R. 170=A.I.R. 1927 Bom. 177.

—Ss. 191 and 193—Number of false statements in the same deposition.

The making of any number of false statements in the same deposition is one aggregate case of giving false evidence and the charge of false evidence cannot be multiplied according to the number of false statements contained in the deposition. (1909) 13 C.W.N. 942=36 C. 808=9 C.L.J. 690=10 Cr.L.J. 150=2 Ind. Cas. 697.

## 10. Time for prosecuting.

—Ss. 191 and 193—Time for prosecuting.

A Magistrate is not justified in directing prosecution for perjury under S. 193, I.P.C. of a witness one the conclusion of his deposition and before the



conclusion of the trial if he makes a statement not desired by the prosecution and is afterwards declared hostile. 1 Pat. L. W. 545=18 Cr.L.J. 626=39 Ind. Cas. 994.

—Ss. 191 and 193—Time for prosecuting—Case pending—Direction for prosecution of witness for perjury.

It is improper to direct the prosecution of a witness under S. 193, I. P. C., while the case in connection with which he is said to have made a false statement is still pending in the Sessions Court. 18 C.W.N. 1342=16 Cr.L.J. 147=27 Ind. Cas. 211.

—Ss. 191 and 193—Time for prosecuting.

It is highly improper to arrest a witness for the defence, for giving false evidence, while the defence evidence is being taken. 4 Bur. L.T. 189=12 Cr.L.J. 465=11 Ind. Cas. 1001.

—Ss. 191 and 193—Prosecution for perjury when should be instituted.

A prosecution for perjury should be instituted as soon as possible after the decision of the case. 11 Cr.L.J. 140=5 Ind. Cas. 469=7 A.L.J. 50.

## 11. Miscellaneous.

—Ss. 191 and 193.

Where a patwari, in order to save the trouble of taking down the evidence, was directed by a revenue Court to prepare a written statement according to his papers and file it, and where the patwari made such a statement on oath, the statement cannot be called a public document which it was his duty to prepare, and therefore on proof of patwari's statement being false, he could not be prosecuted for an offence under S. 218 but under S. 193, Penal Code, for giving false evidence: 5 All. 553, Foll. 118 Ind. Cas. 232=1929 A.L.J. 512=10 L.R.A.Cr. 90=12 A.I.Cr.R. 22=30 Cr.L.J. 874=1929 Cr. C. 1=A.I.R. 1929 All. 374.

—Ss. 191 and 193.

The fact that no oath was administered to the accused is no bar to his prosecution under Penal Code, S. 193. 85 Ind. Cas. 710=26 Cr.L.J. 566=6 L.R.A.Cr. 44=A.I.R. 1925 All. 410.

—Ss. 191 and 193—Evidence given under special oath.

Evidence given under special oath is conclusive only as against the person who offers to be bound by it; but does not prevent the court from attempting to establish that a particular statement made by the appellant was false in fact and false to his knowledge. 82 Ind. Cas. 359=26 Bom. L.R. 713=26 Cr.L.J. 1287=A.I.R. 1924 Bom. 511.

—Ss. 191, 193, 201—Concealment by accused of his own guilt.

An accused person cannot be charged either with giving or fabricating false evidence with the sole object of diverting suspicion from himself and concealing his guilt in regard to a crime with which he is charged. (1906) A.W.N. 191=28 A. 705.

—Ss. 191 and 193—Cr. P. C., S. 133—Accused person—Examination on oath.

A person against whom proceedings under S. 133, Cr. P. C., are taken is not an accused person, and he commits an offence under S. 193, I. P. C., if he makes false statements during his examination on oath in the proceedings. (1905) 9 C.W.N. 983=2 C.L.J. 149.

—Ss. 191, 193, Cl. (2)—Proceedings under Land Registration Act—Witness if "bound to state truth" in such proceeding—Land Registration Act, Ss. 52, 53, 84—Cr. P. C., S. 195—Sanction to prosecute.

In a proceeding held by a Sub-Deputy Collector under Ss. 52, 84 of the Land Registration Act, a witness is "bound to state the truth" within the meaning of S. 191, I. P. C., and a person who made a false statement before the Sub-Deputy Collector would be rightly convicted under the latter part of S. 193 of the Penal Code, even if the proceeding was not a judicial proceeding within the meaning of that section. (1904) 9 C.W.N. 127.

—Ss. 191 and 193—Scope of—Necessity for widening.

Necessity of widening the scope of Ss. 191 and 193 is pointed out. 32 M.L.J. 402=(1917) M.W.N. 303=6 L.W. 364=18 Cr.L.J. 785=41 Ind. Cas. 305.

—S. 193—Power to administer oath.

In proceedings under sections of the Cr. P. Code in which there is nothing said about examining persons on oath, the Magistrate has the power to administer the oath and persons speaking falsely before such Magistrate are liable under S. 193. 17 Cr.L.J. 491=34 P.R. 1916 Cr.=36 Ind. Cas. 171.

—S. 193—Stay of Criminal Proceedings—Pending Civil Proceedings—Discretion.

A criminal proceeding under S. 193 for statements made in a civil suit pending appeal should not ordinarily be ordered to be stayed pending the disposal of the appeal, but it is a matter entirely within the Magistrate's discretion. 8 S.L.R. 20=15 Cr.L.J. 661=25 Ind. Cas. 989.

—Ss. 191, 193, 209—Separate convictions for dishonestly making a false claim and for falsely attesting the plaint in the same matter—Separate conviction, illegal:

Held, that a person could not be convicted both of fraudulently and dishonestly making a false claim in court of justice and of falsely attesting plaint in the false case, the latter being an essential ingredient of the former offence. 1901 A.W.N. 187.

—S. 191—False evidence—Civil action—Right of suit.

The giving of false evidence, no matter how malicious and mala fide it may be, furnishes no right to sue in a civil court, the only remedy being a prosecution for perjury. The mere fact that the giving of false evidence is alleged to be the result of conspiracy to obtain the conviction of a person of a criminal offence does not make any difference. (1900) 25 B. 230=2 Bom. L. R. 244 (F.B.).



—S. 192.

See: also: S. 193.

#### Synopsis.

1. Interpretation—"Causes any circumstance to exist."
2. Offence under section.

1. Interpretation—"Causes any circumstance to exist."

—S. 192—Tutored evidence.

The tutoring of a man to give false evidence amounts to the "causing of a circumstance to exist" within S. 192: 29 All. 351, Foll; 16 Cr. L. J. 667, Diss. from. 105 Ind. Cas. 662=25 A.L.J. 1077=8 A.I.Cr.R. 342=8 L.R.A.Cr. 140=28 Cr.L.J. 950=A.I.R. 1927 All. 721.

#### 2. Offence under section.

- (a) Essentials
- (b) What is and what is not.

#### 2 (a). Offence under section—Essentials.

—S. 192.

Under S. 192, it is the intention that creates the criminal offence and not the fact as to whether under the terms of the law the document is admissible in evidence. A.I.R. 1940 Cal. 449=42 Cr.L.J. 93=I.L.R. (1940) 1 Cal. 465=191 Ind. Cas. 165.

—Ss. 192 and 194.

Quaere.—Whether to enter a false record in a Police diary can be said to be fabricating evidence at all, especially as Ss. 162 and 172, Criminal P.C., appear to negative the admissibility of the entry as evidence save for the purpose of contradicting a witness whose statement is recorded in writing, or of contradicting the Police Officer himself. A.I.R. 1933 P.C. 124=34 Cr.L.J. 322=37 M.L.W. 584=64 M.L.J. 466=1933 M.W.N. 409=10 O.W.N. 522=37 C.W.N. 514=57 C.L.J. 177=14 P.L.T. 305=1933 A.L.J. 645=35 Bom.L.R. 507=142 Ind. Cas. 335 (P.C.)

—S. 192—Making false entry with intention of using it in evidence—Entry inadmissible in evidence—Effect of.

A person is guilty of fabricating false evidence when he makes a false entry in a document intending that it shall appear in evidence and mislead the Judge or Magistrate. The mere fact that the entry is not legally admissible in evidence cannot affect his guilt. 56 P.L.R. 1918=13 P. W. R. (Cr.) 1918=19 Cr.L.J. 141=43 Ind. Cas. 429.

—Ss. 192 and 193—False evidence—Fabrication of document—Admissibility—Intention.

Under S. 192 of the I.P.C. it is the intention that creates the criminal offence and not the fact as to whether under the terms of the law the document is admissible in evidence. The correctness of the decisions on the point is open to question. 16 Cr.L.J. 620=30 Ind. Cas. 444 (Cal.)

—S. 192—Fabrication of evidence not admissible—If possible.

There can be no fabrication of false evidence within S. 192 if the evidence is not in itself admissible. I.P.R. 1914 (Cr.)=139 P.L.R. 1914=15 Cr.L.J. 344=23 Ind. Cas. 696.

—Ss. 192 and 193—False statement made in the recital of title in a document—Statement not admissible in evidence against persons against whose interest such statement is made.

A person does not commit the offence of fabricating false evidence punishable under S. 193, Indian Penal Code, by making a false statement in the recital of title to property in a document when such statement is not admissible in evidence against the person or persons against whose interest such statement is made. (1905) 2 C. L. J. 46=2 Cr.L.J. 383.

—S. 192—Ingredients of—Offence under.

The essence of the offence under S. 192, consist in this, that a false entry must be under S. 192, made in a book or record or a false statement must be made in a document. Secondly, that a false entry of false statement must be made with a certain intention, namely, that the false entry or false statement may appear in evidence in a judicial proceeding or any other proceeding taken by law before a public servant. Thirdly, a false entry or statement so appearing in evidence may cause any person in such proceeding who has to form an opinion upon the evidence to entertain an erroneous opinion. Fourthly, the erroneous opinion must be touching upon a material point, that is to say, a point material to the result of the said proceeding. A.I.R. 1937 Cal. 42=38 Cr. L. J. 700=169 Ind. Cas. 64.

—Ss. 192 and 193—Intention is gist of offence.

It is incorrect to say that S. 193, is not intended to be applicable to an act done by an offender to screen himself from punishment, and is only applicable to an act done by the offender for the purpose of getting another person into trouble.

Per Jack, J.—An accused could only be guilty under S. 193, if he had the intention of fabricating evidence in order that it should appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant, as such or an arbitrator as laid down in S. 193. The prosecution must, therefore, show that there was such an intention and that the accused did not fabricate evidence merely to screen himself in the belief that his conduct would result in no proceedings whatever being taken. A.I.R. 1935 Cal. 304=37 Cr.L.J. 698=62 C. 666=162 Ind. Cas. 910.

—Ss. 192 and 193—Intention to divert suspicion and conceal one's guilt.

The mere intention to divert suspicion and conceal one's guilt need not necessarily amount to fabricating evidence which may appear in a judicial proceeding or in a proceeding taken before a public servant or before an arbitrator so that such authorised person would form a different opinion. But if the act of an accused person comes within the language of S. 192, he cannot take shelter



behind the circumstance that he is an accused person to escape the penalty under S. 193. A.I.R. 1934 All. 1017=1934 A.L.J. 1064=57 All. 403=36 Cr.L.J. 379=4 A.W.R. 535=153 Ind. Cas. 619.

—S. 192—Judicial proceeding need not be pending.

It is not essential for the purpose of these sections that the judicial proceedings in which the person intends to use the false evidence must be pending at the date of the fabrication. 59 Ind. Cas. 193=45 Bom. 668=22 Cr.L.J. 49=A.I.R. 1921 Bom. 366=22 Bom.L.R. 1239.

—S. 192.

For the purpose of S. 192 no judicial proceeding need be pending at the time of the fabrication. It is enough that there is a reasonable prospect of such a proceeding, having regard to the circumstances of the case and that the document is intended to be used in such a proceeding. 59 Ind. Cas. 135=22 Cr.L.J. 23=22 Bom.L.R. 1229.

—S. 192—Document not leading to form erroneous opinion.

There is no fabricating of false evidence if document produced does not lead to the forming of an erroneous opinion touching a particular point, but rather to the forming of a correct opinion. 40 All. 35=15 A.L.J. 819=19 Cr.L.J. 2=42 Ind. Cas. 914.

—S. 192—Fabricating false document—False statement by implication.

A person commits the offence of fabricating false evidence, if he makes a document which, though it may not contain any false statement in express terms, yet contains false recitals which imply such a false statement. (1905) 10 C.W.N. 220=3 Cr.L.J. 196.

—Ss. 192 and 193—Essentials for conviction.

In order to convict a person of fabricating false evidence under S. 193, it is necessary to find that the person intended that the fabrication may appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant as such as before an arbitrator. Where the accused by falsely representing to the Marriage Registrar that a certain marriage had been solemnized induced the Registrar to make a false entry of the registration of the marriage:

Held—That the accused cannot be convicted of the offence of fabricating false evidence under S. 193, in the absence of the finding that the intention of the accused was the false entry in the Marriage Register might appear in evidence in a judicial proceeding or some other proceeding of a like nature as contemplated by S. 192. (1907) 11 C.W.N. 911=6 Cr.L.J. 162.

—Ss. 192 and 193—Signature without reading—Liability.

A person signing a report without reading it cannot be said to know that the report was false. It is not an offence under S. 193, I.P.C. 17 A.L.J. 574=20 Cr.L.J. 268=50 Ind. Cas. 28.

—S. 192—"Purpose of being used."

The purpose with which a document might have been prepared is a matter of inference. 90 Ind. Cas. 534=42 C.L.J. 215=26 Cr.L.J. 1574=A.I.R. 1926 Cal. 224.

2 (b). Offence under section—What is and what is not.

—Ss. 192 and 193.

An Amin making a false return on an execution process is guilty of the offence under S. 193. A.I.R. 1945 Mad. 9=(1944) 2 M.L.J. 157=57 L.W. 465=1944 M.W.N. 684=46 Cr.L.J. 259=217 Ind. Cas. 236=1.L.R. (1945) Mad. 459.

—Ss. 192 and 193—Offence of abetment of making false document and fabricating false evidence.

An offence of abetting the making of a false document can be committed by attesting the document even if the document does not require attestation to complete it, if the person who brought the document into existence intended that it should be attested and that the accused should be one of the attestors. The document in such circumstances is, therefore, not complete until the accused had signed it. He, therefore, abets the making of a false document and where he must have known that the document is intended to be used for the purpose for which it is made he is also guilty under S. 193 of fabricating false evidence. A.I.R. 1942 Mad. 92=43 Cr.L.J. 227=(1941) 2 M.L.J. 746=1941 M.W.N. 1036=197 Ind. Cas. 630.

—Ss. 192 and 193.

The mere fact that a document would be ultimately inadmissible in evidence does not necessarily take it out of the mischief of S. 193.

The accused were charged under S. 193, for fabricating a document purporting to be a *kabuliyat* executed by them in favour of the complainant. It contained a recital to the effect that the land-lord (the complainant) had agreed to accept this document and to grant a lease of the lands to which it related, to the accused:

Held, that the document satisfied the definition of fabricating false evidence contained in S. 192, because it might certainly lead the Court before which it was produced to come to the conclusion that the document was genuine and that it had the effect of creating a lease of lands in the accused's favour:

Held further, that the question whether it was the intention of the accused to use the document in a judicial proceeding became a question of inference. A.I.R. 1940 Cal. 419=1.L.R. (1940) 1 Cal. 465=42 Cr.L.J. 93=191 Ind. Cas. 165.

—Ss. 192 and 193.

An entry would be a false entry or a statement in a record or document would be a false entry if it does either by reason of some false additions or of some material omissions misrepresent the truth. The omission may be illegal or may



not be illegal. The thing to consider is what is the effect of the omission on the entry as made or on the statement as occurring in a document:

Held, that the officer in charge of thana was not guilty of offence under S. 192 inasmuch as it was not proved that he had any motive in making the omission in recording report.

Held also, that he was not bound by law to record a verbatim report of non-cognisable offence, the substance only of the report being sufficient. A.I.R. 1937 Cal. 42=38 Cr.L.J. 700=169 Ind. Cas. 64.

—Ss. 192 and 193.

Fabricated account books relied in the enquiry before the Income-tax Officer—Offence is punishable under S. 193, I. P. C. (1937) 20 N.L.J. 214.

—Ss. 192, 193, 465—Fabrication of electoral roll.

Procuring by improper, dishonest and fraudulent means, the entry in the finally published electoral roll, of the names of persons who were not legally eligible to vote, and wilfully and improperly omitting from the electoral roll the names of certain other persons entitled to vote, and fraudulently and dishonestly altering the electoral roll after its final publication, by inserting certain names therein without lawful authority are offences punishable under Ss. 193 and 465. A.I.R. 1934 Cal. 838=39 C.W.N. 20=36 Cr.L.J. 385=62 Cal. 275=153 Ind. Cas. 657.

—Ss. 192, 193, 471 — Third party forging endorsement on pro-note.

Where a person entrusted a promissory note with a Vakil's clerk for filing a suit thereon and the latter failed to file a suit within the period of limitation but but after that period forged an endorsement of payment on the pro-note and caused the suit to be filed:

Held, that the act of the Vakil's clerk fell within S. 193, and complaint of the Court was necessary for his prosecution. A.I.R. 1933 Mad. 413=37 L.W. 547=1933 M.W.N. 217=34 Cr. L.J. 800=144 Ind. Cas. 519.

—Ss. 192 and 193.

Persons producing the forged receipt and the attestors can be convicted under S. 193. 1932 M.W.N. 454.

—Ss. 192 and 194—False dying declaration.

While a false dying declaration may well, in certain circumstances, go in as evidence, the intent that it may appear in evidence in a judicial proceeding and cause an erroneous opinion to be entertained touching a point material to the result of such a proceeding, which is an essential ingredient in the definition cannot easily be inferred of a man who was thought to be dying at the time and did nothing by himself or by his friends to communicate with or seek any redress from the authorities. The intent of knowledge necessary under S. 194 presents an even greater difficulty in the application of that section, for it postulates a

feeling in the mind of the petitioner that his recovery was impossible. 129 Ind. Cas. 87=A.I.R. 1930 Pat. 550.

—Ss. 192, 193 and 199 — False affidavit intended to be used in a judicial proceeding but voluntarily made—It is an offence both under Ss. 193 and 199.

Where an identifier swore a false affidavit intended to be used in a judicial proceeding although no affidavit was required from the identifier:

Held, that the offence of fabricating false evidence within the meaning of S. 193 was complete.

Held, further, that the false affidavit is also punishable under S. 199, as the Court was authorized under the circular orders of the High Court and O. 19, C.P. Code, to receive an affidavit from an identifier as evidence of the fact of service of summons. 106 Ind. Cas. 703=6 Pat. 760=29 Cr.L.J. 111=A.I.R. 1928 Pat. 161.

—Ss. 192 and 193 — Accused sending waste paper by insured packet, purporting to contain currency notes in satisfaction of his debt due to addressee—Application to file the acknowledgment in suit by the addressee—Accused is guilty under section.

A owed B certain amount. He sent a registered and insured packet to B, purporting to contain currency notes in settlement of debt and got acknowledgment of the receipt of the packet. The packet was found to contain waste paper. B sued A for the debt. A applied to Court to admit the acknowledgment in evidence.

Held, that A was neither guilty under S. 417 for cheating, nor of attempt to cheat. A's action amounted to preparation.

To satisfy the definition of cheating there must be immediate causation, and the act itself must involve the probability. It is not enough to say that the signed acknowledgment is likely to be used as to cause damage; the act of signing itself must be likely to cause damage:

Held, further that A was guilty under S. 193 for fabricating false evidence in judicial proceedings and sanction under S. 195, Cr.P. Code, was necessary. 99 Ind. Cas. 102=24 M.L.W. 725=28 Cr.L.J. 70=38 M.L.T. 187=7 A.I.Cr.R. 7=A.I.R. 1927 Mad. 199=51 M.L.J. 800.

—Ss. 192 and 193.

Where the accused forged a kabuliyat:

Held, that the inference that the intention of the accused in preparing the document was that the document in question should be used in a judicial proceeding, even though such a proceeding, had not in fact been instituted, is a reasonable one. 90 Ind. Cas. 534=42 C.L.J. 215=26 Cr. L.J. 1574=A.I.R. 1926 Cal. 224.

—Ss. 192 and 193.

Making false claim against railway for detention of goods by over-stating of value is punishable under S. 193. 75 Ind. Cas. 703=25 Cr. L.J. 15=A.I.R. 1924 Nag. 35.



—Ss. 192 and 193 — Fabricating false document to support claim of marriage in judicial proceedings—Intention to injure the woman and her husband — Accused is guilty under Ss. 193 and 423.

An accused had unsuccessfully tried to marry a woman. Thereafter he got registered a document containing a false recital that he had married her and purported to transfer certain land to her in lieu of her dower:

Held, that he was acting in furtherance of his desire to secure the person of the woman and thus, in the circumstances, he could only do by judicial proceedings. Therefore, his intention was to use this document and the false statements therein in judicial proceedings and thereby mislead the Judge. So accused was guilty under S. 193, I.P.C.

The words "fraud" "fraudulently" and "to defraud" do not connote deprivation of property and the deception of the person so deprived. Deprivation of property, actual or intended, is not an essential ingredient in fraud, or the intention to defraud, and it is not essential that the person deceived or to be deceived and the person injured or intended to be injured should be one and the same.

In the present case in addition to an intention to deceive and mislead, the further intention to cause injury to the woman and her true husband, and to support accused's own false claim to that status is clearly to be deduced from the facts. So the accused was guilty under S. 423, I.P.C. also. 66 Ind. Cas. 996=48 Cal. 911=A.I.R. 1921 Cal. 226.

—Ss. 192 and 193.

A person fabricating a false rent-note showing that a house has been let to him for a certain period is guilty under S. 193 of the Code. 59 Ind. Cas. 135=22 Cr. L.J. 23=22 Bom. L.R. 1229.

—Ss. 192 and 193 — Witnessing service of summons on wrong person.

Witnessing the service of summons on a wrong person is no offence under S. 193, I.P.C. unless it is proved that accused was aware that service was to be expected on a different person. 20 Cr. L.J. 641=52 Ind. Cas. 417.

—Ss. 192 and 193—Kabuliyat—False recital.

The accused had executed a Kabuliyat with false recitals designedly made. The Kabuliyat was accepted by the complainant:

Held, that the Kabuliyat would be evidence against the complainant and that the accused would be guilty under S. 193 of the Penal Code. 46 Cal. 986=29 C.L.J. 522=20 Cr.L.J. 574=52 Ind. Cas. 62.

—Ss. 192, 193 and 465—Fabrication of false evidence—Disonest intention.

Where with a view to get a refund of the stamp duty on a conveyance which had fallen through, the accused altered its date so as to apply in time to the Collector for refund without knowing that even without the alteration, the application would be in time: Held, that there was a dishonest and fraudulent intention and they were guilty of fabri-

cating and abetting the fabrication of false evidence under Ss. 192 and 193, I.P.C. and not forgery. 6 Cal. 482, Ref. 28 C.L.J. 213=19 Cr.L.J. 971=47 Ind. Cas. 871.

—Ss. 192, 193 and 209—Suing wrong person on a genuine pro-note—Offence.

Where a plaintiff institutes a suit against a wrong person of a similar name but on a genuine promissory note, not dishonestly and intentionally, a sanction to prosecute under Ss. 193 and 209, I.P.C., cannot be granted. 16 Cr.L.J. 154=8 Bur. L.T. 79=27 Ind. Cas. 218.

—Ss. 192, 193 and 463—Endorsement on mortgage-deed of payment—Intention to cheat—Offences committed.

A false endorsement on a mortgage-deed of payment is an offence coming within the purview of Ss. 193 and 463 of the Indian Penal Code. 12 A.L.J. 104=15 Cr. L.J. 221=22 Ind. Cas. 1005.

—Ss. 192, 193 and 210—Effect of—Mistake in specifying property.

The decree for sale of half a house was passed; the applicant for execution preferred one application for half of the house, but subsequent application for whole of the house; Held, there was no criminal or dishonest intention under S. 210 or 193, I.P.C. 7 A.L.J. 93=11 Cr.L.J. 202=5 Ind. Cas. 695.

—S. 192—Fabricating false evidence—Definition.

One Cheda Lal, whose brother Debi was an accused person applied to the Court on behalf of the accused asking that the witnesses for the prosecution might first of all be made to identify Debi. The Court assenting to this request, Cheda Lal produced before the Court twelve men none of whom could be identified as Debi by any of the prosecution witnesses. Upon being asked by the Court where Debi was, Cheda Lal pointed out a man who upon further investigation was discovered to be wearing a false moustache and could be not Debi at all, but one Chimman. Held, upon these facts, that Cheda was rightly convicted of fabricating false evidence having regard to the definition contained in S. 192. 1907 A.W.N. 107=4 A.L.J. 237=29 A. 351.

—Ss. 192 and 193—Fabricating false evidence—Putting in the signature of dead person.

Per Banerji, J.—The fact that a person put in the signature of a dead person to an application for partition along with his own as part of the verification thereof does not constitute fabrication of false evidence within the meaning of S. 193, I.P.C., because (1) the law does not require the verification; (2) the signature below the verification cannot be used as evidence of the fact that an application was made by the deceased man; (3) it was not necessary that all persons should have made the application to enable the Revenue authorities to take action and therefore the signature was not material. 1905 A.W.N. 52=2 A.L.J. 203.



—Ss. 192, 193, 511 — Fabrication of false evidence—Attempt to commit forgery.

A person who obtained a stamp paper in the name of X, by making his servant personate X and had in his possession with the object of forging a document as if executed by X was held guilty of abetment of fabrication of false evidence, though not of an attempt to commit forgery. (1902) A.W.N. 196=25 A. 75.

—Ss. 192 and 193.

Charges of fabricating false evidence and extortion are not private disputes as neither of these offences is compoundable. A.I.R. 1936 Sind 146=30 S.L.R. 217=37 Cr.L.J. 1086=164 Ind. Cas. 1020.

—S. 193.

See also: Ss. 191 and 192.

### Synopsis.

1. Appeal and Revision
2. Judicial proceedings — What are and what are not.
3. Procedure for taking cognizance of offence
4. Sentence
5. Miscellaneous.

### 1. Appeal and Revision.

—S. 193—Appeal.

Perjury committed in administrative enquiry—No appeal lies against order for prosecution. 120 Ind. Cas. 122=30 Cr.L.J. 1154=1930 A.L.J. 251=1929 Cr.C. 664=A.I.R. 1929 All. 936.

—S. 193—Intention—Question of fact—Finding arrived at by approach in erroneous way and without taking into consideration circumstances in which statements were made—If final.

Whether a person can be said to have intentionally given false evidence within the meaning of S. 193, I.P. Code, is a pure question of fact. Where the Courts below have approached the case in an erroneous way and have not taken into consideration the circumstances under which the alleged false statements in the nature of hearsay were made, the finding of intentionally giving false evidence cannot be accepted in revision. 49 Cr.L.J. 188=A.I.R. 1948 Sind 76.

—S. 193.

Appeal before District Judge under S. 476-B, Criminal P.C.—District Judge considering evidence and directing complaint to be made against applicant for prosecution under S. 193, Penal Code—High Court can entertain revision under S. 115, Civil P.C., against the order. 170 Ind.Cas. 125=(1937) A.L.J. 10=1936 A.W.R. 1272.

—S. 193.

Revision Court cannot direct further inquiry into an offence under S. 193, where the sanction of the Court in which that offence was committed is wanting. 118 Ind. Cas. 232=1929 A.L.J. 512=10 L.R.A.Cr. 9=30 Cr.L.J. 874=12 A. I. Cr. R. 22=1929 Cr. C. 1=A.I.R. 1929 All. 374.

2. Judicial proceedings—What are and what are not.

—S. 193—Judicial proceeding—Private inquiry outside Court under Sind Suppression of Hur Outrages Act, 1942.

**Quaere:**—Whether private inquiries held by a Magistrate acting under S. 4 (1) of the Sind Suppression of Hur Outrages Act of 1942, constitute any stage of a judicial proceeding? 49 Cr.L.J. 188=A.I.R. 1948 Sind 76.

—S. 193—Proceedings before Debt Settlement Board.

No prosecution will lie under S. 193, I. P. C., for giving false evidence or fabricating false evidence in respect of proceedings before Debt Settlement Board as they are not judicial proceedings. A.I.R. 1940 Cal. 286=44 C.W.N. 550=41 Cr. L. J. 662=I. L. R. (1940) 2 Cal. 14=188 Ind. Cas. 686.

—S. 193.

The statement made by accused before the manager dealing with claim under Chota Nagpur Encumbered Estates Act must be taken to be evidence within the meaning of the I.P.C., and if the evidence is false and intentionally given, the offence under S. 193 is committed. A.I.R. 1935 Pat. 515=16 P.L.T. 693=36 Cr. L. J. 1354=15 Pat. 69=1 B. R. 872=158 Ind. Cas. 324.

—S. 193—Executive proceedings.

A Magistrate has no power to administer an oath to a person when he is examined as a witness before him in an enquiry regarding the headman of a village. The orders of a Magistrate in respect of such matters are executive orders and the accused cannot be convicted under S. 193. A.I.R. 1934 All. 988=57 A. 407=1934 A.L.J. 1087=36 Cr.L.J. 264=4 A. W. R. 815=153 Ind. Cas. 133 (1).

—Ss. 192 and 193 — Execution proceedings—Execution proceedings are judicial proceedings for purposes of the sections.

Execution proceedings are judicial proceedings for the purpose of Ss. 192 and 193. 59 Ind. Cas. 193=45 Bom. 668=22 Cr.L.J. 49=A.I.R. 1921 Bom. 366=22 Bom. L.R. 1239.

—S. 193.

Statements recorded by a Magistrate in the course of a Police investigation under S. 164, Criminal P. C., are evidence in a stage of a judicial proceeding within the meaning of explanation 2 to S. 193. A.I.R. 1933 Mad. 125=34 Cr.L.J. 92=1933 M. W. N. 100=140 Ind. Cas. 756.

—S. 193, Expl. 2—False statement under S. 164, Criminal P. C.

A statement under S. 164, Criminal P. C., is not evidence in a stage of judicial proceeding within the meaning of Expl. 2, S. 193, I.P.C., and a person cannot, therefore, be convicted under part 1 of S. 193 in respect of such a statement. A.I.R. 1932 Lah. 254=33 P.L.R. 179=33 Cr.L.J. 413 (2)=137 Ind. Cas. 131.

—Ss. 192 and 193—Stage of Judicial proceeding—Giving false evidence—Magistrate recording



evidence acting beyond jurisdiction—Third class Magistrate recording statement under S. 164, Cr. P. Code.

A third class Magistrate not being empowered to commit for trial, cannot deal judicially with any stage of the proceedings in a case exclusively triable by a Court of Session. If such Magistrate records a statement under S. 164, Cr. P. Code in a case of that nature, such statement would not be evidence in a stage of judicial proceedings within the meaning of Ss. 191 and 193, I.P.C. 11 B. 702, Foll. 14 Bom. L.R. 753=13 Cr.L.J. 709=16 Ind. Cas. 517.

—S. 193—Judicial proceedings, meaning of—Cr.P.C., S. 164.

An investigation under S. 164 of the Cr. P. C. is one preliminary to trial and comes within explanation 2 to S. 193 of the Penal Code. 5 S. L. R. 174=13 Cr.L.J. 33=13 Ind. Cas. 273.

—S. 193—'Judicial proceeding'—Investigation under S. 164, Cr. P. C.—Magistrate competent to administer oath.

A Magistrate when acting under S. 164, Cr. P. C. as a court is entitled to administer an oath. An investigation under Chapter XIV, Cr. P. C., is a stage of a judicial proceeding and therefore a person who gives a false evidence therein is liable to be convicted under S. 193, I.P.C. (1905) 29 M. 89=3 Cr.L.J. 370.

—S. 193—Inquiry under S. 11 of the Frontier Crimes Regulations is not a judicial proceeding.

Inquiry by the Magistrate, elaka under orders from the District Magistrate to find out whether action under S. 11 of the Frontier Crimes Regulation is necessary, is not a judicial proceeding and giving false evidence therein is no offence under S. 193. 82 Ind. Cas. 710=6 L.L.J. 375=25 Cr.L.J. 1350=A.I.R. 1924 Lah. 729.

—S. 193—Judicial proceedings, meaning of—Registrar—False statement before—If punishable.

S. 63 of the Registration Act authorises the Sub-Registrar to administer oath and record statement of the petitioner before him and a person making a false statement before the Sub-Registrar is punishable under S. 82 of that Act and S. 193 of I.P.C. 12 M.L.T. 376=(1912) M. W. N. 1107=14 Cr. L. J. 102=18 Ind. Cas. 662.

—Ss. 193 and 211—Judicial proceedings, meaning of—Statement to Magistrate as head of police—Conviction under S. 193—If sustainable—Oath.

Where a statement against a police officer was made to a District Magistrate as the head of the police, and not as a Magistrate and the Magistrate examined the maker of the statement on oath and after finding the statement to be a baseless one, convicted the latter under S. 193, I.P.C. Held, that the conviction could not stand, and also that it was unnecessary and perhaps unlawful to administer oath to him. 35 All. 102=11 A.L.J. 15=14 Cr.L.J. 56=18 Ind. Cas. 344.

—S. 193—Judicial proceedings, meaning of.

A proceeding subsequent to setting aside ex-parte decree on application of one against whom the suit was dismissed, is not judicial proceeding. 8 A.L.J. 674=12 Cr.L.J. 373=11 Ind. Cas. 141.

—S. 193—Judicial proceedings, meaning of—Punjab Land Alienation Act, (XIII of 1900), S. 19.

A mortgagee having produced a copy of the mortgage-deed before the Deputy Commissioner, that officer referred it to the Tahsildar for investigation and report. The Tahsildar did not make an inquiry. Before the Naib Tahsildar, the mortgagee stated that no payments were made by the mortgagor to him. On enquiry, payments were found to have been made and were endorsed on the back of the original mortgage-deed and the document was withheld for that reason. The Deputy Commissioner sanctioned prosecution of the mortgagee for falsification of evidence by fraudulently producing the copy of the mortgage-deed and making a false statement before the Naib Tahsildar. Held, that the prosecution was illegal for (1) the mere production of the copy did not amount to falsification of evidence and (2) the proceedings before the Naib Tahsildar were ultra vires. 80 P.L.R. 1910=11 Cr.L.J. 601=8 Ind. Cas. 243.

—S. 193—Perjury—Criminal procedure Code, S. 476—Enquiry under if judicial proceeding.

An inquiry under S. 476, Criminal Procedure Code is a judicial proceeding and a witness giving false evidence in the course of such an enquiry is guilty of an offence under S. 193 of the Penal Code. (1908) 32 M. 49=19 M.L.J. 42=4 M.L.T. 404=1 Ind. Cas. 597=9 Cr.L.J. 41 (F.B.).

3. Procedure for taking cognizance of offence.

See also: Cr.P.C., Ss. 195 and 476.

—S. 193.

The filing of a complaint by a proper person is a condition necessary to the taking cognizance of an offence under S. 193, I.P.C. A.I.R. 1942 Mad. 326=1942-1 M.L.J. 105=1942 M.W.N. 126=55 L.W. 321=43 Cr.L.J. 738=201 Ind. Cas. 437.

—Ss. 193 and 500—Offence under both sections—Complaint by person defamed under S. 500—Maintainability—Complaint by Court under S. 195, Criminal Procedure Code—If essential.

Per Govinda Menon, J.—Even when the Court before which the alleged defamer had given evidence finds that the deposition is false, it is open to the person defamed to institute proceedings under S. 499, Penal Code, without the Court filing a complaint in accordance with the provisions of S. 195, Criminal Procedure Code. All the more so is such a complaint unnecessary where a defamatory statement is made by a witness in the course of a judicial proceeding and the Court has not adjudicated upon the truth or falsity of it, where the Court was deprived of an opportunity of so adjudicating; in all such cases it is open to the party defamed to take proceedings under S. 499, Penal Code. (1941) 2 M.L.J. 618=1.L.R. (1942) Mad. 158, approved.

Per Balakrishna Aiyar, J.—Where an alleged offence falls both under Ss. 193 and 500 of the Penal Code a complaint of the Court is not necessary to enable a Magistrate to take cognizance of a complaint under S. 500 of the Penal Code alone.

Per Basheer Ahmed Sayeed, J.—Any statement or averment made in the course of judicial proceedings whether false or true could be made the subject-matter of a criminal prosecution by a person aggrieved when



the said statement or averment or evidence is also capable of being brought within the scope of S. 193 of the Penal Code, without a complaint given by the Court before which the statement or averment was made or evidence given. 1950 M.W.N. 878=(1950) 2 M.L.J. 686=A.I.R. 1951 Mad. 34 (F.B.).

—S. 193—Complaint by Court necessary.

A complaint by the Court is necessary for a prosecution for an offence under S. 193, and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation. A.I.R. 1940 Mad. 677=51 L.W. 491=1940 M.W.N. 392=(1940) 1 M.L.J. 689=41 Cr.L.J. 906=190 Ind. Cas. 358.

—S. 193.

A complainant cannot avoid the provisions of S. 195, Criminal P.C., by making a complaint for a lesser offence. An Amin who makes a false return of an execution process is guilty of an offence under S. 193, I.P.C., and a complaint in respect of it must be made by the Court, and the complainant cannot avoid the provisions of S. 195, Criminal P.C., by filing a complaint under S. 167, I.P.C. A.I.R. 1945 Mad. 9=57 L.W. 465=(1944) 2 M.L.J. 157=1944 M.W.N. 684=46 Cr.L.J. 259=217 Ind. Cas. 236.

—S. 193.

The accused were charged under Ss. 193, 211, 218 and 220, I.P.C., in respect of proceedings under S. 109, Criminal P.C. There was no complaint filed by the Magistrate before whom the proceedings were pending:

Held, that the offences under Ss. 193 and 211, were committed in relation to proceedings pending in the Court of the Magistrate, and no Court could take cognizance of these offences except on the complaint in writing of the Magistrate in whose Court these proceedings were pending or of some other Court to which the Magistrate in question, was subordinate. The charges under these sections, therefore, must be quashed. A.I.R. 1937 Lah. 802=39 P.L.R. 1011=39 Cr.L.J. 122=172 Ind. Cas. 373.

—S. 193.

If the offence falls under both the heads S. 193 and S. 218, I.P.C., and forms part of a single act, the complaint cannot be permitted to proceed for an offence under S. 218 only, which does not require sanction. 1935 M.W.N. 1344.

—S. 193—Complaint by Collector acting without jurisdiction, effect of.

The summary investigation which a Collector holds under S. 14, Ben. Patni Regulation (VIII of 1819), is one in the course of which proofs can be called for and as the result of which an award may be made. The Collector holding the investigation, therefore, is a tribunal which would come within the meaning of the word 'Court.' Consequently, a complaint under S. 193, I.P.C. cannot be taken cognizance of except upon the complaint of that Court. The Deputy Collector is a Court though he may not have been acting with jurisdiction. It is not correct to say that an offence under

S. 193, I.P.C., which is an offence against public justice and so not cognizable without the complaint of the Court concerned or some Court to which it is subordinate, would be cognizable on the complaint of some other person or body when the Court itself was acting without jurisdiction. A.I.R. 1934 Cal. 457=35 Cr.L.J. 946=38 C.W.N. 578=61 C. 792=149 Ind. Cas. 363.

—S. 193.

A person cannot be prosecuted under S. 471, I.P.C., when the facts alleged constitute an offence under S. 193, for which a complaint by the Court is necessary. A.I.R. 1933 Mad. 413=37 M.L.W. 547=1933 M.W.N. 217=34 Cr.L.J. 800=144 Ind. Cas. 519.

—S. 193—Evidence—Crucial date.

Where an offence is committed under S. 193, I.P.C., in respect of proceedings in a Court of law which are contemplated but which in fact are never started, S. 195, Criminal P.C., does not apply, and although an offence has been committed under S. 193, I.P.C., the Magistrate can take cognizance of it without getting any complaint from a Court.

Although for the purpose of determining whether an offence has been committed under S. 193, I.P.C., the crucial date is the date on which the offence was committed, yet for the purpose of seeing whether a complaint by the Court is necessary under S. 195, Criminal P.C., the crucial date is not the date when the offence is committed but the date when the Court takes cognizance of the offence.

Though proceedings contemplated at the date of the offence are sufficient to constitute the offence under S. 193, I.P.C., proceedings contemplated at the date when the Magistrate takes cognizance are not sufficient to bring the case within S. 195, Criminal P.C.

Where the charge is that the evidence has been fabricated in connection with proceedings which are only contemplated by the accused, it is upon the prosecution (Crown) to prove the fact that proceedings were contemplated. A.I.R. 1932 Pcm. 185=34 Bom.L.R. 294=58 Bom. 213=33 Cr.L.J. 386=137 Ind.Cas. 134.

—S. 193.

Where a party who has brought a civil suit has not himself fabricated the evidence in relation to that suit but is challenging certain evidence the opposite party might produce against him, to his prejudice as being false and fabricated and it is not produced and the party succeeds in the suit, party is entitled to file a complaint against the other party under Ss. 192 and 193, Penal Code, and it is not necessary that the Court should file complaint under S. 195 (b), Cr. P. Code. 32 Bom. L. R. 589=A.I.R. 1930 Bom. 337.

—S. 193—Sanction.

Sessions Judge can take action even though offence is committed before his predecessor. 93 Ind. Cas. 991=27 Cr. L. J. 527=A. I. R. 1926 Lah. 394.



—S. 193—Who can grant sanction—Offence against public justice—Sanction.

An offence under S. 193 of the I. P. C. is an offence against public justice. The person best qualified to say whether a prosecution should or should not be instituted is the Judge before whom the evidence was given and who had considered all the facts of the case. 9 A.L.J. 538=13 Cr. L.J. 496=15 Ind. Cas. 496.

—S. 193—Public Justice—Offences against—Duty of court to proceed under S. 476, Cr.P.C.—See Cr.P.C., S. 476. 4 Bom.L.R. 618=26 B. 785.

—S. 193—Accused not given opportunity to explain.

The accused in the course of a report to the Police regarding theft of certain articles mentioned that he missed Rs. 410 which he had left in an unlocked drawer. During the examination on being asked where he got this money from, he answered that it was part of the amount of Rs. 500 which he had borrowed from his hostess. This lady was examined first as to some other questions and then without further introduction she was asked whether she had lent the accused the amount of Rs. 500, she shook her head and said she did not lend him Rs. 500 and then after a pause, added, as far as she could remember. The next question asked to her was also on another subject. The accused was prosecuted for perjury:

Held, that as the question put to the lady about the loan was an isolated one without explaining to her what the question was directed to or the circumstances, and as no opportunity was given her to explain her isolated answers nor the accused re-called to amplify the evidence he had given, it appeared as if a trap had been laid in this way for the accused and that a charge of perjury ought not to be thus lightly made or based upon a mere isolated answer:

Held, also that although the Code gives a Magistrate or a Judge a full discretion as to whether or not he shall give the accused an opportunity to show cause why a complaint should not be made against him, this was a case in which the learned Magistrate ought to have given notice to the accused before making the complaint because the accused might well have been able to explain more fully the circumstances in which he gave his evidence, and to satisfy the Magistrate that in fact, he had not made any false statement. A.I.R. 1933 Cal. 606=34 Cr.L.J. 833=144 Ind. Cas. 846.

—S. 193—Application for transfer with sworn affidavit—Denial of allegations by accused by counter affidavit and also by trial Magistrate's statement—Complaint against applicant under S. 193 on the basis of counter affidavit and Magistrate's statement, propriety of.

An application was put in for the transfer of a case on the ground that the accused person had been seen coming away from the compound of the trying Magistrate. This fact was sworn by an affidavit. The accused denied this statement by a counter-affidavit and the trying Magistrate also denied it by his own statement. A complaint under S. 193, I.P.C., was ordered to be drawn up against the complainant. It was contended that a complaint

could not be drawn up on the basis of the counter-affidavit and the Magistrate's statement:

Held, that it was an unwise course to make a complaint on the basis of the counter affidavit and the trial Magistrate's statement, when the difficulty could have been overcome by directing an inquiry under S. 476, Criminal P.C. and the objections raised could thus have been avoided. A.I.R. 1931 Cal. 344=53 C.L.J. 184=32 Cr.L.J. 674=58 Cal. 1211=35 C.W.N. 690=131 Ind. Cas. 262.

—S. 193—Contents of complaint.

In prosecution for perjury, the complainant Court should point out particular statement made as deposition as being in its opinion false and that the maker knew it to be false or did not believe it to be true. 1936 M.W.N. 464.

—S. 193—Complaint under—Particulars necessary.

A complaint generally ought to contain sufficient particulars as to the offence with which a man is charged, and in the case of an offence under S. 193, a complaint ought to mention the particulars, for S. 193 consists of two parts: one relating to false statements and the other to the fabrication of false evidence. If it is a false statement that is complained of then the false statement should be set out in detail. It should not be left to the trying Court to find out what statements are false and what statements are not false. 90 Ind. Cas. 661=26 Cr.L.J. 1539=1925 M.W.N. 470=A. I. R. 1925 Mad. 1157.

—S. 193.

A complaint of offence under S. 193, I. P. C., must state what was the false evidence given by the accused.

It is not for the Magistrate to fish about in order to find out what statements the complaining Court may have considered to be false. The complaint itself must make it clear; otherwise a complaint under S. 193 cannot stand. 86 Ind. Cas. 449=48 Mad. 395=21 M.L.W. 664=26 Cr.L.J. 801=A.I.R. 1925 Mad. 609=48 M.L.J. 290.

#### 4. Sentence.

—S. 193—False statement under S. 164, Criminal P.C. contradicted at his trial—Heavy penalty if proper.

The Court should not impose a heavy penalty in a case where the accused who has made a false statement under S. 164, Criminal P.C., and has contradicted it in his evidence, is alternatively convicted under S. 193, I. P. C. Where, however, the statement at the trial is false it would be much more serious matter calling for severe sentence. A.I.R. 1940 Bom. 385=42 Bom. L. R. 745=42 Cr.L.J. 155=191 Ind. Cas. 336.

—S. 193—Statements need not be material for decision of suit but for purpose of sentence.

It is not necessary that the statements which form the subject-matter of a charge under S. 193, should be material for the decision of the suit and the question can only be considered for the purpose



of the sentence in the event of a conviction. A.I.R. 1939 Lah. 529=41 P.L.R. 652=41 Cr.L.J. 204=185 Ind. Cas. 588.

—S. 193—Extenuating circumstances.

The accused committed perjury in the Court of a Magistrate but had done his best to put the matter right before the Tribunal. He had been actually in the lock-up for almost 18 months. He was a student when he was arrested and 5 years of his life had been wasted. He might have been prosecuted for a failure to comply with the terms under which he was given a pardon but he had not in fact been prosecuted:

Held, that the sentence of 18 months was too severe and should be reduced to one of 6 months. A.I.R. 1934 Lah. 981=16 Lah. 153=36 Cr.L.J. 402=37 P.L.R. 534=153 Ind. Cas. 547.

—S. 193.

The sentence of imprisonment with the alternative of fine is not in accordance with S. 193 which provides for imprisonment and fine. 1933 M.W.N. 896.

—S. 193—Sentence.

Giving false answers to questions which should not have been asked but were asked—Perjury is committed but sentence should be light. 90 Ind. Cas. 715=7 P.L.T. 428=26 Cr. L. J. 1611=A. I. R. 1926 Pat. 168.

—S. 193.

S. 193 does not say that there are two kinds of perjury, but that if perjury is committed in the stage of a judicial proceeding it may be punished more severely than if committed in any other case. The offence is perjury wherever it may be committed. 60 Ind. Cas. 593=45 Bom. 834=23 Bom. L.R. 1=22 Cr.L.J. 241=A.I.R. 1921 Bom. 3 (F.B.)

—S. 193 — Lenient sentence — Intending surety put unnecessary questions—Perjury.

Where an intending surety committed perjury in the matter of answering a question as to whether he was imprisoned 30 years prior to that date, their Lordships observed that a lenient punishment should be given. (1904) A.W.N. 52=26 A. 371.

5. Miscellaneous.

—Ss. 193, 406.

Indian British subject appointed sole executor of will of D, European British subject and guardian of D's minor son—In proceedings on application by R, European British subject, for removal of G from guardianship and rendition of account High Court directing G's prosecution under Ss. 193 and 406, I.P.C.—Case held fell under S. 443 (1) (b), Criminal P.C. A.I.R. 1943 Lah. 8=46 P.L.R. 127=43 Cr. L.J. 901=202 Ind. Cas. 759.

—Ss. 193 — Procedure — Petition under Income-tax Act, S. 25—Statements in.

Statements in a petition under S. 25, Income-tax Act, must be verified like plaints by the petitioner

or some other competent person in the manner required by law. It is the Collector and the District Magistrate who can direct proceedings to be taken for offences under the Act. 15 A.L.J. 163=18 Cr. L.J. 433=38 Ind. Cas. 993.

—S. 194. See Ss. 191 to 193.

—S. 195. See also Ss. 191 to 193.

—S. 195—Taking photographs of under-trial prisoners.

The police in contravention to their departmental rules, took photographs of under-trial prisoners:

Held, that the inference, without proof, of their intention necessarily to use the same for fabricating false evidence could not be drawn. 14 A.L.J. 688=17 Cr. L.J. 431=35 Ind. Cas. 991.

—S. 195—Inducing witness to give false evidence.

Where the accused person persuaded a witness in a case to make a statement that the latter saw certain persons committing a dacoity. Held, this is not sufficient to convict the accused under S. 195, I.P.C. 16 Cr. L.J. 667=30 Ind. Cas. 651 (All.)

—S. 195—Ingredients of offence under.

To sustain a conviction under S. 195, I.P.C., it is not only necessary to prove that the accused spoke falsely, but also that he knew he was speaking falsely. 6 M.L.T. 91=10 Cr. L.J. 7=2 Ind. Cas. 431.

—S. 196—Income-tax proceedings—Applicability—Production of false account books.

Section 37, being a penal section, has to be construed strictly. There is no reference whatsoever in the section itself to S. 196, I.P.C., therefore, a person cannot be prosecuted under S. 196 for producing account books in pursuance of notice under S. 23 (2) where the books were found to be false. 104 Ind. Cas. 90=31 C. W. N. 996=43 C.L.J. 550=8 A.I. Cr. R. 445=28 Cr. L.J. 887=A.I.R. 1127 Cal. 724.

—S. 196—Applicability—Assertions in affidavit on information—Not proved incorrect—No perjury.

A person commits no perjury when the assertions which he makes are, according to his affidavit, not from his personal knowledge but from what he had been told, and where there is nothing whatever to show that the assertions are not correct. 74 Ind. Cas. 75=21 A.L.J. 88=21 Cr. L.J. 747=4 L.R.A. Cr. 6=A.I.R. 1923 All. 175.

—S. 196.

The use of evidence contemplated in S. 196, is use by a party or witness and not use by the Court. A.I.R. 1938 Pat. 83=19 P.L.T. 51=16 Pat. 51=39 Cr. L.J. 314=4 B.R. 274=173 Ind. Cas. 432.

—S. 196.

An offence under S. 196, I.P.C., can be held to have been committed only if it is shown that the



evidence which the accused used or attempted to use as true or genuine was in existence at the time.

Accused relied on an entry in the almanac of a witness who had appeared in the Court in obedience to the summons issued on him. He was neither examined nor asked to produce the almanac. Thus there was no material before the Court to enable it to hold that the almanac which witness had been called to produce was in existence or that it contained any false entry:

Held, that the charge under S. 196 had not been brought home against the accused. A.I.R. 1937 Pat. 467=18 P.L.T. 271=16 Pat. 21=38 Cr. L.J. 1011=4 B.R. 3=3 C.L.T. 10=170 Ind. Cas. 997.

—S. 196 — Essentials — Knowledge of the falsity.

In the absence of any evidence that the accused knew that the interpolation in an account complained about, was a false statement, the mere fact that it was he who produced the accounts into Court cannot support a conviction under S. 196. 86 Ind. Cas. 449=48 Mad. 395=21 M.L.W. 664=26 Cr. L.J. 801=A.I.R. 1925 Mad. 609=48 M.L.J. 290.

—S. 196—Corrupt use—Production of document under Court's orders—Swearing as to its genuineness.

It is an essential element of the offence under S. 196 that the documents should have been corruptly used or attempted to be used as true or genuine evidence.

Where the appellants produced the documents in Court, in obedience to an order of Court to that effect:

Held, that the appellants were not guilty under S. 196 as independent volition on their part was entirely absent. 36 Mad. 387, Foll.

Held: further that their having sworn in evidence that the documents were genuine does not make them guilty under this section. 36 Mad. 302, Foll. 85 Ind. Cas. 253=26 Cr. L.J. 509=3 Bur. L.J. 349=3 Rang. 36=A.I.R. 1925 Rang. 191.

—S. 196—Corrupt use — Inducing a public servant to give false evidence—Using evidence knowing it to be false—Defence to a criminal charge—Not sufficient to absolve.

The accused, who wanted to prove alibi in a case in which he was charged with assault, produced as his witness the *patil* of another village to prove his absence in the village at the time of the assault and produced a cattle pound receipt. His defence having been disbelieved, he was charged under Section 196 of the Penal Code for the offence of using false evidence as true 'corruptly.'

Held, in giving false evidence on behalf of the accused, the *patil* had a corrupt motive and therefore the accused is guilty of the offence of corruptly using false evidence as true. Corrupt use of the fabricated evidence by the accused came under the scope of Section 196 of the Code, because in order to support his false defence the accused induced a public servant to produce a fabricated document.

Per Macleod, C. J.—It is clear that the use of the false evidence with knowledge that it is false must ordinarily be corrupt from its very nature, and the onus lies on the accused to show that there are circumstances in the case which prevent its being corrupt. The fact that he was defending himself against a criminal charge is not enough.

Per Shah, J.—His position as an accused person must be taken into consideration in determining on the evidence in a particular case whether he uses it corruptly or not. 64 Ind. Cas. 503=23 Cr. L.J. 23=46 Bom. 317=23 Bom. L.R. 987=A.I.R. 1922 Bom. 99.

—S. 196—Intention to procure false conviction—If 'corrupt'.

'Corruptly' in S. 196 connotes a motive not necessarily connected with the passing of money as an inducement and an intention to procure a false conviction is a corrupt intention. 1 P.R. 1914 Cr.=139 P.L.R. 1914=15 Cr. L.J. 344=23 Ind. Cas. 696.

—S. 196—Attempt to procure a medical certificate.

A mere attempt to get a medical certificate which is refused does not fall under S. 196. 17 Cr. L.J. 388=35 Ind. Cas. 820 (Mad.).

—S. 196—Punishment—Must be deterrent.

The offences under Ss. 196 and 465 are indeed serious and difficult to detect and consequently call for deterrent punishment. 97 Ind. Cas. 805=50 Bom. 783=28 Bom. L.R. 1051=27 Cr. L.J. 1173=A.I.R. 1926 Bom. 555.

—S. 197—Applicability—Certificate under Post Office Savings Bank rules not certificate contemplated by S. 191.

The certificate given under the Post Office Savings Bank rule that in the case of female depositors withdrawing by their authorised agents under Rule 18 the agent must sign a certificate on the application for withdrawal to the effect "Certified that the depositor is on this day alive and sane" is not a certificate either prescribed by the Government Savings Banks Act or by statutory rules made thereunder. The rule is made for the general conduct of the Post Office business and therefore signing such certificate after a female depositor's death is not an offence under S. 197.

Per Subrawardy, J.—The certificate contemplated by S. 197 is a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice. 91 Ind. Cas. 988=42 C.L.J. 557=30 C.W.N. 120=27 Cr. L.J. 182=A.I.R. 1926 Cal. 258.

—Ss. 197, 198—Medical certificate.

What S. 197 contemplates is that the certificate should by some provision of law be admissible in evidence as such certificate without further proof. A medical certificate is not *per se* evidence of the illness of a person certified to be ill therein. A medical certificate is not, therefore, a certificate relating to any fact of which such certificate is by law admissible in evidence. Hence, issuing and user of a medical certificate in a criminal proceeding stating contrary to the fact that the accused was ill, would render neither the accused nor the issuer of certificate liable under S. 197 or S. 198. A.I.R. 1943 Cal. 40=I.L.R. (1942) 1 Cal. 573=44 Cr. L.J. 292=204 Ind. Cas. 412.



**—S. 197—False affidavit—Accused not protected.**

Where the law does not prohibit the administration of an oath or solemn affirmation and where in fact the practice of the Court directs that an oath or solemn affirmation must be administered before the affidavit is accepted, there cannot be any protection for an accused person who commits perjury in such a document. The fact the affidavit was made for supporting transfer application in a case in which he was an accused is immaterial: 19 All. 200 and 28 All. 331, Doubtful and not Foll. 123 Ind. Cas. 854=1930 Cr.C. 158=31 Cr.L.J. 600=7 O.W.N. 9=A.I.R. 1930 Oudh 62.

**—S. 197—Application under the Land Registration Act—False statement.**

A person who had his name registered by an application under the Bengal Land Registration Act, alleging that the real person is dead, is not liable to be prosecuted under S. 197, I.P.C., as the Land Registration Act does not require a certificate to be signed or given. 3 Pat. L.W. 201=18 Cr.L.J. 978=42 Ind. Cas. 594.

**—Ss. 197 and 198—Certificate—Signed petition.**

A signed petition filed in Court is not a certificate under Ss. 197 and 198, I.P.C. The word 'certificate' in Ss. 197 and 198 has not the force of certification. 20 C.W.N. 520=23 C.L.J. 423=17 Cr.L.J. 140=33 Ind. Cas. 316.

**—S. 198.**

Injuries on complainant slight—Doctor certifying that they were severe:

**Held**, that complainant's or his pleader's prosecution under S. 198 is misconceived. A.I.R. 1944 Cal. 448=46 Cr.L.J. 187=216 Ind. Cas. 321.

**—Ss. 198, 197, 196—Certificate referred to in S. 198, nature of.**

Section 198, must be read along with S. 197. Upon reading these sections it is manifest that the certificate which is referred to in S. 198 must be one which is either "required by law to be given or signed" or "is by law admissible in evidence". Section 197 contemplates that "the certificate" should by some provision of law be admissible in evidence as such a certificate without further proof.

Consequently, a person cannot be convicted for an offence under S. 198, with reference to filing a birth certificate of his father from the President of the Municipality, since the certificate cannot be treated as evidence, unless it is formally proved by the Chairman who granted it. A.I.R. 1927 Pat. 467=18 P.L.T. 271=16 Pat. 21=38 Cr.L.J. 1011=4 B.R. 3=3 C.L.T. 10=170 Ind. Cas. 997.

**—S. 199—Applicability—Munsif's Court—Srishtadar—Affidavit affirmed before him and filed in case before Additional Munsif—False declaration in—Conviction—Legality—Offence.**

Under S. 3 of the Bengal, Agra and Assam Civil Courts Act, the Court of the Munsif is one Court though there may be several officers working as Munsifs in the same district. Each officer does not constitute a separate or different Court, though Munsifs posted to one district are often called first, second and additional Munsif. A Srishtadar of the Court of the Munsif is, ex officio, a Commissioner of Affidavits in

respect of matters and causes arising within and subject to the jurisdiction of the Court of the Munsif. He is therefore competent to administer oaths or affidavits in respect of affidavits filed in causes before the Additional Munsif, when he functions as Srishtadar for both officers, and such an affidavit is a legal declaration. If, therefore, false allegations are made in such an affidavit, the person making such allegations is liable to conviction under S. 199, I. P. Code. 25 Pat. 273=12 Cut. L.T. 21=13 B.R. 246=A.I.R. 1947 Pat. 54=48 Cr.L.J. 258.

**—S. 199—Applicability—Application for execution of decree.**

Section 199 does not apply to applications for execution of decrees containing false averments. A.I.R. 1934 Oudh 65=11 O.W.N. 87=35 Cr.L.J. 390=147 Ind. Cas. 395.

**—S. 199—Affidavits—Oath administered by one having no authority to administer—Section does not apply.**

A nazir of Civil Court has no authority to administer oath for the purposes of an affidavit or statement to be used in a Criminal Court and a person making such statement cannot be convicted under S. 199. 116 Ind. Cas. 248=31 Bom. L.R. 144=30 Cr.L.J. 593=13 A.I.Cr.R. 14=A.I.R. 1929 Bom. 136.

**—S. 199—Under S. 539-A, Cr. P. Code—Grounds of belief not stated—Section applies.**

Where a deponent while swearing an affidavit under S. 539-A, Cr.P. Code swears of his personal knowledge of the truth of his allegations and the allegations are ultimately found to be false, he is guilty under S. 199, I.P.C. although he has not separately stated what facts he had reasonable grounds to believe to be true as required by third clause of the section: 14 Cal. 653, Dist. 116 Ind. Cas. 755=30 Cr.L.J. 645=13 A.I.Cr.R. 91=A.I.R. 1929 Pat. 156.

**—S. 199—Ingredients of offence.**

In order to convict a person under S. 199, the prosecution has to prove that he either knew or believed his statement to be false or that he did not believe it to be true. Where there is reasonable possibility that the defence story was true, these essential ingredients would not be established. 12 B.R. 289=222 Ind. Cas. 620=47 Cr.L.J. 317=A.I.R. 1947 Pat. 251.

**—S. 199—Circumstantial evidence.**

A person can be convicted under S. 199 purely on the basis of circumstantial evidence. A.I.R. 1944 Sind 155=I.L.R. (1944) Kar. 133=46 Cr.L.J. 223=217 Ind. Cas. 182.

**—S. 199—Charge under S. 199, Penal Code and Special Marriage Act, S. 21—Burden of proof.**

In a charge under S. 199, Penal Code read with S. 21, Special Marriage Act, the burden of proving that the declaration made was false and that the deponent knew or had reason to believe that it was false, is on the prosecution. Where in a case, the prosecution had failed to discharge this burden, the accused is entitled to an acquittal. A.I.R. 1934 Oudh 155=9 Luck. 561=11 O.W.N. 404=35 Cr.L.J. 744=148 Ind. Cas. 689.



—Ss. 199, 200—Presentation of false affidavit.

It is an elementary principle of criminal law that when the section creating an offence mentions in the definition of the offence a particular state of mind on the part of the offender as being an ingredient in the offence, the burden of proof is thereby placed on the prosecution to establish that such a state of mind was present in the accused at the time of committing the act charged. The burden of proof in a charge under S. 199, Penal Code is on the prosecution to show that at the time of making the affidavit the accused either knew or believed it to be false, or did not believe it to be true.

The accused in an affidavit filed in a rent suit in a Civil Court stated that his tenant died on a particular date, but on a counter-affidavit filed by the tenant's husband the Court came to the conclusion that the date of death as alleged in the accused's affidavit was not the correct one and directed the presentation of a complaint under S. 476, Criminal P. C., for the prosecution of the petitioner for an offence under S. 199, Penal Code.

Held, that it was wrong to say under S. 106, Evidence Act, that the burden of proof as to the date of the tenant's death was on the accused on the ground that it was a matter particularly within his knowledge; and that the burden lay on the prosecution of proving every ingredient comprised in the definition of the offence, and in the absence of such evidence the conviction could not stand.

An affidavit which is inadmissible merely on the ground of some informality is still a declaration within the meaning of Ss. 199, 200, Penal Code. A.I.R. 1933 Pat. 513=34 Cr.L.J. 912=14 P.L.T. 679=144 Ind. Cas. 587.

—S. 199—Burden of proof—On prosecution.

In the case of a prosecution for making a false statement it is for the prosecution to prove that the statement of the accused was false, and not for the accused to prove that it was true. 108 Ind. Cas. 124=29 Cr.L.J. 336=9 A.I.Cr.R. 91=9 L. R. A. Cr. 3=A.I.R. 1928 All. 182.

—S. 199.

Comparing S. 199, with S. 191, which defines the offence of 'giving false evidence' known as perjury in English Law, it is clear that the declaration contemplated in S. 199, is a species of the genus of declarations contemplated in S. 191, I.P.C. A.I.R. 1943 Nag. 17=1912=N.L.J. 547=44 Cr.L.J. 313=I.L.R. (1943) Nag. 547=204 Ind. Cas. 605.

—S. 199—Reckless allegations in affidavit.

Tendency on the part of applicants to make reckless allegations in the affidavits filed in the High Court deprecated.

Held, after considering the facts, that it was expedient in the interests of justice that an enquiry should be made into an offence under S. 199. A.I.R. 1940 Pat. 631=41 Cr.L.J. 702=6 B.R. 754=188 Ind. Cas. 854.

—S. 199—False declaration and reckless statement—Effect of.

Under S. 199, I.P.C., a statement must be one which is either false to the knowledge of the person making it or which he ought to have known to be false or

could not have believed to be true. Statements made in a reckless or haphazard manner, though untrue in fact do not constitute an offence under the section when the person making them immediately admits the mistake and corrects them. 18 Cr.L.J. 636=6 L.W. 241=22 M.L.T. 298=33 M.L.J. 545=39 Ind. Cas. 1004.

—S. 199—Affidavit merely repeating statement of another.

Where a person in swearing to an affidavit only repeats what another person had written in the notice, it will not have the effect of establishing that the accused swore to a false affidavit. A.I.R. 1937 Pat. 211=17 P.L.T. 612=38 Cr.L.J. 216=3 B.R. 164=166 Ind. Cas. 352.

—S. 199—Insolvency petition containing false statements.

The statements in a petition of insolvency are very analogous to statements made in ordinary civil pleadings—statements which are verified by law on the part of the person who places them on the record. But they certainly do not constitute evidence which is bound to be accepted by the Court. A petition in insolvency unbacked or uncorroborated by other evidence would not be accepted by the Court against the interests of any other person who was concerned in the question of the petitioner's insolvency.

Where in an insolvency petition a false statement was made that the petitioner had not been an insolvent before, and on this being proved to be untrue, prosecution under S. 199, was launched:

Held, that this petition could not be used as evidence to prove that in fact he had not filed such a petition and no offence under S. 199, was committed. A. I. R. 1936 Cal. 801=38 Cr.L.J. 408=I.L.R. (1937) 1 Cal. 504=167 Ind. Cas. 525.

—S. 199—Declaration made under S. 21, Special Marriage Act, 1872.

Apostasy or change of religion or a declaration that one does not profess any of the known or revealed religions of the world is not *per se* criminal offence. The offence contemplated in S. 21, Special Marriage Act, only deals with the declaration of a profession of want of belief in the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religion at the time when the declaration was made. If at the time when a person contracts a marriage under the Special Marriage Act, he makes a declaration that he does not profess any of these religions, then it cannot be said against him that because he was born into the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religion and had not formally renounced any of these religions before he made his declaration, he is guilty of an offence under S. 199, Penal Code. A.I.R. 1934 Oudh 155=11 O.W.N. 404=9 Luck. 561=35 Cr.L.J. 744=148 Ind. Cas. 689.

—S. 199—Written statement—False declaration verified in—No offence.

An allegation in a written statement is not evidence of any fact, which a Court is bound or authorized by law to receive and, therefore, false declaration in a written statement which is verified as required by the provisions of O. 6, R. 15, C.P. Code, but of which the Court has not ordered proof by affidavit, cannot be the basis of a conviction under S. 199. 100 Ind. Cas.



707=49 All. 482=25 A. L. J. 327=8 L.R.A. Cr. 62=28 Cr.L.J. 323=7 A.I.Cr.R. 405=A.I.R. 1927 All. 383.

—S. 199—False declaration—Mamlatdar—Abkari licence.

Accused made a false declaration before a Mamlatdar with a view to obtain a certificate of solvency for the purpose of securing a licence from Abkari authorities. Held, that no offence was committed under S. 199, I.P.C. inasmuch as no Court of justice or any public servant was either bound or authorised by law to receive the declaration in evidence. 17 Bom. L.R. 222=16 Cr.L.J. 309=28 Ind. Cas. 645.

—S. 199—Declaration—Conditions for false statement.

A declaration before it can be made the basis for a prosecution under S. 199, must satisfy the tests of admissibility. 35 All. 58=13 Cr. L.J. 769=10 A.L.J. 462=17 Ind.Cas. 401.

—Ss. 199, 114, 466—False declaration—Registrar of Mahamedan Marriages if bound or authorized to take evidence—Forgery of public register.

Where one X by personating as P before the Mohamedan Registrar of marriages, obtained the registration of P's divorce from his wife, and the appellant identified X as P before the registrar:—Held, that the appellant was not guilty of an offence under S. 199, in as much as the registrar was not bound or authorised by law to receive his statement in evidence. But whether he was guilty of an offence under S. 466 and 114, I.P.C., would depend chiefly on whether he knew that X was not P or had no knowledge whether he was P or not. (1904) 9 C.W.N. 69.

—S. 199—Affidavit—False statement—Material point—Declaration signed by village Munsif.

A statement made in an affidavit in which the declarant is signed by a village Munsif may render the declarant liable for perjury for which sanction may properly be obtained. Where an affidavit in cases in which evidence may be given by affidavit is intended to be used in a judicial proceeding before a Court of justice and the declarant has made a statement therein that is false to his knowledge touching any point material to the object for which the affidavit is to be used, the declarant will be guilty under S. 199, I.P.C. (1903) 27 M. 223=14 M.L.J. 74.

—S. 201.

Synopsis.

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1. Applicability.

—S. 201—Applicability—Husband and wife—Dead body of child hidden in house—Husband absent and refusing outsiders to enter house and search in the absence of her husband—Offence.

Under the law a wife is completely free from disclosing any communication made to her by her husband during the subsistence of their marriage, which may incriminate her husband. It is the policy of the law as well that a wife should not be guilty of harbouring her felonious husband because the law conceives a legal unity between the spouses.

Where, therefore, a wife does not allow outsiders to enter her house, where the dead body of a murdered child is hidden, in the absence of her husband, and refuses to allow others to enter and search the house until her husband appears and allows it, no inference should be deduced so as to ascribe to her any criminal intention or motive; nor can her act make her guilty of an offence under S. 201, I. P. Code. 29 P.L.J. 171=A.I.R. 1949 Pat. 80=50 Cr.L.J. 124.

—Ss. 201, 149 and 511—Applicability—Act with an intention to commit an offence under S. 201—No disappearance of any evidence of the commission of an offence—Offence made out.

Where the accused were seen by the P. Ws. carrying the body of a deceased man along a foot-path and on being confronted and questioned by the P. Ws. gave certain versions found to be untrue and left the body in the foot-path and disappeared from the place:

Held, all the circumstances put together left one with no doubt whatever that the accused knew that the deceased man had been murdered and their conduct showed that their intention was to hide either the scene of murder or the murderer or to cause disappearance of other evidence of the crime. They did an act in furtherance of the intention of committing the crime though an offence under S. 201, I. P. Code, had not been completed by the act. As a matter of fact there had not been any disappearance of any evidence of the commission of the offence, since the dead body had been left and not taken away and secreted or burnt or buried. Hence the offence committed is only an attempt to cause the disappearance of the evidence of the offence and the accused could not be convicted of an offence under S. 201, I. P. Code, read with S. 149, I. P. Code, but only under S. 201, I. P. Code, read with S. 511, I. P. Code. 61 L. W. 703=1948 M.W.N. 682=A.I.R. 1949 Mad. 270=50 Cr.L.J. 324=(1948) 2 M.L.J. 375.

—Ss. 201 to 203—Applicability of.

Per Rowland, J.—The true principle is that there is no law preventing the main offender being convicted under Ss. 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections. A.I.R. 1941 Pat. 550=22 P.L.T. 1035=7 B.R. 802=42 Cr.L.J. 603=194 Ind. Cas. 622.

—S. 201—Applicability.

The section applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself; 22 Cal. 638, Foll. 91 Ind. Cas. 541=27 Cr.L.J. 109=A.I.R. 1926 Lah. 209.

—S. 201—Applicability—Accused under threat of being shot, disposing of body of deceased—Threat ceasing—Body disposed of—Offence under S. 201 is committed—Person giving threat—Also commits offence under S. 201.

Where certain persons who are directed under threat of being shot to take away and dispose of the body of a murdered person to a place from where it was not



likely to be recovered, do so even after the danger of instant death is removed, i. e., when the person threatening goes away and ceases to accompany them. Such persons are along with the person threatening them, guilty under S. 201, I.P.C., and the statements of such persons admitting the facts amount to confession. The person directing the disposal of the body by threatening to shoot, is also guilty under S. 201, and the mere fact that he was not present when the body was actually thrown in jungle makes no difference. A.I.R. 1938 All. 91=1937 A.L.J. 1253=39 Cr.L.J. 364=1937 A.W.R. 1099=173 Ind. Cas. 838.

—S. 201—Applicability—Secretly burying body of man just murdered.

A person who secretly buries the headless body of a man just murdered is *prima facie* guilty under S. 201 unless he can establish that his act was innocent. It is not necessary for a conviction that the accused should be aware of the identity of the offender, or that the offender himself must have been convicted. A.I.R. 1933 Lah. 516=34 P.L.R. 637=34 Cr.L.J. 683=144 Ind. Cas. 12.

—Ss. 201, 302—Applicability — Different acts forming parts of same transaction.

The question whether or not different offences by two or more persons have been committed in the same transaction, is a question of fact, to be determined with reference to the circumstances of each particular case. The tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. The essential tests are continuity of action and unity of purpose. If the act is done in pursuance of a particular end in view and as accessory to what preceded it, the two acts must be regarded as forming parts of the same transaction.

Where according to the prosecution two persons join in laying a false trail after a murder and the actual false information suggestive of a burglary given by one of them is only an incident of this transaction, the murder, the fabrication of evidence to suggest burglary and the false information given by one of them are so connected together as to form one transaction and each of the accused will be punishable under S. 201, Penal Code, even without a specific charge framed in that behalf. A.I.R. 1933 Nag. 136=34 Cr.L.J. 503=29 N.L.R. 251=143 Ind. Cas. 17.

—S. 201—Applicability—Principal offender, whether liable to be convicted under.

Section 201 does not relate to the principal offender but to persons other than the actual criminal who by causing the evidence of the offence to disappear, assist the principal to escape the consequence of his offence.

But a person cannot escape conviction under this section merely because he has been charged also with the principal offence, or because there are some grounds for suspicion that he might be the principal culprit; it is also not necessary that, in order to justify a conviction under S. 201, it must be found that the principal offender is some known person, because there do arise cases where the principal offender may be unknown or untraced. A.I.R. 1931 Pat. 172=10 Pat. 140=32 Cr.L.J. 975=12 P.L.T. 746=132 Ind. Cas. 876.

—Ss. 201 to 203—Applicability — Omission to give information—Grave and sudden death—Obligation to inform—Failure—Liability.

In the case of grave and sudden death the offender himself is under an obligation to give information and he can be convicted for breach of that law under Ss. 201 to 203, I.P.C. In practice, if he has been convicted of the offence itself, no court will think it worthwhile to convict him also under Ss. 201 to 203, I.P.C. But if the commission of the main offence is not brought home to him, then he can be convicted under Ss. 201 to 203, I.P.C. 1930 M.W.N. 489=54 Mad. 68=59 M.L.J. 677=32 M.L.W. 389=129 Ind. Cas. 230=A.I.R. 1930 Mad. 870.

—S. 201—Applicability — Removal of corpse—Constitutes offence.

The mere removal of a body from one place to another so as to remove traces of the place where the murder took place, or indications which might implicate a particular individual, even though such removal does not remove undoubted evidence that a murder has taken place, is within the section. 97 Ind. Cas. 44=49 All 57=24 A.L.J. 958=27 Cr.L.J. 1068=7 L.R.A. Cr. 156=A.I.R. 1926 All. 737.

—S. 201—Applicability—Causing evidence of one's own offence to disappear—Section does not apply.

S. 201 does not apply to a criminal causing evidence of his own crime to disappear but applies to a person who screens the actual offender and no question of abetment can possibly arise in such a case; 22 Cal. 638; 12 C.P.L.R. 17 (Cr.), Foll. 91 Ind. Cas. 236=21 N.L.R. 86=27 Cr.L.J. 60=A.I.R. 1925 Nag. 407.

—Ss. 201, 203 and 211—Applicability—False information to police implicating innocent person—Screening of real offender.

A person who gives false information to police accusing another of an offence of murder in order to screen the real offender commits offences not only under Ss. 201 and 203, I.P.C., but also under S. 211. 46 Cal. 427=19 Cr.L.J. 903=47 Ind. Cas. 275.

—S. 201—Applicability—Concealing body of murdered person.

Concealing or otherwise disposing of the body of the murdered person means causing disappearance of evidence and is therefore punishable under S. 201, I.P.C. 8 P.W.R. 1909=10 Cr.L.J. 321=3 Ind. Cas. 622.

2. Case of suicide.

—S. 201—Case of suicide—Causing evidence of suicide to disappear.

**Obiter.**—No conviction under S. 201 can be had against an accused person who has done nothing more than to cause to disappear the evidence of suicide. A.I.R. 1934 Sind 139=36 Cr.L.J. 83=28 Sind L.R. 387=152 Ind. Cas. 376.

—Ss. 201, 302 and 309—Concealment of dead body—Case of suicide—offence.

The removal of the concealment of the body of a person not proved to have been murdered but proved to have committed suicide does not amount to an offence under S. 201, I.P.C. 17 P.W.R. (Cr.) 1911=12 Cr.L.J. 425=11 Ind. Cas. 609.



## 3. Conviction under—Legality.

—S. 201 — Conviction under — Legality — Disinterring of incriminating articles from the place pointed out by accused—Inferences—Determination of probable inference.

It is impossible to lay down any absolute rule on the point, whether when an accused person leads the Police to a place not his own or in his exclusive possession, e.g., a jungle, waste, river-bed or pond and from there disinters some incriminating article, the Court is entitled to infer that the accused himself must have put that article there. The decision of the question will, in each case, depend on a variety of facts. In such a case, ordinarily, the hypotheses that are possible are: (1) that the accused saw someone bury the article there; (2) that someone told the accused that the article lay buried in that place; and (3) that the accused himself alone or with others, buried the article there. The third hypothesis is undoubtedly the most natural and prominent in such a case and if the other two hypotheses are excluded or are not reasonably possible, there is no reason why the Court should not hold the third hypothesis proved. In determining which of these three possible hypotheses is more probable and presents such degree of certainty that the Court, like a reasonable man, ought to act upon the assumption of its existence, the Court shall have to consider a variety of circumstances. The Court must have regard to the situation of the place where the article was buried, the accused's relationship with the person suspected and the explanation, if any, given by the accused of his knowledge of the place. The stress which is often laid by the authorities on the question who owns the land as distinguished from the question in whose possession is the land from where stolen property is recovered is an emphasis on an immaterial circumstance. Such cases do not differ from those where property is recovered from a jungle waste, river-bed, pond or cave.

No rule of law can be laid down that in such cases, the Court is not justified in drawing the inference that the accused himself placed the incriminating article at the place pointed out by him. The true position is that it is for the Court in each case to draw any such inference as may be legitimate or reasonable in the circumstances. The question what inference from a relevant fact may be drawn as to existence or otherwise of a fact in issue and with what degree of certainty, is, in each case, a matter for the Judge to determine on the facts of that case and cannot be regulated by a generalization. The outstanding fact in such cases is that the discovery of the incriminating article from a place which is hidden from public view but is pointed out by the accused unmistakably shows that the accused was in some way privy to the felony. This is the most natural and prominent inference which the Court will draw under S. 114, Evidence Act, and the fact being within the peculiar knowledge of the accused, it is for him to show that he acquired knowledge of the place of concealment in some other way. If, therefore, the prisoner makes no attempt to explain how he acquired knowledge of the place, leave aside the question of proving the truth of the explanation; if given, there is nothing in law to prevent the Court from convicting him if, after considering all the surrounding circumstances and bearing in mind the other possible hypotheses and the principle that it is better that ten guilty men should escape than one innocent man be punished, the Court comes to the conclusion that the accused himself must have put the article or articles there, it not only may, but it is its duty to convict.

The accused S was tried with three others for the murder of a man. The Sessions Judge acquitted all the accused persons on the charge of murder; but he convicted S alone under S. 201, Penal Code. Accused S had made a statement to the investigating officer to the effect that he, together with the three other persons, had placed the dead body of the deceased in a cave and that he would point out the place. He led the investigating officer to a place in the jungle and pointed out a cave as the place where he and the others had kept the dead body. The mouth of the cave was covered with stones. When the stones were removed, the dead body was found inside the cave. The cave was in the hills and at a considerable distance from the *abadi* and there was nothing to show that it was the only cave in the locality or that it had any particular name or that it was of such a character that any other person could have described the cave in such a manner as to enable the accused to take the Police directly to this cave. The question was whether the mere fact that the accused took the Police to a cave and pointed it out as a place where the body of the deceased lay was sufficient for his conviction under S. 201:

**Held**, that in the circumstances, if the accused himself had not put the body in the cave or taken part in the disposal of the body, he would not have known that the body was inside the cave. Nor could it be believed that the accused was actuated by such a high sense of moral obligation that for the precious information about the place of concealment of the body that he might have received from some one, he would rather swing than betray the confidence reposed in him by his informant. Therefore, the hypothesis that the accused might have heard from someone that the body was in the cave was not, in the circumstances of this case, a reasonable hypothesis. The hypothesis that the accused might have seen someone else put the body in the cave was also not reasonably possible, because, in the first place, such acts of disposal are done secretly and not in the presence of others, and secondly, if that had been the fact, the accused, when tried for his life, could easily have said that he saw some one put the body in the cave and not denied having led the Police to the cave. The only other hypothesis left, therefore, was that the accused himself or with the assistance of others, put the body in the cave from where it was found. He was, therefore, rightly convicted under S. 201. A.I.R. 1945 Lah. 27=46 Cr. L.J. 407=218 Ind. Cas. 145.

—Ss. 201 to 203—Conviction under Ss. 201 to 203—Legality.

**Per Shearer, J.** — A person who, having committed an offence, subsequently causes evidence of the commission of that offence to disappear, does not in so doing, commit another separate and distinct offence for which the Courts have in strict law jurisdiction to impose a separate punishment.

**Quaere.**—Whether S. 201, applies to the accused who has committed an offence and caused the evidence of its commission to disappear with the intention of screening himself from legal punishment. A.I.R. 1941 Pat. 550 = 7 B.R. 802 = 42 Cr. L.J. 603 = 22 P.L.T. 1035 = 194 Ind. Cas. 622.

—Ss. 201 and 302—Accused charged under S. 302—Conviction under S. 201, legality of.

The mere possession by a person, of the property of the deceased immediately after the murder, is sufficient to prove his guilt under S. 201, I.P.C.



If the accused is charged with the offence of murder but the evidence discloses an offence under S. 201, I.P.C., he may under S. 237, Criminal P.C., be convicted of the offence under S. 201.

When there is a strong circumstantial evidence against an accused person that he was in the presence of a murdered man just before or at the time when the murder was committed, it is safe to conclude, especially when the property of the deceased is recovered from him that he committed the murder. But if the accused can offer some explanation the burden is on the prosecution to show that it could not be true. 1937 M.W.N. 544.

—S. 201—Conviction under—Legality—Accused suspected of murder—Conviction under, if illegal.

A conviction under S. 201 is not illegal merely because the accused gave false information to prevent himself from being harassed by the Police or merely because it may be a fact or it is suspected that the accused is guilty of the murder himself. A.I.R. 1937 Sind 28=38 Cr. L.J. 373=30 Sind L.R. 461=167 Ind. Cas. 368.

—S. 201—Conviction under—Legality — Accused not proved to be murderer.

A murderer cannot be charged under S. 201, with causing evidence to disappear by concealing the corpse. But where it is held that the offender has not committed the murder, he can be punished for the offence which it is proved he has committed, viz., that of concealing the corpse. A.I.R. 1934 Sind 139=36 Cr. L.J. 83=28 Sind L.R. 387=152 Ind. Cas. 376.

—Ss. 201, 302 — Acquittal under S. 302 and conviction under S. 201—Legality.

Where a trial is conducted on charges under Ss. 302 and 201, there is nothing to prevent an acquittal under S. 302 and conviction under S. 201. A.I.R. 1932 Cal. 297=36 C.W.N. 373=33 Cr. L.J. 546=59 Cal. 1040=138 Ind. Cas. 116.

—S. 201—Legality of conviction—Acquittal of principal offence—No bar to conviction for proved offence.

When an accused person has been acquitted of a charge of committing a crime, the fact that he had been suspected and tried of the principal offence would not prevent his conviction under S. 201, if there is clear proof that he has caused the evidence to disappear in order to screen some unknown offender from legal punishment: 6 P.R. 1902 Cr.; 1 P.R. 1904 Cr.; 46 Cal. 427; A.I.R. 1926 All. 737; A.I.R. 1923 Bom. 262; 1 L.B.R. 316 and A.I.R. 1925 P.C. 130 (P.C.), Foll.; 22 Cal. 638; 3 C.L.J. 333; and A.I.R. 1925 Nag. 407; Dist. from; A.I.R. 1926 Lah. 209, Dist. 110 Ind. Cas. 682=10 Lah. 213=30 P.L.R. 402=10 A.I.Cr.R. 562=29 Cr.L.J. 746=A.I.R. 1928 Lah. 906.

—S. 201—Conviction under—Legality—Suspicion of principal offence — Conviction under—Not illegal.

A conviction for the accessory offence under S. 201 is not illegal merely because it is suspected, but not proved or admitted, that the accused committed or was one of several persons who committed the principal offence. A.I.R. 1925 P.C. 130 and Rat. Un. Cr.C. 799, Foll.; 6 Cal. 789, and 22 Cal. 638, Ref. 103 Ind. Cas.

402=21 S.L.R. 206=8 A.I.Cr.R. 353=28 Cr.L.J. 674=A.I.R. 1927 Sind 241.

—Ss. 201 and 300—Murder—Separate conviction for offence under S. 201—Legality.

A separate sentence under S. 201, I. P. C., along with a conviction of the accused of murder is illegal. 16 Cr.L.J. 583=30 Ind. Cas. 135 (Mad.).

#### 4. Disappearance of evidence—What is.

—S. 201—Removal of corpse of murdered man few yards away.

The removal of the corpse of the murdered man from the place of murder to another place a few yards away will not amount to causing disappearance of any evidence of the commission of the murder. A.I.R. 1939 All. 665=1939 A.L.J. 547=40 Cr.L.J. 948=184 Ind. Cas. 409.

—S. 201—Disappearance of evidence — What is—Pieces of document afterwards found.

A forged document recovered in a damaged condition, is not said to disappear even temporarily under S. 201, I. P. C., if it is complete and fully available for purposes of evidence concerning the alleged offences under Ss. 467 and 471, I. P. C. 16 Cr.L.J. 791=31 Ind. Cas. 647 (All.).

#### 5. Essentials.

—S. 201—Essence of offence under S. 201.

The essence of an offence under S. 201, is the causing of evidence of the commission of an offence to disappear and it cannot be considered correct to say that the mere moving of the body of the deceased with the knowledge that an offence of culpable homicide has been committed, amounts to causing the disappearance of evidence of an offence:

Held, on evidence that there could be no conviction of the individual accused upon a charge under S. 201. A.I.R. 1941 Cal. 456=42 Cr.L.J. 796=45 C.W.N. 633=195 Ind. Cas. 850.

—S. 201—Essentials—Naming or identification or conviction for principal offence of offender is not necessary—Intention of screening offender and giving false information for that purpose is sufficient.

It is not necessary before a conviction can take place under S. 201, that the offender must be named or identified or convicted of the principal offence. If it is clear that the information was given by an accused with the purpose of screening the murderer from legal punishment, then the provisions of S. 201 are to that extent satisfied. The knowledge as to who the offender is may not be available to the prosecution. Nor does S. 201 say that it is necessary before a conviction can be recorded under that section, that the murderer should have been identified and punished. It is sufficient if it is proved that the accused gave false information with the intention of screening the murderer, that is, the offender, from legal punishment. A.I.R. 1937 Sind 28=38 Cr.L.J. 373=30 Sind L.R. 461=167 Ind. Cas. 368.



**—S. 201—Essentials—Disappearance of evidence of murder.**

When a person was convicted under S. 201, but the only facts proved against him were that he caught hold of the tuft of the deceased when another person stabbed him and that he took part in tying the deceased with a rope and dragging him along for some distance:

**Held**, that the essential ingredient of an offence under S. 201 being causing the disappearance of evidence of commission of an offence with a view to screen the offender, the acts proved were not sufficient for a conviction under S. 201. A. I. R. 1935 Mad. 36=67 M. L. J. 631=1934 M. W. N. 1281=40 L. W. 770=36 Cr. L. J. 143=152 Ind. Cas. 696 (2).

**—S. 201—Essentials—Removal of corpse from scene of murder.**

To constitute an offence under S. 201, there must be disappearance of some evidence of the commission of an offence. Removing the corpse of a murdered man from the scene of murder to another place does not come under S. 201 as the removal does not cause the disappearance of some evidence of the commission of the murder. A. I. R. 1934 Cal. 141=37 C. W. N. 348=35 Cr. L. J. 535=147 Ind. Cas. 1028 (1).

**—S. 201—Essentials of offence.**

Before there can be a conviction under S. 201 it must be proved that an offence, the evidence of which is caused to disappear, has actually been committed. A. I. R. 1932 Cal. 850=33 Cr. L. J. 657=139 Ind. Cas. 89.

**—S. 201—Essentials.**

Son killing father on small provocation—Cremation conducted with due publicity—No intention of accused to screen himself from the charge of murder—No charge can be sustained under S. 201. 1931 M. W. N. 765.

**—S. 201—Essentials—Volition and intention to screen.**

The essence of S. 201 is that the accused caused the evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment.

P murdered H and ordered B to help him, carrying the corpse to a ditch and burying the wearing apparel.

**Held**: that the offence under S. 201 was not proved against B. B in helping to carry the corpse to the ditch was acting under orders of P and she appeared to have been bullied into doing the act. B's acts were not voluntary nor done with the intention of screening the offence from punishment. 120 Ind. Cas. 268=31 Cr. L. J. 37=1930 Cr. C. 61=A. I. R. 1930 All. 45.

**—S. 201—Essentials—Intention to screen necessary—Mere knowledge not sufficient—Presumption as to intent.**

Under S. 201 mere knowledge on the part of the accused that his act is likely to screen the principal offender is not sufficient, but actual intention must be established. Whether the requisite intention is proved or not is a question to be decided on the facts of each case. Ordinarily, where the Crown has satisfactorily proved that (a) an offence has been committed for which some person is criminally responsible and (b)

that the accused caused the disappearance of the evidence of the commission of the offence or gave false information concerning it, as the case may be, a presumption arises in favour of the Crown that the accused did act with the requisite intent. That presumption may, however, be rebutted by circumstances or by direct evidence. Where it is so rebutted the accused is entitled to be acquitted except where he is charged with giving false information, in which case he may still be convicted under S. 203. 103 Ind. Cas. 402=21 S. L. R. 206=8 A. I. C. R. 353=28 Cr. L. J. 674=A. I. R. 1927 Sind 241.

**—S. 201—Essentials—Offender need not be specified.**

There is nothing in the section to require the Crown to prove that the accused intended to screen a specified offender. An intention to screen an offender unknown to the Crown is sufficient; A. I. R. 1925 Sind 257, Expl. 103 Ind. Cas. 402=21 S. L. R. 206=8 A. I. C. R. 353=28 Cr. L. J. 674=A. I. R. 1927 Sind 241.

**—S. 201—Essentials—Intention to screen a specified offender, necessary.**

One of the ingredients of the offence under this section is the intention to screen a specified offender, 3 All. 279, Foll. In order to justify a conviction under the section it is necessary that an offence for which some person has been convicted or is criminally responsible should have been committed. 86 Ind. Cas. 961=19 S. L. R. 6=26 Cr. L. J. 897=A. I. R. 1925 Sind 257.

**—S. 201—Essentials—Destruction of evidence—If requires to be proved.**

For an offence under S. 201, it is not necessary to prove complete destruction of evidence. So an offence under that section is committed if the corpse of a man is buried with intent to conceal the fact. 5 S. L. R. 123=13 Cr. L. J. 18=13 Ind. Cas. 210.

**—S. 201—Essentials—Concealment should be by a third person—Evidence recorded in a previous trial imported into a subsequent trial for another offence—Irregularity—Criminal Procedure Code, S. 537.**

Under S. 201 the concealment must be concealment by a third person and not by the person who is charged with having committed the offence and aided or abetted the same. It is also necessary that the disappearance of evidence should be after the offence. The accused was tried for abetment of murder and acquitted. He was again put up for trial for an offence under S. 201 with respect to the same offence. At the request of the pleader of the accused and with the consent of the Government Pleader the evidence recorded by the Judge at the previous trial was accepted as evidence in the second case. **Held**, that the procedure adopted was irregular and was cured by S. 537, Criminal Procedure Code, 1898. Per **Russel, J.**—"The procedure which was adopted in this case must never be followed under any circumstances whatever. The evidence of all the witnesses before the judge and assessors must be **viva voce** except in the case of evidence given by a medical officer which under certain circumstances need not be **viva voce**. (1906) 8 Bom. L. R. 538=4 Cr. L. J. 89.



## 6. Interpretation.

—S. 201—Interpretation—"Evidence"—Meaning of—Not evidence of witnesses, etc.—Material object making the crime evident.

The expression "any evidence of the commission of that offence" refers not to evidence in the extensive sense in which that word is used in the Evidence Act, but to evidence in its primary sense as meaning anything that is likely to make the crime evident, such as the existence of a wounded corps or of blood stains, fabricated documents, or similar material objects indicating that an offence had been committed. The statements of a witness and Panchanamas do not constitute such evidence. 15 Bom. L.R. 578, Ref. 63 Ind. Cas. 145=23 Bom. L.R. 823=22 Cr.L.J. 609=A.I.R. 1921 Bom. 115.

—S. 201 — Interpretation—'Offence' — Not the offence committed—Offence the accused knew had been committed.

Under S. 201, I.P.C., it is necessary for the Court to decide not so much what the offence, the evidence of which had been concealed, had been committed, as what offence the accused knew or had reason to believe had been committed. The Court must treat him to be a stranger to the crime, who had merely witnessed it. 54 Mad. 68=59 M.L.J. 677=32 M.L.W. 384=129 Ind. Cas. 230=A.I.R. 1930 Mad. 870=1930 M.W.N. 489.

—S. 201—Interpretation—"Offender"—Not the person charged.

It is settled law that a principal cannot be convicted as an accessory and it may well be presumed that in enacting this section the legislature never intended to depart from that rule, if it be so, the offender in S. 201 must needs refer to a person other than the person charged. A.I.R. 1923 Bom. 262; A.I.R. 1925 Sind 306 and A.I.R. 1925 Nag. 407, Foll; A.I.R. 1926 All. 737, not Foll. 103 Ind. Cas. 402=21 S.L.R. 206=8 A.I.Cr.R. 353=28 Cr.L.J. 674=A.I.R. 1927 Sind 241.

## 7. Scope.

—S. 201—Offender, if can be convicted of concealing evidence of offence committed by himself.

The language of S. 201, Penal Code, is perfectly general and there is really no justification for holding that the offender cannot be punished for concealing evidence or causing disappearance of evidence of the commission of the offence by himself. 49 All. 57, Rel. on 1949 A.W.R. 54=A.I.R. 1949 All. 329=50 Cr.L.J. 527.

—S. 201—Scope.

Punishment for offence under cannot be awarded without deciding what the offence was, the evidence of which the accused caused to disappear. 51 Cr.L.J. 1178=A.I.R. 1950 Kut. 54.

—S. 201—Scope—Information, need not be given to Police or Magistrate.

The information need not be given to the Police or Magistrate under S. 201, and it is immaterial whether that information is volunteered or given in reply to enquiries. A.I.R. 1940 Mad. 898=1940 M.W.N. 803=41 Cr.L.J. 950=(1940) 2 M.L.J. 315=52 M.L.W. 349=190 Ind. Cas. 573.

—Ss. 201, 326 — Scope — Accused committing offence and concealing evidence can be convicted for both the offences.

It may be that a principal in England cannot be convicted also as an accessory after the fact, but that rule can have no effect on the Indian Law which is contained in definite Acts. Section 201, makes it punishable to remove evidence of the commission of a crime and it is nowhere said either in the I.P.C., or in the Criminal P.C., that a man who commits an offence, and then conceals the evidence, cannot be convicted both of the offence and of concealing the evidence. A.I.R. 1937 All. 14=1936 A.L.J. 1310=38 Cr.L.J. 193=166 Ind. Cas. 369.

—S. 201—Scope.

Section 201 is not limited to giving false information to the Police. A.I.R. 1937 Sind 28=38 Cr.L.J. 373=30 Sind L.R. 461=167 Ind. Cas. 368.

—Ss. 201, 302—Scope—Charge under both sections—No certainty as to commission of principal offence—Charge for principal offence, whether bars conviction under S. 201.

Where it is impossible to say definitely that a person has committed the principal offence, he cannot escape conviction under S. 201, merely because he has been charged also with the principal offence, or because there are grounds for suspicion that he might be the principal culprit. A.I.R. 1932 Mad. 748=1932 M.W.N. 461=33 Cr.L.J. 814=56 Mad. 63=36 L.W. 798=64 M.L.J. 153=139 Ind. Cas. 725.

—S. 201—Scope—Itself an offence—Destruction of all evidence—Not necessary.

Removal of dead body from the house to a distant place does amount to causing an evidence of the commission of the offence to disappear. S. 201 cannot be confined to the destruction of the evidence of the murder itself. The words "any evidence of the commission of that offence" clearly include any evidence of the commission by the offender of that offence. 86 Ind. Cas. 52=26 Cr.L.J. 676=47 All. 306=23 A.L.J. 25=6 L.R.A. Cr. 68=A.I.R. 1925 All. 315.

—S. 201—Scope—Removing traces of crime—Offender can be guilty of.

A person who has actually committed a crime himself, whether murder or any other crime, cannot be said to be less guilty of removing traces thereof if it is proved against him that he has done so, because he was the person who actually committed the offence. A.I.R. 1925 All. 315, Appr.; 8 All. 252, Diss. from. 97 Ind. Cas. 44=49 All. 57=24 A.L.J. 958=27 Cr.L.J. 1068=7 L.R.A. Cr. 156=A.I.R. 1929 All. 737.

—Ss. 201 and 302—Scope—Murder—Propriety of alternative indictments—Principal, if can be convicted under S. 201.

S. 201, I.P.C., is an attempt to define the position known in England as that of an accessory after the fact. A principal cannot be convicted as an accessory. If it is impossible to say, definitely, though strongly suspected, that an accused was



guilty of murder, mere suspicion does not bar a conviction under S. 201. But if it is accepted as a proved fact that the accused disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder they cannot be convicted of the minor offence of causing evidence of the murder to disappear though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn. *Per Chapman, J.*—It is unsatisfactory that one Court should charge the accused as principal and the other as accessory after the fact. 20 C.W.N. 166=23 C.L.J. 333=17 Cr.L.J. 4=32 Ind. Cas. 132.

—S. 201 — Scope — Screening offender—Offender unknown—Person causing disappearance of evidence—Whether liable.

S. 201 does not require the accused to be aware of the offender's identity whom he intends to hide. Mere intention to screen any offender falls under the section. The illustrations to a section are only the cases decided under it; and so should not be allowed to control its plain meaning. Motive and intention are two different things; the motive induces a man to commit an offence. A person suspecting his sons to be the murderers, caused the evidence of the murder to disappear. The sons were acquitted of trial. Held, that the ordinary consequence of his act was to screen any offender; and if the consequence be contemplated, he had the intention prescribed by S. 201, though he cannot be held guilty of screening his sons. 6 S.L.R. 76=13 Cr.L.J. 721=16 Ind. Cas. 753.

### 8. Sentence.

—S. 201—Sentence.

Devil dancers attempting to cure a woman by branding her—Death due to injuries—Woman's husband burying her due to panic—Conviction under S. 201;

Held, that it was possible to reduce the sentence of the husband of the deceased under S. 201 on the ground that his action was due to panic rather than a deliberate attempt to shield his confederates from punishment. A.I.R. 1935 All. 282=36 Cr.L.J. 346=1935 A.W.R. 57=153 Ind. Cas. 425.

—S. 201—Sentence—Depends on the offence that accused knew was committed.

For the purposes of calculating the punishment to be awarded under S. 201, it is necessary for the Court to decide, not so much what offence, the evidence of which has been concealed has been committed, as what offence the accused knew or had reason to believe had been committed. Where, therefore, a person himself charged but acquitted of the actual crime, is convicted under S. 201 the Court must treat him as a stranger to the crime, as one who had merely witnessed it, while calculating the sentence to be passed. 54 Mad. 68=59 M.L.J. 677=32 M.L.W. 389=1930 M.W.N. 489=129 Ind. Cas. 230=A.I.R. 1930 Mad. 870.

12—P. Y. D.—6.

### 9. Sufficiency of evidence.

—S. 201 — Applicability — Concealment of weapon with which offence is alleged to have been committed—Offence—Statement of witness and panchanamas—If evidence of the commission of the offence.

*Sharif, J.*—The concealment of a weapon (bar-chha) with which an alleged murder is committed is not "to cause any evidence of the commission of the offence to disappear" within the meaning of S. 201, I. P. Code. The weapon itself is no evidence of the commission of the offence, but is only an instrument with which an offence could have been committed, and its discovery at the instance of an accused person indicates no more than that he knew where it was to be found. Nor do the statement of a witness and panchanamas constitute evidence of the commission of the offence.

*Teja Singh, J.*—There cannot be the slightest doubt that the weapon with which an offence is committed is a very valuable piece of evidence of its commission, more so when the offence is said to be of murder, and the weapon is blood-stained. If a person conceals that weapon, provided his intention in doing so is to screen the offender, he is guilty of the offence of causing that evidence to disappear. 231 Ind. Cas. 400=48 Cr.L.J. 786.

—S. 201—Sufficiency of evidence.

When an accused is found guilty of the offence of murder, the facts that 2nd accused met the first on the evening of the date of murder and knew the place where certain articles belonging to the deceased which she had carried with her on that fateful evening were to be found, lead to grave suspicion against accused No. 2 but are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence. A.I.R. 1941 Mad. 316 (319)=1940 M.W.N. 764=52 L.W. 284=I.L.R. (1940) Mad. 1028=42 Cr. L. J. 466=193 Ind. Cas. 814.

—S. 201—Sufficiency of evidence.

The recovery of the body pointed out by the accused would be very strong evidence of an offence under S. 201. 177 Ind. Cas. 909=1938 M.W.N. 866=48 L. W. 332=39 Cr.L.J. 977.

—S. 201—Sufficiency of evidence.

Where the head of the deceased was found after two hours' search in a tank and it was pleaded by the accused that he only knew that the head was there, and where witnesses also contradicted each other regarding search—Held, under the circumstances it was unsafe to convict him under S. 201, I.P.C. or S. 302. (36) 1936 M.W.N. 1389.

—S. 201—Sufficiency of evidence—Knowledge of murder and of the place where the bodies were—Jewellery on the body traced to accused—Confession to lambardar.

A who was charged under S. 302 knew where the bodies of the murdered persons were. He also knew that murder had been committed. The jewellery removed by him from the dead body was subsequently produced and identified. Moreover, he confessed his guilt to the lambardar of the village,



Held, that it was not safe to rely upon the confession made to the lambardar and therefore he could not be convicted under S. 302. But the evidence was sufficient to convict him under S. 201. 111 Ind. Cas. 449=29 P.L.R. 486=29 Cr.L.J. 865=A.I.R. 1928 Lah. 858.

—S. 201—Sufficiency of evidence—Motive for crime—Tracks of accused traced—Shoe and body discovered at his instance—Ample evidence.

B and S were charged under S. 302, Penal Code, for the murder of R, who, according to the village rumour, was in intrigue with G's wife, M, sister to B. S was the brother of G. A tracker followed the tracks with directions from villagers to the Ahata of S and G. Shoes of R were recovered at the instance of B. The tracker found tracks of B and S, leading to the place where the body was later found buried. Dead body of R was found at the instance of the confession made by S.

Held, that the evidence was not sufficient to establish charge under S. 302 but was ample to establish an offence under S. 201, Penal Code. 112 Ind. Cas. 347=9 Lah. 671=29 Cr.L.J. 1019=11 A.I.Cr.R. 284=A.I.R. 1928 Lah. 476.

#### 10. Miscellaneous.

—S. 201—Miscellaneous — Mis-direction to jury.

Omission of Judge to point out to jury the real meaning of S. 201, I.P.C., constitutes mis-direction of prime importance and hence, is sufficient to vitiate the verdict of jury. A.I.R. 1934 Cal. 144=34 C.W.N. 348=35 Cr.L.J. 535=147 Ind. Cas. 1028 (1).

—S. 201—Miscellaneous—Causing evidence about the locality to disappear—Intention to screen—A question of fact.

The ordinary inference to be drawn from the conduct of persons who have been concerned in a murder in a house, and who have removed the body to another place, is that they do so with the intention of causing, at any rate, the true evidence about the locality, in which the murder took place to disappear. Whether such evidence was caused to disappear, with the intention of screening the offender from legal punishment is a question to be decided from the circumstances of the case; 47 All. 306, Rel. on.

Three men were sleeping close to the deceased man. Some one came in the night and struck the man with a violent blow severing the neck from body. Subsequently, these persons removed the corpse to another room, broke bars of the windows and obliterated blood marks in original place, thereby causing evidence of locality of murder to disappear and putting police on wrong scent as to murderer:

Held, that the fact that none of them was disturbed was improbable and it must be held that those persons must have had an intention of screening the murderer or murderers. 123 Ind. Cas. 886=31 Cr.L.J. 575=6 Q.W.N. 1017=A.I.R. 1930 Oudh 113.

—S. 202—Object — Not punitive—Facilities for investigation otherwise obtained—No conviction under.

The provisions of the section are not intended to be punitive in themselves but are intended to facilitate information as to the commission of an offence and thereby to facilitate steps being taken in the investigation of the same.

Where all this object was attained by what happened in the case and particularly by what the Chaukidar had informed the Sub-Inspector in the clearest terms in the presence of the person accused under S. 202, he cannot be convicted under that section. 4 Cal. 623; 20 Cal. 316 and 7 Mad. 436, Foll. 65 Ind. Cas. 626=8 O.L.J. 590=A.I.R. 1921 Oudh 227.

—S. 202—Failure to give information under Cr.P.C., S. 44.

A person witnessing a commission of an offence and failing to give information to the nearest Magistrate or police officer as required by S. 44 of Cr.P.C., is guilty of an offence under S. 202 of Penal Code. 16 N.L.R. 30=21 Cr.L.J. 486=56 Ind. Cas. 582.

—Ss. 202 and 201—Nature of offences under —Difference—Charge under S. 201—Conviction under S. 202.

An offence under S. 202 is not a minor one included under S. 201. The requisite for an offence under S. 202 is the duty of the accused to give information of the offence which is not required under S. 201. So if a person is charged under S. 201 he cannot be convicted under S. 202 without a charge being framed under that section. 5 S.L.R. 123=13 Cr. L.J. 18=13 Ind. Cas. 210.

—S. 203—Any information knowing it to be false.

The section applies where information is voluntarily given and not when it is extracted by police in an examination. 3 U.B.R. (1920) 204=57 Ind. Cas. 940.

—S. 203—'Giving information'—Meaning of.

Statements of the accused examined as witnesses under S. 164 of the witness made to the police do not amount to information within S. 203. 'Gives information' means volunteers information. 6 S.L.R. 143=14 Cr.L.J. 252=19 Ind. Cas. 508.

—S. 203—Scope of—Person answering questions put to him—Liability for conviction for giving false information.

S. 203 contemplates information volunteered by a person. A person cannot be convicted under this section if he makes false statements to the police in the course of their investigation and that only in reply to questions put to him. 11 Cr. L.J. 438=7 A.L.J. 1150=7 Ind. Cas. 50.

—S. 203—Statement to police—No statement volunteered—Offence — False evidence as a witness to the police in the course of the investigation in reply to questions put to him.

The section 203, only contemplates information volunteered by some person. Where the accused



while being examined by the police in answer to questions put to him falsely stated that certain persons had committed theft and melted stolen property: Held, that he could not be convicted under S. 203. 7 Ind. Cas. 50=(1910) 11 Cr.L.J. 438 =7 A.L.J. 1150.

—S. 204—Mere refusal to produce document.

A mere refusal to produce documents though not an offence under S. 204, a refusal to produce a document, with the intention, otherwise proved, of keeping the document secret may well be sufficient evidence to prove a secretion within the meaning of the section. An honest refusal to produce a document is obviously not a "secretion" of a document within the meaning of the section. But where there is a refusal coupled with a secret dealing with the document or with a dealing intended to be kept secret, an offence under S. 204, is committed. A.I.R. 1938 Sind 217=40 Cr.L.J. 75=1.L.R. (1939) Kar. 238=178 Ind. Cas. 381.

—S. 204—Original document destroyed—Another prepared and written by the same scribe.

A document—a panchayatnama—drawn up by a police officer at the time of investigation, was destroyed by him for interlineations and scratches and having got it rewritten by the same scribe and signed by the same Panchas. Held, that the newly presented documents was the original produced compulsorily by the police officer, the first being considered as the only rough notes. Hence his conviction under S. 204, Penal Code, cannot be supported. 14 Bom. L.R. 1163=13 Cr.L.J. 912=17 Ind. Cas. 1008.

—S. 205—Security bond lodged for purpose of succession certificate whether act in suit.

By the ordinary rule of construction all the acts detailed in S. 205, are acts "in any suit or criminal prosecution." Proceedings under the Succession Act and some other proceedings are not acts in any suit. Hence, a security bond lodged for the purpose of a succession certificate is not an act in a suit. A.I.R. 1940 Lah. 514=42 P.L.R. 683=42 Cr.L.J. 295=192 Ind. Cas. 339.

—S. 205—Accused representing as servant of another getting notice under S. 158-B, Bengal Tenancy Act served on such person.

Where an accused personates as a servant of another person and gets a notice under S. 158-B, Bengal Tenancy Act, to be served on such person by writing before the Civil Court process-server, *apne malik ka namaka notice para*, it is not a case of falsely personating another person within the meaning of S. 205, and he cannot be convicted under that section. A.I.R. 1937 Pat. 211=17 P.L.T. 692=38 Cr.L.J. 216=3 B.R. 164=166 Ind. Cas. 352.

—S. 205—False personation in suit or criminal proceedings—Registration proceedings—Proceedings before Collector—Essential ingredients.

Fraud or dishonesty is an essential ingredient to constitute false personation in proceedings before a Collector for a criminal offence, while it

is not so in proceedings in a criminal suit or registration proceedings. 1 C.L.J. 469=(1905) 9 C.W.N. 807=32 C. 775.

—Ss. 206 and 395 and Cr. P. Code (V of 1898), S. 195 (1) (b)—Attachment before judgment of cattle—Cattle left in the custody of sureties—Forcible removal of such cattle by owner and others after commission of dacoity armed with deadly weapons—Written complaint of attaching Court under S. 195 (1) (b)—Necessity.

While certain cattle were in the custody of sureties after an attachment before judgment, the owner of the cattle along with others went in a body and committed dacoity armed with deadly weapons and forcibly removed them. On a question whether a written complaint of the attaching Court under S. 195 (1), Cr.P. Code, was necessary even before an inquiry into the charge of dacoity could be made:

Held, that the elements constituting the offences under Ss. 206 and 395 are not only not identical but the one under S. 395 is a much graver offence involving certain additional ingredients and it cannot be said that for such an offence the sanction of Civil Court is necessary for the prosecution of the accused. 1947 M.W.N. 667 (1)=60 L.W. 445=49 Cr.L.J. 71=A.I.R. 1948 Mad. 115=(1947) 2 M.L.J. 119.

—Ss. 206, 421—Applicability and scope.

Complainant alleging that he filed suit against A with respect to his land and attached crops on land and cattle of A, that B along with A removed crops and cattle claiming them to be his, thus preventing Receiver from taking possession thereof—Allegations in complaint held implicated both A and B—Offence held fell under S. 206 and not under S. 421. A.I.R. 1942 Mad. 675=55 M.L.W. 518=1942 M.W.N. 492=(1942) 2 M.L.J. 246=44 Cr.L.J. 129=203 Ind. Cas. 670.

—S. 206—Fraudulent removal or concealment is gist of offence under.

The wording of S. 206, clearly makes fraudulent removal or concealment a matter of the essence of the offence. Where the prosecution story is that the petitioners forcibly cut the crops and removed them in spite of the remonstrances of the peon and the constable, and there is no trace of any fraudulent removal or concealment, the conviction under S. 206 is bad. A.I.R. 1941 Pat. 136=7 B.R. 326=42 Cr.L.J. 251=22 P.L.T. 662=192 Ind. Cas. 177.

—S. 206—Partition suit—Appointment of Receiver—Defendant, brother of plaintiff, taking away certain sums from funds of family publishing business, in spite of protest from Receiver and warnings by Court.

The plaintiff instituted a partition suit in respect of his father's estate, impleading his brother and his mother as defendants. A receiver was appointed to receive all the moneys due to the estate and to pay off all the moneys due by the estate. The plaintiff's brother defendant No. 1 in spite of the protests from the receiver and



the plaintiff and previous warnings by the Court took away a certain amount from the funds of the family publishing business:

Held, that the defendant was guilty of contempt of Court. A.I.R. 1940 Cal. 487=71 C.L.J. 409=44 C.W.N. 925=190 Ind. Cas. 678.

—S. 206—Accused judgment-debtor immediately after giving undertaking to Court not to transfer certain property, transferring it—Case falls under S. 206.

The word "fraudulently" in the I.P.C., ordinarily connotes firstly, an element of deceit to secrecy and secondly, an intention to cause injury. Where the accused judgment-debtor immediately after giving an undertaking to the Court not to transfer certain property, transfers the same in favour of his son by a sale deed with the knowledge that his son would be in a position to claim the property as his own, the intention to cause injury clearly exists in such a case and the case falls under S. 206, I. P. C.; it does not matter whether or not the creditor might by taking troublesome proceedings in the Civil Court to circumvent the transfer. A.I.R. 1940 Mad. 271=1939 M.W.N. 1248=(1940) 1 M.L.J. 761=41 Cr.L.J. 397=51 M.L.W. 744=187 Ind. Cas. 122.

—Ss. 206, 406—Intention.

An offence punishable under S. 406, is substantially a different offence from the one punishable under S. 206. The criminal intention necessary for an offence punishable under S. 206 is that of fraudulent prevention of property or any interest therein from being forfeited or taken in execution of a decree or order. Such an intention is materially different from the intention required in an offence punishable under S. 406. A.I.R. 1937 Bom. 46=38 Bom. L.R. 1192=Cr. L.J. 272=166 Ind. Cas. 731.

—S. 206—Essentials.

In execution of the decree he had obtained, the accused attached certain grain and live-stock from the possession of his judgment-debtor, and this was left in the custody of the accused on his passing a jimmapatra. On the property being sold, the property was found to be less than that delivered to him. On refusal of permission to prosecute, the judgment-debtor filed a complaint under Ss. 403, 206 and 109:

Held, that no offence under S. 206, being made out on facts, sanction to prosecute was not necessary:

Held, also that the word 'taken' in S. 206 was used in the sense of 'seized' or 'taken possession of'. A.I.R. 1937 Bom. 46=38 Cr.L.J. 272=38 Bom. L.R. 1192=166 Ind. Cas. 731.

—S. 206—Applicability.

Court sending amin to harvest attached crops—Accused forestalling Court's action, openly harvesting it himself—Action held not fraudulent within S. 206. A.I.R. 1937 Mad. 713=1937 M.W.N. 462=46 M.L.W. 139=(1937) 2 M.L.J. 802=39 Cr.L.J. 711=176 Ind. Cas. 144.

—S. 206—"Fraudulently."

The word "Fraudulently" in S. 206 is not equal to "dishonestly." 1936 M.W.N. 1150.

—S. 206—Necessity for complaint.

Cattle attached in execution of decree removed from possession of lawful person—Offence under Ss. 379 and 206, I. P. C., is committed and complaint of Court is essential for prosecution. 1936 M.W.N. 212.

—S. 206—Necessity for sanction.

After attachment has been effected dishonest removal of movable property would constitute an offence under S. 206 and therefore, sanction is necessary. 1933 M.W.N. 722.

—S. 206—Interpretation—"Civil suit" must be actually pending.

The words "intending thereby to prevent that property from being taken into execution of a decree or order which has been made or which he knows likely to be made by a Court of justice in a civil suit" refer to a civil suit which is actually pending before a Court. 8 Rang. 268=126 Ind. Cas. 533=A.I.R. 1930 Rang. 128.

—S. 206—Removal of property not liable under decree.

It is not a fraudulent dealing with the property under S. 206, if a person in order to protect a property not liable for the decree, from being confused with one liable for it, makes it over to another. 19 Bom. L.R. 535=18 Cr.L.J. 784=41 Ind. Cas. 160.

—S. 206—Assignment of decree under attachment—Fraudulent removal or concealment of property of decree under attachment.

The assignment by the decree-holder of a decree obtained upon the basis of a debt which is under attachment does not per se amount to the commission of the offence defined in S. 206 inasmuch as such assignment cannot affect the rights of the attaching creditors. 3 A.L.J. 38=(1906) A.W.N. 26.

—S. 206—Public Demands Recovery Act—Certificate—Decree—Attachment—Fraudulent removal.

A certificate issued under the Public Demands Recovery Act (I of 1895 B. C.) has the force and effect of a decree of a civil court, as regards the remedies for enforcing the same and money due under such certificate must be regarded as money due under a decree of a civil court; and a removal of crops under attachment in execution of such a certificate amounts to an offence punishable under S. 206 of the Penal Code. (1900) 5 C.W.N. 291=28 C. 217.

—S. 208—Fraudulent execution of decree.

The complainant mortgaged certain lands to the accused in pursuance of the agreement between the parties in satisfaction of a decree which the accused held against the complainant. But the accused in spite of this proceeded to execute the



decree against the complainant. The complainant thereupon prosecuted the accused alleging that he (the complainant) had been cheated over the mortgage:

**Held**, the proceedings must be quashed. 84 Ind. Cas. 351=26 Cr.L.J. 287=A.I.R. 1925 Lah. 289.

—S. 209—Attempt to execute decree—If offence.

An attempt to execute a decree cannot correctly be described as making a false claim within the meaning of S. 209, I. P. Code. I.L.R. (1946) Nag. 686=227 Ind. Cas. 233=1946 N.L.J. 402=A.I.R. 1946 Nag. 350=47 Cr.L.J. 1031.

—S. 209—"Claim".

The expression 'claim' in S. 209 does not include a claim made in execution. A.I.R. 1946 Nag. 350=1946 N.L.J. 402=I.L.R. (1946) Nag. 686=47 Cr.L.J. 1031=227 Ind. Cas. 233.

—S. 209—"Claim", meaning of.

The word 'claim' cannot refer to a document produced in evidence to substantiate the relief asked for in a suit. 28 M.L.J. 486=17 M.L.T. 446=16 C.L.T. 439=29 Ind. Cas. 71.

—S. 209—Fraud, dishonesty, etc.—A question of fact.

The question of fraud or dishonesty or intent to injure or annoy must be decided like any other question of fact, on the evidence. A.I.R. 1936 All. 164=1936 A.L.J. 71=1936 A.W.R. 161=37 Cr.L.J. 420=161 Ind. Cas. 314.

—S. 209—Manager dealing with claim under Chota Nagpur Encumbered Estates Act, 1876, is not Court—False claim made to Manager—Conviction under, if legal.

The essential characteristic of a Court is that it is authorised by law to decide, in accordance with law, disputes between parties that appear before it. In dealing with claims against the estate under the Chota Nagpur Encumbered Estates Act, the manager is not deciding a dispute between two parties who have appeared before him for the determination of their dispute. Consequently, a manager in dealing with a claim under the Act is not a Court. That being so, a person cannot be convicted under S. 209, I. P. C. for making a false claim before the manager. A.I.R. 1935 Pat. 515=1 B.R. 872=16 P.L.T. 693=36 Cr.L.J. 1354=15 Pat. 69=158 Ind. Cas. 324.

—S. 209—Duty of Court.

All Courts should be careful when a complaint of defamation is filed in respect of proceedings in a Civil Court, to see whether the provisions of S. 209, I. P. C., read with S. 195, Criminal P. C., have not been evaded. A.I.R. 1935 Sind 81=36 Cr.L.J. 881=156 Ind. Cas. 219.

—Ss. 209, 499—Court's duty.

As a general rule it is undesirable that people should be hampered in their access to the Courts and in getting justice by the fear that if they are

unsuccessful, they may be prosecuted for defamation and therefore all Courts should be careful when a complaint of defamation is filed in respect of proceedings in a Civil Court to see whether the provisions of S. 209, Penal Code, and Criminal P. C., generally have not been evaded. A.I.R. 1934 Sind 114=36 Cr.L.J. 78=28 Sind L.R. 251=152 Ind. Cas. 346.

—S. 209—Burden of proof.

It will not be enough in a proceeding under S. 209, to show that the plaintiff in the Civil Court failed to discharge the burden of proof. Nor is it sufficient to show that in the evidence adduced for the plaintiff there were discrepancies or improbabilities which made it impossible for the Court to rely with confidence on their evidence or even which made it improbable that the fact alleged was true. In a prosecution based on the allegation that a false claim was wilfully presented, the prosecution will have to prove affirmatively that the case was false one. A.I.R. 1932 Pat. 243=13 P.L.T. 370=33 Cr.L.J. 860=139 Ind. Cas. 543.

—Ss. 209, 210—Obtaining attachment for amount not due.

A complaint under S. 210, Penal Code, would lie where a person fraudulently obtains an attachment of property against another for an amount not due from the latter. A complaint under S. 209 would also lie in such a case. A.I.R. 1931 All. 305=32 Cr.L.J. 367=1931 A.L.J. 117=53 All. 416=129 Ind. Cas. 264.

—S. 209—Essentials—Knowledge of falsity.

To justify a sanction to prosecute for an offence under S. 209 of the Penal Code, a mere dismissal of the plaintiff's suit is not enough. It must be proved that the claim was to his knowledge false. 61 Ind. Cas. 995=22 Cr.L.J. 467 (Pat.)

—Ss. 209 and 210—Court in which decree was obtained incompetent to try the suit—Offence.

To bring a case under S. 209, it is immaterial whether the Court in which the false claim was instituted had jurisdiction to try the suit. If a person obtains a decree fraudulently for a sum not due, the case would fall under S. 210 of the Code whether the Court had or had not power to pass the decree. 20 Cr.L.J. 698=52 Ind. Cas. 666 (All.)

—S. 210 — Applicability — Charge under S. 120-B read with S. 210—Conspiracy for making false claim in Court and to obtain decree upon it—Decree not obtained—Offence.

In a charge under S. 120-B read with S. 210 I. P. Code, in respect of a conspiracy to file a false claim in a Court of Justice and to obtain or attempt to obtain a decree upon it, it is not necessary for the application of S. 210, I.P. Code, that a decree should have been obtained upon the claim. When the Court holds the claim false, no decree could be passed and S. 210 is not inapplicable on the ground. 226 Ind. Cas. 631=A.I.R. 1947 Sind 49.



—S. 210—Decree-holder getting execution application dismissed before order of attachment—If commits offence.

Where on an execution application the Court passes an order that an attachment has to be made after the decree-holder files an affidavit giving the movable property of the judgment-debtor, but the decree-holder does not file any affidavit or pay any process fee and has his execution case dismissed, he cannot be said to have caused the decree to be executed against the judgment-debtor, and he does not, therefore, commit an offence under S. 210, I.P. Code. I.L.R. (1946) Nag. 686=227 Ind. Cas. 233=1946 N.L.J. 402=A.I.R. 1946 Nag. 350=47 Cr.L.J. 1031.

—S. 210, S. 195, Cr.P.C.—Scope and applicability.

Where the facts primarily and essentially disclose an offence under S. 210, I.P.C., the other offences alleged, being merely subsidiary to the main offence, the complainant should not be permitted to evade the provisions of S. 195, Criminal P.C., by omitting S. 210 from the complaint.

The bar of S. 195, Criminal P.C. applies even against an accused, who was not party to the civil proceedings, but was proceeded against as an abettor of an offence under S. 210, I.P.C. A.I.R. 1944 Sind 130=46 Cr.L.J. 97=215 Ind. Cas. 302.

—S. 210—Applicability.

Complaint under S. 210 would lie against person obtaining attachment for amount not due. A.I.R. 1931 All. 305=32 Cr.L.J. 367=(1931) A.L.J. 117=53 All. 416=129 Ind. Cas. 264.

—S. 210, O. 21, R. 2 (3)—Scope and operation.

Order 21, R. 2 (3), Civil P.C. does not prohibit the executing Court from making an enquiry under S. 476, Criminal P.C., into an alleged adjustment with a view to file a complaint under S. 210, I.P.C. A.I.R. 1931 Rang. 148=9 Rang. 104=132 Ind. Cas. 713.

—S. 210—Execution petition—Omission to enter part-satisfaction—Fraud must be established.

H had obtained a decree for Rs. 578-12-0 against one U. A sum of Rs. 276-12-0 was recovered in execution. H put in another application for execution of his decree claiming the full decretal amount, i.e., Rs. 578-12-0 with costs. The sum of Rs. 276-12-0 which he had realized in part-satisfaction of the decree was not shown in the appropriate column. Eventually, a house was sold in satisfaction of the decree and the full amount was realized by H. U the applicant subsequently discovered that H had recovered more than what was really due on the basis of the decree and applied to the execution Court for sanctioning prosecution of H under S. 210, Penal Code:

Held, for sustaining a charge under S. 210 it must be established that the person charged acted 'fraudulently.' Although H omitted to state the amount realized in his application for execution, it was very doubtful, if he acted fraudulently.

The Judgment-debtors did not raise any objection as to the excess claimed by the decree-holder for nearly two years although they raised various other objections in the meantime. The case was therefore not a fit case for sanctioning prosecution of H under S. 210. 116 Ind. Cas. 711=11 L.L.J. 103=30 P.L.R. 392=30 Cr.L.J. 666=13 A.I.Cr.R. 99=A.I.R. 1929 Lah. 676.

—S. 210—Jurisdiction—Decree fraudulently obtained for claim disallowed in another court—Latter cannot take action.

Where a plaintiff first instituted a suit in one Court and obtained a decree for a part of his claim and then proceeded to present a fresh plaint in respect of the item disallowed and obtained an ex parte decree, the action under S. 210, Indian Penal Code, can only be taken by the Court in which later suit was filed or by the Court to which they are both subordinate, as the filing of the second suit cannot be held to be an offence committed in relation to proceedings in the first Court. 90 Ind. Cas. 660=26 Cr.L.J. 1588=26 P.L.R. 717=6 Lah. 445=7 L.L.J. 341=A.I.R. 1925 Lah. 524.

—S. 210—Over-stating claim—Sanction.

The applicant a dealer in saltpetre brought a suit against the East Indian Railway for damages for detention of his goods and obtained a decree. It was found that the value of the goods when purchased was over-stated in the suit with a view to the claim for damages, and the depositions of both the applicant and his munim on this point were apparently false:

Held, that a sanction to prosecute them under S. 193, I.P.C. was rightly granted. 75 Ind. Cas. 703=25 Cr.L.J. 15=A.I.R. 1924 Nag. 35.

—S. 210—Execution application—Mis-stating decretal amount—Whether liable.

Where in an execution application, the decree-holder after referring to the final decree mis-stated its previous terms he cannot be held liable under S. 210 of the I.P.C. as it is the duty of the executing Court to verify the amount due. 11 P.W.R. 1914 Cr.=64 P.L.R. 1914=15 Cr.L.J. 263=23 Ind. Cas. 4.

—S. 210—Cr. Pro. Code, S. 195—Decree-holder omitting to mention a claim.

In an application for execution the decree-holder did not mention certain sum received by him. Held, that there was a prima facie case against the accused, and a sanction under S. 195, Cr.P.C., for trial for an offence under S. 210, I.P.C., was good. 59 P.L.R. 1911=12 Cr.L.J. 189=59 P.W.R. 1911 Cr.=10 Ind. Cas. 646.

—S. 210—Sale of more than what the decree allowed—Criminal intention.

M obtained a decree for sale of half of certain property. He executed the decree thrice. First, he applied for sale of the half but in his second application which was infructuous, he applied for the sale of the whole property and actually got the same sold by his third application. On the judgment-debtor's objection part of the property



was exempted and the decree-holder was put on his trial for an offence under S. 193, which in appeal was changed to S. 210. Held, that the facts proved did not establish a criminal intention. 5 Ind. Cas. 695=(1909) 11 Cr.L.J. 202=7 A.L.J. 93.

—S. 210—Fraudulent decree not set aside by a civil court—Evidence.

If it is alleged that a decree has been obtained by fraud, the fact that the decree has not been set aside might be evidence to prove there was no fraud, but it cannot be a bar to the prosecution under S. 210. (1905) 33 C. 193.

—S. 211.

Synopsis.

See also: I.P. Code, Ss. 499, 500 and Tort—Malicious prosecution.

1. Applicability
2. Complaint
3. Essentials
4. Evidence and proof
5. False charge
6. Graver and lesser offence
7. Instituting criminal proceedings
8. Interpretation
9. Jurisdiction
10. Notice
11. Practice
12. Procedure
13. Sanction
14. Miscellaneous.

1. Applicability.

—S. 211—Applicability.

An offence constituted by a false complaint against unknown persons is not one under S. 211, but one under S. 182. A.I.R. 1941 Cal. 288=42 Cr.L.J. 624=194 Ind. Cas. 799.

—S. 211—Applicability.

Where the case was taken on file after investigation by the Police under S. 202, Criminal P.C., the subsequent discharge of the accused would not justify the making of a complaint under S. 211, I.P.C. 196 Ind. Cas. 557=1941 M.W.N. 463 (1)=43 Cr.L.J. 32.

—S. 211—Applicability—Failure of complainant to prove his case.

The failure of a complainant to prove his case may result in the dismissal of his complaint under S. 203, Criminal P.C., or at later stages in the discharge or acquittal of the accused; but it will not by itself warrant his prosecution under S. 211, I.P.C., for bringing a false case. A.I.R. 1941 Pat. 419=7 B.R. 420=42 Cr.L.J. 332=192 Ind. Cas. 836.

—S. 211—Applicability.

The failure of a complainant to prove his case is not the same thing as the institution of a malicious-

ly false case so as to make him liable for an offence under S. 211. A.I.R. 1940 Pat. 97=20 P.L.T. 947=6 B.R. 377=41 Cr.L.J. 349=186 Ind. Cas. 627.

—S. 211—Applicability.

If the complaint in its generality was bona fide, the fact that one accused person had been wrongly identified cannot be regarded as a ground for instituting a prosecution under S. 211. A.I.R. 1939 Pat. 178=5 B.R. 203=40 Cr.L.J. 157=179 Ind. Cas. 167.

—Ss. 211, 182—Applicability.

Section 211 may cover the institution of proceedings through the Police as well as by way of complaint to the Magistrate direct. Where a complaint is made both to the Police and a Magistrate, the Magistrate's jurisdiction overrides that of the Police, and the provisions of S. 195 (1) (b), Criminal P.C., cannot be evaded by placing an offence under S. 195 (1) (a). Where, upon information given to the Police by the accused a third person is arrested on a charge of murder and challaned to the Court of a Magistrate by whom, however, he is subsequently discharged and the prosecution case is that the accused is responsible for the proceedings instituted against the third person, the offence committed by the accused is one under S. 211 and not under S. 182, I.P.C. A.I.R. 1939 Sind 274=41 Cr.L.J. 8=184 Ind. Cas. 243.

—S. 211—Applicability.

Woman demanding investigation and punishment to Sub-Inspector who is alleged to have raped her—Sub-Inspector not found guilty of charge—Complaint by Sub-Inspector against woman for false charge:

Held, woman was guilty of offence under S. 211 and not under S. 182. 17 N.L.J. 189=A.I.R. 1935 Nag. 69.

—S. 211—Applicability.

It is in the interests of justice that a man who brings a false charge of murder against any person should be prosecuted if a prima facie case is made out against him. 151 Ind. Cas. 691 (1)=35 P.L.R. 593=35 Cr. L.J. 1392.

—Ss. 211, 500—Applicability—Dismissal of complaint—Second complaint alleging—defamation—Maintainability of.

If on the dismissal of a complaint under S. 211, a second complaint under S. 211 can be filed, then the complainant can certainly file a second complaint on the same facts, but instead of alleging an offence under S. 211 allege an offence under S. 500. A.I.R. 1934 Rang. 40=35 Cr. L.J. 802=148 Ind. Cas. 845.

—S. 211—Applicability—False information to police—Prosecution not launched—Trial of informant by Magistrate.

Where the offence under S. 211 consists in giving false information to the police and the case does not go further than a police inquiry, the offence falls within para. (1) S. 211 and not within para. (2)



even though the charge made in the report is one of murder. Where the Magistrate commits the informant to the Sessions the committal is bad, and is liable to be quashed. 6 A.L.J. 989, Followed. 129 Ind. Cas. 369=1930 Cr. C. 1202=A.I.R. 1930 All. 818.

—S. 211—Applicability—False information to police—To a police officer charging his subordinate officer—S. 211 and not S. 182 applies.

Where the charge against the accused was that he gave false information to a public servant, namely, the Superintendent of Police that he and his mother had been unlawfully confined by a certain Police Officer and that money had been extorted wrongly from them, held, that the offence fell under S. 211 and not under S. 182, I.P.C. and that the case could not be tried summarily. 34 C.W.N. 556=1930 Cr.C. 1111=A.I.R. 1930 Cal. 711=128 Ind. Cas. 208.

—S. 211 — Applicability — No charge in any Court nor trial nor proceeding for offence complained—Section does not apply.

Where the person at whose instance proceedings under S. 211, Penal Code, are initiated against a false complainant, is never charged in any Court, nor is he ever put upon his trial before any Magistrate, nor were any proceedings taken against him before the Court in which another person who was alleged by the false complainant to be his accomplice was involved, it cannot be said that the offence under S. 211, Penal Code, was an offence which was committed in or in relation to any proceeding in Court, though another person against whom also false complaint was made in the same transaction is tried in Court: A.I.R. 1924 All. 779, Foll. 19 P.R. 1917 Cr. and 34 All. 522, no longer good law; 43 Cal. 1152 and 44 Cal. 650, Ref. to. 109 Ind. Cas. 685=9 Lah. 408=13 L.L.J. 218=29 Cr. L.J. 605=10 A.I.Cr.R. 313=29 P.L.R. 515=A.I.R. 1928 Lah. 259.

—S. 211—Applicability and scope— Ss. 211 and 182 distinguished.

Sections 182 and 211, Penal Code in reality differ fundamentally as regards the ingredients of the offence concerned.

Section 182 is primarily intended for cases of false information which do not ordinarily involve a particular allegation or charge against a specified and definite person. S. 211 covers cases where there is a definite information or charge with reference to a criminal offence against a particular person. 105 Ind. Cas. 454=23 N.L.R. 136=28 Cr. L.J. 934=9 A.I.Cr.R. 87=10 N.L.J. 191=A.I.R. 1928 Nag. 17.

—S. 211—Applicability — False information to Police—Complaint dismissed—Offence under S. 211 and not under S. 182.

The false information to the police was followed by a complaint to the Magistrate on the same facts and the same charge. The Magistrate tried the complaint and classified it to be false. The police preferred a complaint under S. 182 for false information given to them;

Held, that the offence alleged fell under S. 211 and a complaint by the magistrate before whom

the charge was made was necessary. 112 Ind. Cas. 468=29 Cr. L.J. 1044=11 A.I.Cr.R. 272=A.I.R. 1928 Rang. 243.

—S. 211—Applicability and scope—Report of a police officer against his Subordinate— Not a police report—Conviction bad.

Offences under Section 211, I.P.C., fall under two categories only. First is a complaint to a Magistrate, second is a report, of a cognizable offence to a police officer. In the present case the letter was, no doubt addressed to a police officer. Whether or not it was that police officer's duty to institute proceedings against his subordinate, if he thought fit, to have the subordinate prosecuted and for that purpose he were to make a report to a Magistrate, such a report would not be a police report for the purpose of Section 190 (b) of the Cr. P.C. Conviction of complainant under Section 211, I.P.C. is therefore, bad in such a case. 69 Ind. Cas. 81=9 O.L.J. 342=23 Cr.L.J. 641=26 O.C. 44=A.I.R. 1923 Oudh 4.

—S. 211—Applicability — Report to make enquiry on suspected theft.

S. 211 contemplates a false charge to an officer of the Court to set the law in motion; hence a report made to an officer for making inquiry with respect to a suspicion of theft is a false report at the utmost, and would not come under S. 211, I. P. C. 17 M. 129; 31 M. 506, Foll. 39 All. 715=15 A.L.J. 767=18 C.L.J. 1017=42 Ind. Cas. 761.

—S. 211 — Applicability — False charge against several—Single or separate offences.

A person who lays an information containing a false charge against a number of persons commits a distinct offence against each of the persons against whom he makes a charge and may be separately prosecuted under S. 211, I. P. C., for each of such offences. 11 Bur. L.T. 136=19 Cr.L.J. 1002=48 Ind. Cas. 342.

—S. 211—Applicability—False charge to Police.

The making of a false charge before the Police falls within the first portion of S. 211, 14 C. 633, Foll. (1903) 7 C.W.N. 556.

## 2. Complaint.

—S. 211—Complaint — Complaint to Police followed by a complaint to Magistrate.

Where an alleged false complaint is first made to the Police and then to a Court, a complaint under S. 211 subsequently filed is a complaint of an offence alleged to have been committed in, or in relation to a proceeding in Court and cannot be taken cognisance of except on a complaint of the Court. A.I.R. 1946 Bom. 7=47 Bom. L.R. 664=47 Cr.L.J. 321=223 Ind. Cas. 35.

—S. 211 — Complaint — Complainant not appearing before Magistrate.

Where a complaint made by a person is preferred by the Police, and the complainant does not



appear before the Magistrate there is no proceeding in any Court and a complaint by the Magistrate is not necessary for the prosecution of the complainant under S. 211, Penal Code, in respect of a cognizable offence. A.I.R. 1941 Mad. 579=1941 M.W.N. 222=53 L.W. 358=42 Cr.L.J. 649=195 Ind. Cas. 233.

—S. 211—Complaint—Complaint by private person under S. 195, Criminal P. C., is legal.

Offence under S. 211, not committed in or in relation to any Court—Private person can make a complaint of such offence. A.I.R. 1939 Sind 65=40 Cr.L.J. 461=I.L.R. (1939) Kar. 388=180 Ind. Cas. 650.

—S. 211—Complaint.

Accused charged under Ss. 211, 218, 220 and 193 in respect of proceeding under S. 109, Criminal P. C.—No complaint by Magistrate—Charges under Ss. 211, 193 held should be quashed. A.I.R. 1937 Lah. 802=39 P.L.R. 1011=39 Cr.L.J. 122=172 Ind. Cas. 373.

—Ss. 211, 500—Complaint.

The appellant, a woman, made a report to the Police charging one A and other persons unknown with having confined and raped her. On inquiry the Police were of the opinion that the case was not a true one, and they declined to take action. She then filed a complaint in Court definitely charging A and B with having confined and raped her. The charge being found false, the complaint was dismissed and A and B filed complaint against her for having defamed them:

Held, that what she was doing was not defaming these persons but bringing a (possibly a false) charge against them. If her complaint was a false one, her object in making it was not to defame these persons so much as to harass them and cause them the inconvenience of being subject to criminal proceedings for which offence, S. 211, Penal Code, was the appropriate section and the Magistrate could not take cognizance of it except on complaint in writing of the Court as required by the provisions of S. 195, Criminal P. C. A.I.R. 1935 Rang. 163=36 Cr.L.J. 970=156 Ind. Cas. 598.

[Overruled in A.I.R. (Vol. 25) 1938 Rang. 232 (235)=175 Ind. Cas. 915=39 Cr. L. Jour. 663= (1938) Rang. L.R. 404 (F.B.)].

—S. 211—Complaint—Complaint by three Magistrates—Order of discharge passed by two—Legality.

Where an order of discharge was passed by two Magistrates of a Bench but the complaint of an offence under S. 211, was made by three Magistrates and it was urged that this was an illegality:

Held, that this was a very technical matter and the High Court would not interfere on a ground of this kind in revision. A.I.R. 1933 Oudh 430=10 O.W.N. 1037=35 Cr.L.J. 121=146 Ind. Cas. 638.

—S. 211—Complaint — Dying declaration—Accusation contained in—Made to a Magistrate—Does not amount to complaint.

An accusation contained in a dying declaration made to a Magistrate stands on no better footing than an accusation made to a private individual, such as the compounder in the hospital, without any statutory obligation to move in the matter at all: 11 Ind. Cas. 617; 17 Cal. 574; 30 Cal. 415; 19 Bom. 51 and 26 Mad. 640, Ref. 129 Ind. Cas. 87=A.I.R. 1930 Pat. 550.

—S. 211 — Complaint — Court has power suo motu.

Even where accused persons do not desire to take action under S. 211, I.P.C. a Court of law has authority to complain against a false complainant under S. 182. 112 Ind. Cas. 770=30 Cr. L. J. 2=9 A.I.Cr.R. 475=9 A.I.Cr.R. 446=9 L.R.A.Cr. 78=9 L.R.A.Cr. 71=A.I.R. 1928 All. 333.

—S. 211—Complaint—No complaint under S. 195, Cr.P. Code, necessary.

When a false charge has been made only to the police, but the person making the false charge has not applied to the Magistrate and no Court proceedings whatever have ensued, no complaint is necessary under S. 195, Cr.P. Code, before a prosecution under S. 211, Penal Code, can be instituted against the informant: 43 Cal. 1152, Foll.: A.I.R. 1924 All. 779, Appr.; 34 All. 522, Doubtful. 105 Ind. Cas. 454=23 N.L.R. 136=10 N.L.J. 191=28 Cr. L. J. 934=9 A.I.Cr.R. 87=A.I.R. 1928 Nag. 17.

—S. 211 — Complaint — Complaint filed in Court—No report to police—Police cannot proceed under S. 211.

Accused filed a complaint of dacoity in the Court and afterwards in reply to certain questions put to him by the Sub-Inspector of Police made a statement that he had been decoited by certain persons and that he had filed a complaint in Court. Police upon investigation found that the complaint was false and the accused was sent up for trial on a charge under S. 211 by the Police:

Held, that the statement to the police did not amount to a report and as proceedings were started in Court, complaint by Court was necessary to initiate proceedings under S. 211 and that police was not competent to proceed against the accused. 96 Ind. Cas. 870=26 Cr.L.J. 1014=24 A. L. J. 816=7 L.R.A.Cr. 145=A.I.R. 1926 All. 613.

—S. 211—Complaint—Investigation by Police — Non-cognizable offence — Police have no power—Complaint must be preferred.

The petitioner made a statement to the Village Munsif that a dacoity was committed in his house and mentioned certain persons as having taken part in the dacoity. The Village Munsif forwarded the complaint to the Police, who held an investigation and referred the case as false. The Sub-Magistrate to whom the papers were sent, accepted the referred charge-sheet and struck the case off his file. The police put in a charge-sheet before the Sub-Divisional Magistrate against the petitioner for an offence under S. 211, I.P.C. The Sub-Divisional Magistrate transferred the case to the Second Class Magistrate who had acted on the referred charge-sheet in the alleged dacoity case.



Held, that this was not a case in which the police could start proceedings of their own accord. The offence under S. 211 is a non-cognizable one and the Police were not empowered to investigate into a non-cognizable offence and charge the petitioner. It was open either to the accused in the alleged dacoity case or to the Village Munsif, or any Police Officer to prefer complaint under S. 190, Cr.P.Code, in which case the Magistrate before whom the complaint is made might take the case on his file after taking a sworn statement from the complainant. As such course was not adopted in this case, the proceedings were illegal. 90 Ind. Cas. 398=1925 M.W.N. 317=22 M.L.W. 209=26 Cr.L.J. 1550=A.I.R. 1925 Mad. 672.

#### —S. 211—Complaint—Meaning of.

Application by complainant asking for judicial enquiry of the charge made by him which the police had reported to be false, is a complaint. 20 Cr. L. J. 389=50 Ind. Cas. 997 (Pat.).

#### —S. 211—Complaint — Hearsay evidence — Telegram sent—No complaint—No prosecution can be ordered—Cr.P.C., S. 193.

A Chaprasi sent a telegram to the Collector saying that the Tahsildar and certain others in his absence entered his house and forcibly inoculated his wife and children. The Collector sent the telegram to a Magistrate who examined the Chaprasi and certain witnesses who stated that they had heard that the complainant's house was forcibly entered into. Finding the statement false he directed the prosecution of the complainant and his witnesses. Held, that the complaint was no complaint in law and a prosecution could not be maintained against the Chaprasi under S. 211. A hearsay statement should not be recorded by a Magistrate while recording the deposition of a witness. If such a statement is recorded it cannot be made the subject of prosecution under S. 193. (1910) 11 Cr.L.J. 351=6 Ind. Cas. 380=7 A.L.J. 618.

### 3. Essentials.

#### —S. 211—Essentials.

The elements of an offence under S. 211 are firstly that a false charge should be brought; secondly, that the person bringing it should know that there was no just or lawful ground for such proceeding or charge, and thirdly, that it should be brought to cause injury to the persons against whom it was made. Where the only finding recorded is that a false complaint was brought, it is not sufficient to support a conviction under S. 211. A.I.R. 1939 Cal. 288=40 Cr.L.J. 605=181 Ind. Cas. 916.

#### —S. 211—Essentials.

The complainant must have falsely charged such person with having committed an offence, that is to say, the person must be innocent. The complainant must have known that there is no just or lawful ground for the proceeding or charge, that is to say, there is no penalty in this section for incautious or negligible acceptance of information which the complainant might have learnt by enquiry to be unreliable. Thirdly, there must have been an intention to cause injury to the person.

The last can in some cases be inferred from the relation of the parties when the other two elements are established. As regards the other two ingredients, it is important to remember that there is a difference between suspicion and evidence. The prosecution will have to establish facts irreconcilable with the innocence of the accused. A.I.R. 1939 Pat. 178=5 B.R. 203=40 Cr.L.J. 157=179 Ind. Cas. 167.

#### —S. 211—Essentials—Material sufficient for prima facie case — Mere belief—Dismissal of complaint—No grounds.

A mere belief without any foundation whatsoever does not justify a Court of justice to send a man for trial. Before a Court orders a prosecution under S. 211, there must be enough materials to justify a complaint being filed, i.e., there must be enough materials to show that there is a prima facie case. A dismissal of complaint does not justify a Court in prosecuting the complainant under S. 211. 98 Ind. Cas. 465=27 Cr. L. J. 1345=A.I.R. 1927 All. 107.

#### —S. 211—Essentials—Failure to prove case—Not sufficient ground—Intent to cause injury or knowledge of falsity essential.

The fact that the complainant fails to prove his case is by itself not sufficient to sanction a prosecution under S. 211 of the Indian Penal Code. It must be established satisfactorily in the mind of the Judge or the Magistrate that the complaint was made with intent to cause injury or that it was a false complaint made with the knowledge that it was false. 83 Ind. Cas. 701=6 P.L.T. 365=26 Cr. L. J. 14=A.I.R. 1925 Pat. 329.

#### —S. 211—Essentials—Complaint without just cause—Action without due care or caution—Sufficient grounds—S. 182 distinguished.

Under S. 211 of the Penal Code if the accused makes his complaint without any just grounds and acts without due care or caution it is enough to constitute an offence. But under S. 182 the information given to a public servant should not only be false in fact but it must be false to the knowledge or belief of the informant and the mere fact that the accused had reasons to believe it to be false is not sufficient. 82 Ind. Cas. 718=25 Cr. L.J. 1358=19 S.L.R. 91=A.I.R. 1925 Sind 184.

#### —S. 211—Essentials — Malice or failure to make reasonable enquiry — Not sufficient ground.

A man cannot be convicted of perjury for having acted maliciously or for having failed to make a reasonable enquiry with regard to the facts alleged by him to be true. It must be proved that he made some statements which he knew to be false and which he believed to be false or which he did not believe to be true. 61 Ind. Cas. 521=22 Cr.L.J. 393=L. R. 2 A. (Cr.) 94 (All.).

#### —S. 211—Essentials—Specific offence—Mere suggestion.

S. 211 requires a specific offence charged with the object of setting the criminal law in motion and not a mere suggestion or inference against the



accused, the circumstances of, and the form of making statement being considered.

Prosecution should not be ordered, merely because pleader for accused, charges another with the offence. 10 Bur. L.T. 259=18 Cr.L.J. 2=36 Ind. Cas. 834.

—S. 211—Essentials—Report of an offence without any one being named—as the perpetrator thereof.

Before a case can be instituted under S. 211 it must be proved that the person accused instituted or cause to be instituted a criminal proceeding against a particular person with intent to cause injury to that person. 4 A.L.J. 361=1907 A.W.N. 149.

—S. 211—Essentials of offence under.

Two principles are to be remembered: (1) that failure of a complainant to establish the truth of his allegation does not mean that the complaint was false; (2) that to secure a conviction it must be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused, but entirely inconsistent with his innocence. 16 C.L.J. 453=17 C.W.N. 379=13 Cr.L.J. 897=17 Ind. Cas. 993.

—S. 211—Essentials for a prosecution under —Disposal of complaint a preliminary necessity.

A complaint must, according to the law as laid down in the decisions of the Calcutta High Court, be dealt with under S. 203, Cr.P.C., before a prosecution under S. 211, Indian Penal Code, can be instituted against the person who presents it. The correctness of those decisions doubted. (1905) 33 Cal. 1=10 C.W.N. 158=2 C.L.J. 228=2 Cr.L.J. 615.

—S. 211—Proof—Essentials — O n u s — See S.182.

9 Bom. L.R. 33=31 B. 204.

#### 4. Evidence and proof.

—S. 211—Evidence—Proof to establish offence.

In order to prove an offence under S. 211, it will be necessary for the prosecution to establish, that the prosecution brought by the appellant against the respondent was brought with intent to cause injury to the respondent; secondly, that the charge made against the respondent was false, and thirdly, that it was made with the knowledge on the part of the appellant that there was no just or lawful ground for such charge. A.I.R. 1936 Rang. 473=38 Cr.L.J. 226=166 Ind. Cas. 489.

—S. 211—Evidence.

In order to successfully prosecute an accused under S. 211, it is necessary for the prosecution to establish that the primary intention of the accused when he made the statement, the basis of the charge, was to cause injury to the persons mentioned by him. A.I.R. 1932 Lah. 246=33 P.L.R. 174=33 Cr.L.J. 409=13 Lah. 568=137 Ind. Cas. 157.

—S. 211—Evidence and proof—Rest on prosecution.

Where a person is charged under S. 211 of making a false report it is not for him to make out that his report was true until it has been clearly traversed by evidence produced by the prosecution showing that it was false. 113 Ind. Cas. 455=2 M.Cr.C. 78=30 Cr.L.J. 167=30 M.L.W. 795=12 A.I.Cr.R. 71=A.I.R. 1929 Mad. 496.

—S. 211—Evidence and proof—Absence of reasonable grounds—Knowledge of the same—Burden on prosecution.

In order to bring home a charge under S. 211 the prosecution must establish that there are no just and lawful grounds for the action taken and that the accused knew this. The mere communication of a suspicion to the police does not amount to a charge of a criminal offence. 88 Ind. Cas. 525=6 Lah. 28=26 Cr.L.J. 1165=26 P.L.R. 131=A.I.R. 1925 Lah. 325.

—S. 211—Evidence and proof—Duty of prosecution—Failure of accused to examine witness, if implies guilt.

In a case under S. 211 the prosecution has to prove clearly that the charge was wilfully false to the knowledge of the maker thereof and if they fail to do so, the mere fact of the accused failing to examine any one as defence witness will not imply his guilt having been proved. 18 C.W.N. 391=15 Cr. L.J. 355=23 Ind. Cas. 723.

—S. 211—Evidence and proof—False charge —Proofs of falsity—Quantum of proof.

To establish falsity more than mere failure to prove the complaint would be necessary. (1902) 4 Bom. L.R. 645.

#### 5. False charge.

—S. 211.

Statement to police of suspicion that particular person has committed an offence—Does not amount to a charge. 6 L. 28, 14 Ind. Cas. 767 and 46 A. 906, rel. on. I.L.R. (1950) Nag. 208=A.I.R. 1950 Nag. 20=51 Cr.L.J. 267=1949 N.L.J. 604.

—S. 211 — "False charge" —Petition to a Assistant Superintendent of Police charging certain persons with commission of cognisable offence—Inquiry by Sub-Inspector in charge of thana—Case found maliciously false—Offence under S. 211, is committed.

Where upon a petition by the accused to the Assistant Superintendent of Police charging certain persons of commission of a cognizable offence, he directs an enquiry and having received a report from the Sub-Inspector in charge of the thana that the case was maliciously false, makes a complaint against the accused for prosecuting him under S. 211, Penal Code, the complaint is proper and an offence is committed even though the offence complained of was enquired into by the Sub-Inspector. A cognizable offence can be enquired into either by the Police Officer in charge of the Police Station or by any officer to whom he was subordinate and within whose jurisdiction the



offence was said to have been committed. The Assistant Superintendent of Police having taken action on the petition and directed an enquiry, was in a position to get the offender punished. A.I.R. 1940 Pat. 625=41 Cr.L.J. 409=6 B.R. 424=187 Ind. Cas. 128.

—S. 211—False charge—False allegation against Subordinate Judge that he committed offence under S. 196, made to District Judge.

The expression "falsely charges" in S. 211, must be construed along with the words which speak of the institution of proceedings in the earlier part of the section, so that the test is "whether the person who made the statement which is alleged to constitute the charge did so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed." An accusation made to a person who has nothing to do under the law with setting the criminal law in motion would thus not amount to a charge within the section. False allegations of an offence under S. 196, Penal Code, against a Subordinate Judge made to such an authority as a District Judge for the purpose of obtaining sanction to prosecute, amounts to the making of a charge within the meaning of S. 211. Since the object in making the allegation to the District Judge is to set the criminal law in motion, and the District Judge has statutory power to further that object, though the sanction of the Local Government is also necessary before any Criminal Court can take cognizance of the offence. A.I.R. 1938 Pat. 83=16 Pat. 571=19 P.L.T. 51=39 Cr.L.J. 314=4 B.R. 274=173 Ind. Cas. 432.

—S. 211—"False charge"—False petition to Superintendent of Police for protection from oppression of head constable.

For an allegation to amount to a false charge, as contemplated under S. 211, Penal Code, it must be made with the intention and object of setting the criminal law in motion. A false petition to the Superintendent of Police praying for the protection of the petitioner from the oppression of a head constable which may be effected by some departmental action, does not amount to such a false charge. The charge must be embodied either in a complaint to the Magistrate or in a report of a cognizable offence to a Police Officer:

Held, that the conviction under S. 211, could not also be altered to one under S. 182, since none of the Police Officers to whom the complaint was addressed by the petitioner had taken the trouble of presenting a complaint against him as required by S. 195, Criminal P.C. A.I.R. 1937 Lah. 624=39 P.L.R. 238=38 Cr.L.J. 1070=171 Ind. Cas. 333.

—S. 211—False charge.

Where allegations are substantially true and there is no mention of particular section when preferring a charge before the Police, conviction under S. 211, could not be sustained. 20 Nag. L. Jour. 92.

—S. 211—False charge—Falsity of complaint.

In a charge under S. 211, what is to be considered is the nature of the complaint or charge

made by the accused; in other words, whether the complaint is substantially true and what is false is a mere fringe to the complaint or whether the substantial complaint is false and what is true is a mere fringe, or in other words, a mere accessory circumstance.

If A believes what B told him and in good faith orders B to file a complaint, the fact that B's story turned out to be untrue will be no ground for criminal prosecution of A, even if, during the inquiry he assists in the production of evidence. It is necessary to prove also that A believed in its falsity. A.I.R. 1937 Pat. 84=3 B.R. 347=38 Cr.L.J. 462=167 Ind. Cas. 852.

—S. 211 — False charge — Information to Police Officer amounting to complaint of cognizable offence—Information not reduced to writing under S. 154, Criminal P.C.—Subsequent complaint by accused—Complaint found false—Prosecution of accused under—Legality.

Where a person gives information to a Police Officer which amounts to a complaint of a cognizable offence, any statement made by another person to the Police afterwards, however false it might have been, is a statement made in Police investigation and cannot be made the foundation of a prosecution under S. 211, Penal Code, even though the Police Officer who received the first information did not record the same in writing as required by S. 154, Criminal P.C. A.I.R. 1936 Mad. 160=1935 M.W.N. 1197=43 M.L.W. 261=37 Cr.L.J. 357=160 Ind. Cas. 988.

—S. 211—False charge.

Fight between Municipal employees under accused and cartmen—Accused not present at alleged fight—Accused charging cartmen with obstructing him in discharge of his duties—Charge found false—Conviction of accused under S. 211, held proper. 157 Ind. Cas. 792=36 Cr.L.J. 1289.

—S. 211—False charge—Offence under S. 211, when complete.

Where a person does not confine himself to reporting what he knew of the facts, stating his suspicions and leaving the matter to be further investigated by the Police, but he definitely alleged his belief in the guilt of certain men and insists on Court proceedings being taken against them, it amounts to a charge within the meaning of S. 211. And as soon as the charge is made, the offence under S. 211 is complete and the injured party can file a complaint against the informant under S. 211 irrespective of the fact that the latter files a complaint subsequently. A.I.R. 1934 Rang. 21=35 Cr.L.J. 1259=151 Ind. Cas. 185.

—S. 211—False charge.

An allegation will amount to a false charge under S. 211, only if made with the intention and object of setting the criminal law in motion. An allegation made to the Superintendent of Police to the effect that a Sub-Inspector had committed bribery and extortion does not amount to a false charge as contemplated under S. 211. A.I.R. 1932 Cal. 511=59 Cal. 334=33 Cr.L.J. 631=138 Ind. Cas. 551.



## —S. 211—False charge.

The word 'charge' as used in S. 211, implies that the allegation or accusation of an offence against another should be made to a person who, or to a tribunal, which is competent to take action against the person complained against. The test is whether the person making the charge intended to set the criminal law in motion against the person charged. A.I.R. 1932 Lah. 246=33 P.L.R. 174=33 Cr.L.J. 409=13 Lah. 468=137 Ind. Cas. 157.

## —S. 211—False charge against public servant—To whom made.

A false charge against a public servant must be made to an officer who has power to investigate and send it for trial: 6 Cal. 620, Foll. 33 C.W.N. 1058=1929 Cr.C. 360=A.I.R. 1929 Cal. 724.

## —S. 211—Charge—Charge against several—Only some proceeded against in Court—No charge against the rest.

Where a charge is made against several people but one of them is not proceeded against and is not charged in Court, the fact that the others are charged in Court does not make the charge against the former a charge in Court: 34 All. 522, Dissented from. 82 Ind. Cas. 167=22 A.L.J. 829=5 L.R.A.Cr. 137=25 Cr.L.J. 1239=46 All. 906=A.I.R. 1924 All. 779.

## —S. 211—False charge—What amounts to.

Merely stating facts and suspicions is not "charge" but alleging belief in guilt of particular person and desiring he should be proceeded against is charge. 82 Ind. Cas. 167=22 A.L.J. 829=5 L.R.A.Cr. 137=25 Cr.L.J. 1239=46 All. 906=A.I.R. 1924 All. 779.

## —S. 211—False charge—Causing police search to be made—Indicating guilt—Amounts to.

Causing police search to be made and identifying property as being unlawfully in complainant's possession and indicating to the police that the complainant was guilty amounts to charge within the meaning of S. 211. 82 Ind. Cas. 167=22 A.L.J. 829=5 L.R.A.Cr. 137=25 Cr.L.J. 1239=46 All. 906=A.I.R. 1924 All. 779.

## —S. 211—False charge.

Failure to prove a case is not the same thing as the institution of a maliciously false case. 72 Ind. Cas. 76=4 P.L.T. 703=1 Pat. L.R.Cr. 50=24 Cr.L.J. 316=A.I.R. 1924 Pat. 379.

## —S. 211—False charge—Statement to police under S. 162, Cr.P.C.

A statement made under S. 162 to a police is not a complaint or charge. If it is made after the institution of proceedings, it cannot be made the basis of prosecution under S. 211, I.P.C. 8 M.L.T. 87=11 Cr.L.J. 286=20 M.L.J. 132=5 Ind. Cas. 908.

## —S. 211—False charge—Cr. P. Code, S. 157.

A telegram that a dacoity had taken place without mentioning names is not an institution of a

false charge within S. 211 and is not 'information received' within S. 157, Cr. P. Code. 1 L.W. 355= (1914) M.W.N. 382=15 Cr.L.J. 622=25 Ind. Cas. 630.

## —S. 211—'False charge' meaning of—Petition for inspection of Municipal election paper to the District Magistrate, whether charge.

The applicant presented a petition to the District Magistrate asking for permission to inspect the file of papers connected with Municipal election saying that he intended to take criminal proceedings against an employee of the Municipal Board who, while distributing the voting papers, had given some of them to persons who had no right to receive them intending to cause injury to the applicant. Held, that the petition did not amount criminal charge within the meaning of S. 211. 8 A.L.J. 1106=12 Cr.L.J. 433=11 Ind. Cas. 617.

## —S. 211—False charge—Information to village Magistrate or other persons mentioned in S. 45, Cr.P.C., which they are found to transmit—Information and charge, distinction between: Per Benson and Munro, JJ. (Sankaran Nair, J. dissenting):—

A false complaint to a village magistrate or other persons merely in S. 45, Cr.P.C. of an offence which the village magistrate or other person is required by the section to forward to higher authorities is an offence under S. 211, I.P.C. It may be otherwise if the information be one which is not required by S. 45, Cr. P. C. to be so forwarded:—31 M. 506 dissented from. Obiter:—Every information of an offence does not necessarily amount to a charge of an offence. A man might give the information which he had heard from others and without himself alleging its truth. Per Sankaran Nair, J.:—The statement given to the village Magistrate is not one made under S. 154, I. P. C. Nor is it the institution of a criminal proceedings. The information given to the village Magistrate is distinguishable now what is known as "criminal information." The statement itself need not be transmitted under S. 45, Cr.P.C. and it is only the information that has to be transmitted and consequently no offence under S. 211, I.P.C. can be said to be committed. A false charge under S. 211, I.P.C. must not be understood in any restricted or technical sense, but in its ordinary meaning of a false accusation made to any authority bound by law to investigate it or to take any steps in regard to it, such as giving information of it to superior authorities with a view to investigation or other proceedings and the institution of criminal proceedings includes the setting of the criminal law in motion. 17 C. 574, ref. to. If an aggrieved person gives false information of an offence to the Station House Officer under S. 154, Cr. P. C., he may be proceeded against under S. 211, I. P. C. (1909) 32 M. 258=5 M. L. T. 269=1 Ind. Cas. 187 (F.B.) Overruling 31 M. 506=18 M.L.J. 573, supra.

## —S. 211—False charge—False complaint need not be followed by summons.

To constitute the offence provided for by S. 211, it is sufficient that a false complaint should be made against any person. It is not necessary that summons should be issued upon such complaint, 1904 A.W.N. 10=26 A. 244.



—S. 211 — "Falsely charged" — Test—Sentence.

The 'test' to find out whether there was a false charge is "did the person who made the charge intend to set the Criminal law in motion against the person against whom the charge is made"; and the fact that the statement to the Police officer should have been reduced to writing in accordance with S. 154, Cr.P.C., does not prevent the statement from being a false charge. A distinction was drawn between the case of one who persisted in the charge and another who withdrew from it at a very early stage. (1903) 27 M. 127.

—S. 211—False charge—'Charges'—'Gives information'—Difference between—Intention.

The word "charges" as used in S. 211 means something different from "gives information." The words "falsely charged" must be construed with reference to the words which speak of the institution of proceedings, the test being where the person making the statement alleged to constitute the "charge" does so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed, which may be inferred from the language of the statement and the circumstances under which it is made. A person who makes a petition merely with a view to prevent a recurrence of the incident (such as "tutoring" in this case) and not with a view that the authorities should take criminal proceedings is not making a "charge" within the meaning of the section. (1903) 26 M. 640.

—S. 211—False charge involving true facts also—False prosecution, test of.

S. 211, I.P.C., contemplates an indivisible charge. Where a charge is partly true and partly false, the proper test is whether the charge is substantially true or false, i. e., whether the main charge is false and what is true is only a mere fringe of the reverse. No definite rule can be laid down for all cases. (1001) 5 C.W.N. 727.

6. Graver and lesser offence.

—S. 211—Graver and lesser offence.

An offence falling under S. 182 is included in the more serious offence falling under S. 211 and a prosecution for a false charge may be either under S. 182 or S. 211, though clearly, if S. 211 does apply and the false charge is serious, a prosecution should be under the more serious charge under S. 211. A.I.R. 1943 Lah. 31=1.L.R. (1942) Lah. 675=44 Cr. L. J. 305=204 Ind. Cas. 572.

[Overruling: A.I.R. 1941 Lah. 216=43 Pun. L.R. 191=195 Ind. Cas. 102]

—S. 211—Graver and lesser offence—Charge for offence under Ss. 182 and 211—Conviction for minor offence only—Legality.

As soon as a false complaint has been made to the police the person who made the complaint is guilty of an offence under S. 182 and a repetition of the same complaint to a different person will not exonerate him from guilt regarding the earlier

offence. Where the accused is found to have committed two distinct offences under Ss. 182 and 211, I. P. Code the prosecution may be for either offence though generally it should be for the more serious offence. 128 Ind. Cas. 836=8 Rang. 499=1931 Cr. C. 28=A.I.R. 1931 Rang. 12.

—S. 211—Graver and lesser offence—Offence falling under Ss. 211 and 182—Prosecution for minor offence under S. 182 improper.

P went to the police station and made allegations against one B and A to the effect that they had jointly committed robbery on him, in the course of which, one of them caused hurt to him. The police investigated the case, found it to be false and finally classified it as such, thereupon, P lodged a complaint in Court against B and A on the same facts and for the same offence. The Magistrate on receipt of it directed the police for enquiry and report. On receipt of the police report, the Magistrate dismissed the complaint, classifying the case as "false." Then the officer-in-charge of the police station filed a complaint against P under S. 182 Penal Code.

Held, that though the offence alleged against the petitioner fell under both S. 182 and S. 211, prosecution under S. 182 was quite improper. To permit such prosecution will be contrary to the general principle that a prosecution for a lesser offence should not be launched when the facts constitute a graver offence: 5 Cal. 184; 32 Cal. 180; 15 All. 336; 44 Cal. 650; A.I.R. 1925 Pat. 483; 7 Bom. 184; 32 Cal. 180; and 2 U.B.R. 95; Rel. on. 114 Ind. Cas. 685=30 Cr.L.J. 342=6 Rang. 578=A.I.R. 1928 Rang. 254.

—S. 211—Graver and lesser offence—Definite statement to police—Different from mere information to Police—Section applies.

There is an essential difference between a mere information to the Police and a definite statement to it that a certain person has committed a certain particular offence. In the latter case, which is much graver than the former, S. 211 of the Penal Code applies. A.I.R. 1924 All. 779, Ref. 85 Ind. Cas. 818=26 Cr.L.J. 594=6 L.R.A.Cr. 71=A.I.R. 1925 All. 472.

—S. 211—Graver and lesser offence—No jurisdiction for the grave—Investigation by Magistrate into the lesser—If empowered.

Where a Magistrate has no jurisdiction to take cognizance of an offence under S. 211 for want of proper complaint he can investigate the complaint as regards S. 182. 88 Ind. Cas. 1045=5 Pat. 33=6 P. L. T. 515=26 Cr.L.J. 1269=1926 P.H.C.C. 106=A.I.R. 1925 Pat. 717.

—S. 211—Graver and lesser offence—Sanction for graver offence refused—Fresh charge on minor offence, not requiring sanction—Improper.

Where the charge might have been made against the accused under section 182 or section 211, Held, it seems to be contrary to public policy and to the recognised principles of the administration of the criminal law, when a charge has been launched which requires sanction by a particular authority



and that authority has refused sanction, to hold that it is open to a complainant to alter his election, shift his ground and start a fresh charge on an alternative section which does not require sanction. 68 Ind. Cas. 32=20 A.L.J. 775=45 All. 11=23 Cr.L.J. 496=A.I.R. 1922 All. 502.

**—S. 211—Graver and lesser offence.**

Where there have been Court proceedings in consequence of a false report to the police, then S. 211 is the appropriate section to apply, and is so in any event, where the case is a serious one. 1 U.B.R. 134, Rel. on.

But this does not of necessity make a prosecution under Section 182 illegal. It is a question of expediency whether the High Court will quash the conviction for the minor offence under Section 182 and direct a trial for the graver one under Section 211. 7 M.H.C. App. 5, Rel. on. 34 All. 522. 32 Cal. 180 and 15 Bom.L.R. 574, Ref. 64 Ind. Cas. 839=11 L.B.R. 43=A.I.R. 1921 L.B. 43.

**—Ss. 211, 182—Graver and lesser offence.**

Prosecution for a false charge may be under S. 182 or S. 211, I.P.C.; but if the false charge be a serious one, the graver S. 211 should be applied and the trial should be full and fair. 5 C. 184, 7 C.L.R. 382, Foll.; 5 C.W.N. 727, doubted; 17 C. 574 F.B. Com. on. (1904) 32 C. 180.

**7. Instituting criminal proceedings.**

**—S. 211—"Criminal proceeding"—Meaning of—Proceeding under S. 107, Cr. P. Code—If and when amounts to.**

The expression "Criminal proceeding" means a proceeding which lies under the law of procedure in a criminal Court, and which is in accordance with some requirement of, or is performed under some power conferred by the relevant procedural provisions. In a proceeding under S. 107, Cr. P. Code, the receipt of information against a person by whom a breach of the peace is apprehended, and the verification of such information are not provided for in that section, and it must therefore be held that the mere making of a complaint, whether orally or in writing, against such a person and any steps which the Magistrate may take to verify the truth of the allegations before he issues notice to such a person are not within the expression "criminal proceeding" as used in S. 211, I. P. Code. But if the magistrate, acting upon the information laid before him, issues notice to such person, the person laying the information must be held to have instituted a "criminal proceeding." Where however the Magistrate refuses to issue notice, there is no "criminal proceeding," and if the information be false and malicious, the action in law would be provided, not by S. 211, but by S. 182, I.P. Code. Pak L.R. (1948) Lah. 53=A.I.R. 1949 Lah. 28=50 Cr.L.J. 244 (F.B.)

**—S. 211—Instituting criminal proceedings—No intention to set criminal law in motion.**

Railway gangman reporting to Station Master about removal of keys on the line—Information not given with intention of setting criminal law in motion—No offence, held, committed under

S. 211. A.I.R. 1944 Mad. 391=57 M.L.W. 275=1944 M.W.N. 271=46 Cr.L.J. 232=(1944) 1 M.L.J. 379=217 Ind. Cas. 191.

**—S. 211—Instituting criminal proceedings—False charge to Police.**

The criminal proceedings are just as much instituted within the meaning of S. 211, Penal Code, when first information of a cognizable offence is given to the Police under S. 154, Criminal P. C., as when a complaint is made direct to a Magistrate under S. 200. But there is an essential difference between a mere information to the Police and a definite statement to it that a certain person has committed a certain particular offence. In the latter case, which is much graver than the former, S. 211, Penal Code, applies. A person who sets the criminal law in motion by making a false charge to the Police of a cognizable offence by definitely charging a person with having come to his house for the purpose of committing a dacoity and insisting on investigation, institutes criminal proceedings within the meaning of S. 211, Penal Code. A.I.R. 1942 Oudh 100=1941 O.W.N. 1072=42 Cr.L.J. 833=1941 A.W.R.C.C. 298=196 Ind. Cas. 262.

**—S. 211—Instituting criminal proceedings.**

The mere fact of giving evidence alone cannot by any stretch of reasoning be tantamount to the institution of proceedings within the meaning of S. 211. A.I.R. 1936 Lah. 828=38 P.L.R. 16=37 Cr.L.J. 1043=164 Ind. Cas. 1057.

**—S. 211—Instituting criminal proceedings.**

The laying of an information which the Police Officer has power to investigate and the causing of that officer to investigate amounts to institution of criminal proceedings. Consequently, where the accused reports to two Police Officers, one of whom has no jurisdiction, while the other has, the accused must be held to have instituted proceedings and the offence under S. 211, is committed, though partially, at each place. A.I.R. 1936 Pat. 358=17 P.L.T. 472=2 B.R. 643 (2)=37 Cr.L.J. 862=163 Ind. Cas. 805.

**—Ss. 211, 182—Instituting criminal proceedings—Proof of intention to get criminal proceedings started against person charged is necessary.**

A person actually institutes criminal proceedings upon making a complaint as defined in S. 4 (g), Criminal P. C., and a person also institutes criminal proceedings upon reporting the commission of a cognizable offence to the Police who are empowered to investigate the allegation. It is true that a Criminal Court can take cognizance of an offence not only upon the receipt of a complaint or upon the report of a Police Officer, but also under S. 190 (1) (c), Criminal P. C., upon information received from any person, but it cannot be said that a person who gives information to a Court without a view to that Court taking action under the Criminal P. C., thereby himself institutes criminal proceedings. In order to render an allegation a complaint, it must be made "with a view to a Magistrate taking action under the Criminal P. C." Where, therefore, a telegram



alleging that a certain offence has taken place does not contain a prayer asking the addressee to take action as contemplated by the Code, there must be clear proof that this was the petitioner's intention before it can be held that he submitted a complaint.

Where telegrams were sent to the Deputy Commissioner, Assistant Commissioner and District Superintendent of Police that a certain Sub-Inspector had committed certain offence against the sender, and on Magisterial inquiry the allegations were found to be incorrect and the sender was prosecuted under S. 211, Penal Code:

Held, that in the absence of proof that the telegrams were sent with a view to the authorities taking criminal proceedings against the person charged, he could not be convicted under S. 211 but his conduct was punishable under S. 182. A.I.R. 1936 Pesh. 66=37 Cr.L.J. 604=162 Ind. Cas. 140.

—S. 211—Instituting criminal proceedings.

A false charge and institution of criminal proceedings are not exclusive though they are not co-extensive and the latter phrase applies to a report to the Police of a cognizable offence. A false charge made to the Police of a non-cognizable offence will be a false charge which will not amount to the institution of criminal proceedings. But if a report of a cognizable offence is made to the Police, the machinery of law is set in motion by the report and the criminal proceedings instituted within the meaning of S. 211. A.I.R. 1934 Pesh. 112=35 Cr.L.J. 1410=151 Ind. Cas. 816.

—S. 211—Instituting criminal proceedings.

A person, who applies to a Magistrate for an order under S. 144, Criminal P. C., against another institutes a criminal proceeding within the meaning of S. 211, Penal Code. 1933 M.W.N. 1263.

—S. 211—Instituting criminal proceedings—Allegation to Police of non-cognizable offence.

A false charge of a non-cognizable offence made to the Police is not an institution of criminal proceedings as the Police have no power to take any proceedings in non-cognizable cases without the order of a Magistrate. A.I.R. 1932 Cal. 511=59 Cal. 334=33 Cr.L.J. 631=138 Ind. Cas. 551.

—S. 211—Instituting criminal proceedings—Charge of cognizable offence.

The making of a false charge to the Police of a cognisable offence is the institution of criminal proceedings within the meaning of S. 211. Where the accused made a report of an alleged offence under S. 304, and thereby caused the Police to make an investigation:

Held, that the accused must be deemed to have instituted a criminal proceedings within the meaning of S. 211. A.I.R. 1931 All. 269=1931 A.L.J. 177=33 Cr.L.J. 256=136 Ind. Cas. 277.

—S. 211—Instituting criminal proceedings—Charge to Police of cognizable offence.

Setting the criminal law in motion by making a charge to the Police of a cognizable offence against a person does not amount to the institution of criminal proceedings against that person within the meaning of S. 211. A.I.R. 1931 Nag. 134=32 Cr.L.J. 1009=27 N.L.R. 275=133 Ind. Cas. 398 (F.B.).

[Overruling: 2 N.L.R. 119.]

—S. 211—Instituting criminal proceedings—False information to superior Police Officer—If constitutes.

Lodging false information with Superintendent of Police that the informant and his mother were wrongfully confined by a police officer constitutes institution of criminal proceedings within the meaning of S. 211. (Cuming, J.) Topzal Hossain v. H. C. Hunt. 34 C.W.N. 556=128 Ind. Cas. 208=A.I.R. 1930 Cal. 711.

—S. 211—Instituting criminal proceedings.

A false information given to the Police is a proceeding instituted on a false charge within the meaning of S. 211 as a charge laid before the police is a criminal proceeding. 17 Cal. 574 (F.B.), Foll. 92 Ind. Cas. 885=4 Pat. 472=7 P.L.T. 657=27 Cr.L.J. 373=A.I.R. 1925 Pat. 678

—S. 211—Institution of criminal proceedings—Application for relief from Police torture—Not a complaint—No offence even if false.

The applicant was tortured by the police under the suspicion of theft and he therefore prayed that the enquiry be directed to be made in the presence of the officer and that it be ordered that the police should not trouble him in any way. The Magistrate treated this as a complaint, took evidence and wrote a brief order dismissing the complaint under section 203, Cr. P. Code, in which he did not refer to the witnesses or discuss their evidence. He then took proceedings under section 476 against the applicant, and (P. W. 14) one other who was said by the police in their report to have instigated the applicant to file the application. The applicant was ordered to be prosecuted under S. 211 and the other man under S. 211 read with section 109 and section 193, Indian Penal Code:

Held, that no offence under section 211 was committed as there was no intention to set the law in motion against anybody. There was neither an institution of any criminal proceedings against the police nor were these persons charged with having committed the offence 26 Mad. 640 and 39 All. 715, Foll. 75 Ind. Cas. 158=24 Cr.L.J. 910=6 N.L.J. 202=A.I.R. 1923 Nag. 313.

—S. 211—Instituting criminal proceedings—Workmen's Breach of Contract Act, S. 1—Not a criminal proceeding.

The mere initiation of a proceeding under the preliminary portion of S. 1 of the Workmen's Breach of Contract Act for execution of the work or for repayment of the advance, which is



withdrawn before any order is passed therein, is not a criminal proceeding within S. 211 of the Cr. P. Code. 59 Ind. Cas. 45=22 Cr.L.J. 13=43 Mad. 443.

**—S. 211—"Instituting criminal proceedings"—Statement under S. 162, Cr. P. C.**

A statement made to the Police under S. 162, Cr. P. C., after the law has been set in motion and by which the prosecution cannot be said to have been instituted, cannot be made the basis of a prosecution for an offence under S. 211, I. P. C. (1909) 8 M.L.T. 87=11 Cr.L.J. 286=20 M.L.J. 132=5 Ind. Cas. 908.

**—S. 211—Instituting criminal proceedings—Accusation before Village Magistrate of murder—Criminal proceedings, institution of.**

An accusation of murder made to the Village Magistrate who under S. 14, Reg. XI of 1816, has authority to arrest any person whom he suspects of having committed the murder of a person whose body is found, as it was in this case, within his jurisdiction is a charge within the meaning of S. 211, even though it does not amount to the institution of criminal proceedings or even though no criminal proceedings follow it owing to the Police on investigation referring the charges as false. (1903) 27 M. 129.

**—S. 211—Institute Cr. Proceedings—Meaning.**

Under S. 211 answers to questions put by a police officer under S. 161, Cr. P. C. do not amount to institution of criminal proceedings or preferring a false charge. 6 M.L.T. 133=11 Cr.L.J. 164=4 Ind. Cas. 1061.

**—S. 211—Institution of criminal proceedings—Information to the Village Munsif and communicated by him to the police—Conviction of informant under S. 211.**

Information given to the Village Munsif who, in his turn, communicated it to the police, who found it to be false, may be the basis of conviction of the informant under S. 211 of the I. P. C. (Per Sankaran Nair, J.)—Information given to a Village Munsif is different from criminal information and cannot be treated as institution of criminal proceedings. 32 Mad. 258=5 M.L.T. 269=9 Cr.L.J. 170=1 Ind. Cas. 187.

**—S. 211—"Institutes criminal proceeding or falsely charges"—Meaning of—Statement under S. 162, C.P.C.—Information to Village Munsif—Test about dacoity.**

20 M. 79; 1 M.H.C. 30 ref. to. 18 M.L.J. 573=31 M. 506.

Overruled by 32 M. 258, *infra*.

**8. Interpretation.**

**—S. 211—Interpretation.**

The words "be instituted" in second part of S. 211 do not denote the past tense as is sometimes contended. The words denote the passive mood. A.I.R. 1938 Sind 213=40 Cr.L.J. 12=1 L.R. (1939) Kar. 241=178 Ind. Cas. 218.

12—F. Y. D.—7.

**—S. 211—Interpretation.**

There is no distinction between the first and second parts of S. 211, Penal Code, between proceedings before the Police and the proceedings before the Magistrate. The second part of S. 211 must be read with the first part and the second part refers to 'such criminal proceedings'. A.I.R. 1938 Sind 213=40 Cr.L.J. 12=1 L.R. (1939) Kar. 241=178 Ind. Cas. 218.

**—S. 211—Interpretation.**

The word "falsely charges" used in S. 211, must be read with the preceding words of that section and imply a false charge to a person in authority made with a view to setting the criminal law in motion. The question here is one of intention. A.I.R. 1936 Pesh. 66=37 Cr.L.J. 604=162 Ind. Cas. 140.

**—S. 211—Interpretation—"Falsely charging".**

"Falsely charging" means a false accusation made to any authority bound by law to investigate it or to take any step in regard to it. 32 Mad. 258, Ref. 129 Ind. Cas. 87=A.I.R. 1930 Pat. 550.

**—S. 211—Interpretation—Charge and proceedings—Must be made in British India.**

On general rules of construction it seems that the criminal proceedings and false charge within S. 211 must mean proceedings and charge in British India where the Indian Penal Code is in force though a person may be able to institute such proceedings or make such a charge while he is actually in foreign territory. The criminal proceedings taken and the false charge made before the Vyra Court in the Baroda State are not within the scope of the section. 77 Ind. Cas. 189=47 Bom. 907=25 Bom. L.R. 772=25 Cr. L. J. 333=A.I.R. 1924 Bom. 51.

**—S. 211—Interpretation—Court proceedings followed, accused discharged—Offence committed "in relation to proceedings."**

The petitioner himself planted a mould in respondent's house and gave information to the Police that respondent was counterfeiting coin. The respondent was prosecuted but was discharged. Subsequently, the Court granted an application for sanction to prosecute the petitioner for an offence under S. 211, I.P.C. On application to revoke the sanction on the ground that the offence was not committed "in or in relation to any proceeding in the Court":

Held, that the facts alleged against the petitioner did constitute an offence in relation to the proceedings before the Magistrate. 84 Ind. Cas. 863=2 Bur.L.J. 289=26 Cr.L.J. 383=A.I.R. 1924 Rang. 211.

**—S. 211 — Interpretation — "Institution" meaning of.**

The term 'institution' in Section 211, Indian Penal Code means the institution either by the Police or others in some Criminal Court in consequence of accused's action. 65 Ind. Cas. 434=23 Cr. L. J. 82=6 P. W. R. Cr. 1922=A.I.R. 1922 Lah. 133.



## 9. Jurisdiction.

—S. 211—Territorial jurisdiction in regard to an offence under—False charge made in letter posted from a mofussil station to a public officer in Madras—Offence where completed—Court at mofussil station, if has jurisdiction to take cognizance and try the accused for the offence under S. 211.

The accused posted a letter at Kumbakonam addressed to the Inspector General of Police, Madras, wherein he alleged that a village munsif of a neighbouring village had received illegal gratification. This complaint, on investigation was found to be absolutely groundless. The accused was charged before the Additional First Class Magistrate, Kumbakonam, of an offence under S. 211, I. P. Code. On a petition to quash the proceedings on the ground that the Court at Kumbakonam had no territorial jurisdiction to enquire into the case:

Held, that the offence can be said to be completed only when the letter reached the destination, i. e., the office of the Inspector General of Police, Madras. It cannot be said that by merely posting the letter, the accused had attempted to commit the offence. The Court at Kumbakonam which had taken cognizance of the offence had acted without jurisdiction and the charge framed has to be quashed. I.L.R. (1949) Mad. 893=61 L.W. 15=49 Cr. L. J. 335=A.I.R. 1948 Mad. 292=1948 M.W.N. 3=(1948) 1 M.L.J. 21.

—S. 211 — Jurisdiction — False charge of dacoity.

No doubt the criminal law may be set in motion by giving information to the Police of a cognizable offence, but unless proceedings are instituted in a Court of law, it is not correct to say that criminal proceedings have been instituted. A mere charge, however serious (e. g., dacoity) which gets no further than a Police inquiry, does not give rise to a case triable only by a Court of Session. If the matter gets into Court, and a man is put on his trial on false charge, that is a much more serious matter. If the case gets no further than a Police inquiry, it falls within the first part of S. 211, and, therefore, the First Class Magistrate has jurisdiction to try it. A.I.R. 1941 Bom. 414=43 Bom. L. R. 858=I.L.R. (1942) Bom. 22=43 Cr.L.J. 240=197 Ind. Cas. 598.

—S. 211—Jurisdiction—Complaint by woman to Police that certain person raped her—Police finding case to be false on investigation—Offence by woman, if comes under first part of S. 211—Whether can be tried by first Class Magistrate.

The criminal proceedings referred to in S. 211 must be regarded as proceedings before a Magistrate. A man who makes a false charge, which fails to result in any proceedings before a Magistrate, owing to his clumsiness or for some similar reason is saved from himself to a certain extent by the action of the Police in throwing out the case, and he has merely "falsely charged", he has neither initiated criminal proceedings nor caused them to be initiated. If owing to his greater skill, he has succeeded in getting the Police to arrest his enemy and place

him before a Court, then his greater skill has succeeded in involving himself perhaps in an offence for which he can be more heavily punished, because he would then have caused criminal proceedings to be instituted. If he had gone directly to the magistrate with the idea that the Magistrate will harass his enemy by summoning him to Court, then he has "instituted criminal proceedings" himself and the annoyance or dishonour which he has placed on his enemy has again made him liable to heavier punishment.

Where, therefore, a woman reports to the Police that a certain person had committed an offence of rape on her and the Police investigate the case but find it to be false, the offence committed by the woman comes under first part of S. 211, and she can be legally tried by a Magistrate of the First Class. A.I.R. 1938 Rang. 397=1938 Rang. L.R. 236=40 Cr.L.J. 113=178 Ind. Cas. 644.

—S. 211—Jurisdiction—Erroneously and in good faith taken over by Magistrate—Prosecution for false complaint—Not sustainable.

If a Magistrate not empowered by law to take cognizance of an offence under S. 190 (1) (a) erroneously and in good faith does so, although his proceedings shall not be set aside merely on the ground of his not being so empowered, it will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so: A.I.R. 1926 Pat. 400, Foll. 17 Cal. 574 and 32 Mad. 258, Dist. 129 Ind. Cas. 87=A.I.R. 1930 Pat. 550.

—S. 211—Jurisdiction—Preliminary inquiry on complaint ordered by one Court—Subsequent complaint by police to another Court—Latter Court has no jurisdiction.

A person made a complaint against Abkari Inspector's Naik to the police and as the police took no action he filed a complaint in the Court of a Magistrate and the Magistrate ordered a preliminary enquiry. The police subsequently filed complaint against the person in the Court of another Magistrate charging him under Ss. 182 and 211 with regard to the complaint which he had made to the police.

Held, that the latter Court could not take cognizance of the complaint filed by the police against the person, the preliminary enquiry of the first Court not having been completed and no complaint by the first Court having been made: A.I.R. 1927 Cal. 95; A.I.R. 1927 Mad. 851; A.I.R. 1928 Rang. 254; Rel. on. 115 Ind. Cas. 313=23 S.L.R. 225=30 Cr.L.J. 399=1929 Cr.C. 106=A.I.R. 1929 Sind 115.

—S. 211—Jurisdiction—Dismissal of complaint—Same Magistrate acting under S. 211—Competency.

Where a false complaint is lodged and dismissed, the Magistrate dismissing the complaint is not competent to proceed against the complainant under S. 211, Penal Code. He should make a complaint under S. 195, Cr. P. Code. 96 Ind. Cas. 651=5 Pat. 450=7 P.L.T. 716=27 Cr.L.J. 987=7 A. I. Cr. R. 20=A. I. R. 1926 Pat. 368.



**—S. 211—Jurisdiction—False charge—Jurisdiction of magistrate—Commitment to court of session.**

Where the offence consists in the giving of false information to the Police and the case does not go further than a Police enquiry, the offence falls within the first paragraph of S. 211. Where the Magistrate commits the accused for trial to the Court of Session only on the ground that the fine or sentence which he may impose will not be adequate to meet the ends of justice, the commitment is bad in law. (1909) 6 A.L.J. 989=4 Ind. Cas. 812.

**10. Notice.**

**—S. 211—Notice—Opportunity to substantiate charge.**

The law does not require that an opportunity should be given to a person accused under S. 211, on the basis of a false report to impugn that report nor is there any general principle of natural justice which requires the issue of a notice to the accused in such a case. A.I.R. 1942 Oudh 100=1941 O.W.N. 1072=1941 A.W.R.C.C. 298=42 Cr.L.J. 833=196 Ind. Cas. 262.

**—S. 211—Notice.**

Issuing process under S. 211 without dismissing the *naraji* petition is illegal. A.I.R. 1932 Cal. 383 (1)=33 Cr.L.J. 514 (1)=36 C.W.N. 15=137 Ind. Cas. 849.

**—S. 211—Notice—Opportunity to show cause.**

Ordinarily a person ought to be given an opportunity to show cause before he is ordered to be prosecuted under S. 211. A.I.R. 1932 Cal. 287=35 C.W.N. 1210=33 Cr.L.J. 406=137 Ind. Cas. 133.

**—S. 211—Notice.**

No person should be proceeded against for making a false charge against another unless he has been given an opportunity of substantiating his allegations by the tribunal before which the charge is made and which proposes to take action against him. It is the duty of the tribunal making a complaint under S. 476, Criminal P.C., to come to a judicial finding that the allegations made before it are *prima facie* false. A.I.R. 1932 Lah. 246=33 P.L.R. 174=33 Cr.L.J. 409=13 L. 568=137 Ind. Cas. 157.

**—S. 211—Notice.**

Notice to show cause prior to prosecution need not be issued unless complaint challenges police report. A.I.R. 1927 Pat. 402; 6 Cal. 496 and 14 Cal. 707 (F.R.), Dist. 120 Ind. Cas. 48=1929 Cr.C. 378=8 Pat. 734=30 Cr.L.J. 1144=A.I.R. 1929 Pat. 650.

**—S. 211 — Notice — Circumstances dispensing with.**

False information was given to the police in a cognizable case. The investigating police officer complained against the informant under S. 211. The information was *prima facie* false and it would have been impossible for the informant to establish its truth. Until proceedings had been taken under S. 211 the informant never protested against mode of the investigation. The Magistrate was not uncertain as regards the regularity of the investigation;

Held, that the Magistrate could dispense with calling on the informant to show cause against the proceedings. 117 Ind. Cas. 647=7 Pat. 408=30 Cr.L.J. 842=10 P.L.T. 827=A.I.R. 1929 Pat. 70.

**—S. 211—Notice—Opportunity to prove case—Trial bad, if accused not given.**

A trial for an offence under S. 211, merely on the report of the police that the information given by the accused was false, without giving the accused an opportunity to prove the truth of the information given by him, is bad. 99 Ind. Cas. 408=31 C.W.N. 124=28 Cr.L.J. 152=A.I.R. 1927 Cal. 175.

**—S. 211—Notice—Must be given before sanction is ordered.**

A Magistrate does not exercise a proper discretion in ordering a complainant to be prosecuted under S. 211 I.P.C., merely on the receipt of a police report that the complaint is false. The complainant should be given a reasonable time and full opportunity to prove his case before sanction is given for his prosecution. 103 Ind. Cas. 63=8 A.I.C.R. 259=8 P.L.T. 662=28 Cr.L.J. 639=A.I.R. 1927 Pat. 402.

**—S. 211—Note — Opportunity to be given to prove charge before prosecuting.**

Where it is intended to prosecute any person under S. 211, such person ought to be given an opportunity of substantiating, if he can, the charge which he has brought before he is prosecuted. 8 A. 38 and 15 A. 336 Ref. to. 1907 A.W.N. 195=4 A.L.J. 471=29 A. 587.

See also 33 C.I. 1907 A.W.N. 268.

**—S. 211—Notice—Prosecution for false charge—Opportunity to establish truth—Form of.**

Where a person charged under S. 211, was examined by the magistrate who entertained the false complaint and a local investigation of the complaint also took place, it cannot be said that he had no opportunity to establish the truth of the complaint. It is not necessary to examine him again after the investigation or to hold a preliminary investigation before making an order under S. 476. 14 C. 707 Ref. to. 27 C. 921 dist. (1901) 6 C.W.N. 295.

**11. Practice.**

**—S. 211—Practice—Original case practice that complainant should not be tried under S. 211, till disposal of his case is merely rule of safety and not based on any statute.**

The practice that a complainant or first informant should not be prosecuted under S. 211 until his complaint or police case has been disposed of is not based on any statute and is merely a precautionary rule of safety in respect of a special class or criminal cases. While a prosecution under S. 211 might in certain circumstances be delayed or even set aside in accordance with this practice, the practice could *per se* be no ground for setting aside a conviction under S. 211 before disposal of the main case. 125 Ind. Cas. 770=9 Pat. 126=11 Pat. L. T. 224=31 Cr.L.J. 934=1930 Cr.C. 1214=A.I.R. 1930 Pat. 622.

**—S. 211 — Practice — Petition impugning the correctness of the police report that the charge was false and praying trial of accused person—Prior**



requisites before prosecution under S. 211, I. P. C. Cr.P.C., S. 4—Complaint.

A petition to a magistrate impugning the correctness of the police report that the charge brought by the petitioner is false, and praying that the accused may be brought to trial is a complaint within the meaning of S. 4, Cr.P.C. According to the practice of the Calcutta Court, when a person institutes before the police criminal proceedings, which on inquiry are found to have no justification, before he can be prosecuted for an offence under S. 211, I.P. C., he must have an opportunity afforded him of proving his case against the accused, and if he chooses to impugn the correctness of the police inquiry by petition, he is entitled to have the person complained against tried on the charge the Police and the Magistrate consider false, or else his statement must be recorded by the magistrate on oath and his complaint dismissed under S. 203, Cr.P.C. 14 C. 707 F. B. Foll. But the practice reprobated. (1905) 33 C. 1=10 C.W.N. 158=2 C.L. J. 228.

See also 29 A. 587.

## 12. Procedure.

—S. 211—Procedure—Charge sheet by Sub-Inspector in non-cognizable offence is proper.

In a non-cognizable case filing of a charge-sheet by a Sub-Inspector with regard to an offence punishable under S. 211, Penal Code, alleging that a false complaint has been sent to him through the Village Magistrate of an offence under the Arms Act, is a proper method of bringing the case before the Court. (1942) 201 Ind. Cas. 517=55 M. L. W. 63 (1)=1942 M.W.N. 224=43 Cr.L. J. 775.

—S. 211—Procedure.

Where after the Magistrate has taken cognizance of the offence under S. 211, upon complaint, the accused files a protest petition stating that he is ready to prove the case set up by him with a prayer that the matter may be enquired into by any Magistrate before any order is passed on the Police report and the petition is rejected by the Magistrate on the ground that as he had already taken cognizance of the offence it was too late to modify that order, the procedure followed by the Magistrate is proper one. A.I.R. 1940 Pat. 625=41 Cr. L. J. 409=6 B. R. 424=187 Ind. Cas. 128.

—S. 211—Procedure—Complaint must be verified and dealt with under S. 200, Criminal P. C.

If a Magistrate is going to make a charge against a person of an offence under S. 211, Penal Code, the complaint which the Magistrate holds to be false must have been verified and dealt with by the Court according to law. For instance when the complaint is made to the Magistrate, he is bound to take cognizance of it under S. 200, Criminal P.C., and he is bound to verify the complaint in the ordinary way. The Criminal P.C. does not contemplate that when the Magistrate has received a formal complaint he need not follow the procedure set out in S. 200, Criminal P. C., but can straightway send it to the Police under S. 156 (3), Criminal P. C., and then upon issue of B summary make a complaint of a false charge. The word "may" under S. 190, Criminal P. C., does not mean that Magistrate may refuse to take cognizance of an offence upon a complaint duly made to him. A.I.R. 1939.

Sind 78=40 Cr. L. J. 449=I. L. R. (1939) Kar. 648=180 Ind. Cas. 436.

—Ss. 211, 193—Procedure—Magistrate declining to prosecute—District Magistrate directing prosecution—Trial Magistrate commencing prosecution—Propriety.

Once a Magistrate passes an order declining to take action under Ss. 211 and 193, Penal Code, that order can be displaced only by the order of the Appellate Court under S. 476-B, Criminal P. C. The District Magistrate has no power to direct the prosecution and if the Magistrate in making the complaint allows himself to be guided by the wishes of a superior executive officer acting in that capacity, he manifestly acts improperly and contrary to law. A.I.R. 1938 Pat. 145=4 B.R. 327=39 Cr.L. J. 358=173 Ind. Cas. 738.

—Ss. 211, 500—Procedure—False report by woman that her modesty was insulted by servants of complainant at his instigation.

A woman made a false report in the Police Station that a certain *malguzar* called her up and told his servants to pollute her (*kujat karo*) whereupon they dragged her away and insulted her modesty by taking off her *dhoti*, beating her and turning her out with her person exposed:

Held, that to attribute such conduct to a person in the respectable position of a *malguzar* like the non-applicant would tend to lower him in the estimation of right thinking persons of his community and would, therefore, amount to defamation.

Even though the allegations of the prosecution may, in such a case, amount to an offence under S. 211, the complainant is not precluded from proceeding under S. 500. When the complainant merely asks for redress of his personal grievance, he is entitled to do so and the accused cannot be heard to say that she prefers the more serious section because the procedure under it would be more favourable to her. A.I.R. 1936 Nag. 241=38 Cr.L. J. 189=I. L. R. (1937) Nag. 338=166 Ind. Cas. 282.

—S. 211—Procedure.

Where the offence under S. 211 is committed in two places but only one place is mentioned, by mention of only one place, the accused is not misled in his defence and this does not affect his conviction. A.I.R. 1936 Pat. 358=17 P. L. T. 472=2 B. R. 643 (2)=37 Cr.L. J. 862=163 Ind. Cas. 805.

—S. 211—Procedure.

It is not permissible for the Magistrate to order an enquiry and to sanction the prosecution of the applicant under Ss. 182 and 211, where he has not examined him on oath. A.I.R. 1935 All. 745=36 Cr.L. J. 860 (2)=(1935) A.L.J. 1067=1935 A.W.R. 796=58 All. 129=155 Ind. Cas. 1070.

—S. 211—Procedure—Great delay in filing complaint.

In charges under S. 211, great delay should not be tolerated, and such delay alone is a sufficiently good reason for refusing to proceed with the complaint; it is not in the public interest that persons should be allowed to come forward eighteen months after an alleged false charge has been made and to require a Court to enquire into such matter. A.I.R. 1935



Rang. 485=8 Rang. 345=37 Cr.L.J. 243=160 Ind. Cas. 150 (2).

—S. 211—Procedure—Protest petition.

Where on a complaint of a police Inspector a Magistrate takes cognizance of offence under S. 211, and subsequently, the opposite party files a protest petition, the failure of the Magistrate to examine him on oath is only an irregularity. A.I.R. 1934 Pat. 573 =15 P.L.T. 756=36 Cr.L.J. 200=13 Pat. 789=152 Ind. Cas. 847 (2).

—S. 211—Procedure — Accused charged under S. 211, tried along with persons charged with attempting to bribe doctor—Legality—Joint trial of different accused for distinct offences though irregular, not interfered with by High Court.

Where the accused who was charged with an offence under S. 211, was tried along with two others who were sent upon a charge of attempting to bribe the doctor who performed the *post mortem* examination of the deceased in respect of whom the proceedings under S. 211 were instituted, and all the proceedings against the accused except the order sheet, statement of the accused and the charge were recorded in the case against the last two persons:

Held, that the procedure was irregular as it amounted to trying jointly distinct offences against two sets of accused without any suggestion that the charges could be tried jointly, but when no prejudice has been caused to the accused by this procedure adopted by the Magistrate, the High Court will not interfere on this ground especially when it is evident that the objection has been waived in the trial Court. A.I.R. 1934 Pesh. 112=35 Cr.L.J. 1410=151 Ind. Cas. 816.

—S. 211—Procedure.

No sanction is necessary for filing a complaint under S. 211, unless some proceedings before a Magistrate have preceded the complaint under S. 211. A.I.R. 1934 Rang. 40=35 Cr.L.J. 802=148 Ind. Cas. 845.

—S. 211—Procedure—Statement or examination of complainant not taken—No prosecution lies.

Where a criminal charge is filed by a complainant before a Magistrate but the Magistrate does not examine the complainant on oath, nor does he take down his statement in writing, the complainant, even if the charge transpires to be a false one, cannot be prosecuted under S. 211. 95 Ind. Cas. 68=28 Bom. L.R. 490=27 Cr.L.J. 740=A.I.R. 1926 Bom. 284.

—S. 211—Procedure—Original case—Must have been investigated.

It is not open to a Magistrate to lodge a complaint for making a false charge against a complainant until he has first investigated according to law the original complaint which the complainant has made. 95 Ind. Cas. 68=27 Bom. L.R. 490=27 Cr.L.J. 740=A.I.R. 1926 Bom. 284.

—S. 211—Procedure—Complaint dismissed.

If a complaint is dismissed on the report of the Investigating Officer without taking the complaint's evidence, it is improper to direct the prosecution of the complainant under S. 211, I.P.C. 56 Ind. Cas. 64 (All.)

—S. 211—Procedure—Complaint not on oath.

Complainant who sent a telegram, but who was not examined on oath cannot be considered to be guilty under S. 211 though his complaint is found on enquiry to be based on what he heard. 7 A.L.J. 618=11 Cr.L.J. 351=6 Ind. Cas. 390.

—Ss. 211 and 182 (a)—Procedure—Facts disclosing offence under S. 182.

Where on a charge under S. 211 the facts proved do not prove an offence under that section, but disclose an offence under S. 182 (a), the Magistrate should frame a charge against the accused under the latter section and then try him. 6 M.L.T. 175=11 Cr.L.J. 154=4 Ind. Cas. 1039.

—S. 211—Procedure—Complaint—When can be acted upon.

A complaint must be disposed of one way or the other before it can be the subject of a charge under S. 211. 3 S.L.R. 189=11 Cr.L.J. 199=4 Ind. Cas. 1160

—S. 211—Dismissal of complaint as false—Proper procedure;—Sec. 29 C. 479.

### 13. Sanction.

—S. 211—Sanction of Magistrate.

The accused was given shelter for the night in the house of B. In course of the night, he attempted to take advantage of B's wife. As a result of this he was braten by B. He then went to the Police Station and brought an entirely false charge of robbery against B. The Police reported the case to be a false one and prayed for the prosecution of the accused under S. 211. The Magistrate called upon the accused to show cause why he should not be prosecuted, and the accused then filed what is known as a "*narazi* petition." The case then proceeded to trial, and the accused was in due course convicted:

Held, that the sanction of the Magistrate who dealt with the "*narazi* petition" was not necessary before the prosecution started. A.I.R. 1939 Cal. 273=43 C.W.N. 279=I.L.R. (1939) 1 Cal. 318=40 Cr.L.J. 785=183 Ind. Cas. 384.

—S. 211—Sanction of Local Government.

Cognizance of complaint under S. 211, cannot be taken against person for action taken by him as Deputy Commissioner of Police, without the previous sanction of the Local Govt. A.I.R. 1936 Rang. 242=37 Cr.L.J. 723=162 Ind. Cas. 988.

—S. 211—Sanction—Accused not party in proceedings—Court may proceed suo motu.

Court may make a complaint against a person, under S. 476 for an offence under S. 211, Penal Code if it is of opinion that the proceedings before the Court were caused to be started by that person though he was not a party to a proceeding before it. A.I.R. 1925 Rang. 321, Foll.; 37 Cal. 250 and 7 C.L.J. 375, Ref. 52 C.L.J. 149=127 Ind. Cas. 65=A.I.R. 1930 Cal. 671.

—S. 211—Sanction—Report to police—Subsequent complaint to Court—Dismissed—Sanction not necessary.



**P** complained on 9th October 1927 to the police that certain persons committed an offence. Subsequently he lodged a complaint in the Court of a Magistrate on the same allegations on 17th October and the complaint was dismissed after inquiry. The Superintendent of Police, then sent a written complaint to the District Magistrate for the prosecution of **P**:

**Held**, the offence, if any, committed by **P** was complete before he went to Court with his complaint, and therefore it could not be said that the offence was committed in, or in relation to any proceeding in any Court. Sanction of the Court under S. 195 (1) (b) was therefore not necessary. A. I. R. 1924 All. 779, Foll. 111 Ind. Cas. 858=29 Cr.L.J. 938=10 L.R.A. Cr. 19=1929 A.L.J. 68=51 All. 382=11 A.I.Cr.R. 152.=A.I.R. 1928 All. 765.

—S. 211—Sanction—Information followed by complaint to Court—Court not investigating.

Where an information to the police is followed by a complaint to the Court based on the same allegations and the same charge, the sanction of complaint of the Court itself under S. 195 (1) (b) of the Code is necessary before the Court could take cognizance of an offence punishable under S. 211 of the Indian Penal Code, in respect of the false charge made to the police, on the ground that it was an offence committed in relation to a proceeding in Court. The fact that the complaint was not investigated by the Court, does not make any difference. 43 Cal. 1157 and 44 Cal. 650, followed. 86 Ind. Cas. 825=4 Pat. 323=6 P.L.T. 457=26 Cr.L.J. 889=A.I.R. 1925 Pat. 483.

—S. 211—Sanction—Complaint should be dealt with.

As a matter of judicial prudence, sanction to prosecute for making a false complaint ought not to be granted until the complaint is properly dealt with and dismissed. 75 Ind. Cas. 543=24 Cr.L.J. 954=A.I.R. 1924 Nag. 115.

—S. 211—Sanction—Difference of opinion.

Where complaint is found true by one Court and false by appellate Court, sanction should not be given. 66 Ind. Cas. 336=3 P.L.T. 43=1922 P.H.C.C. 26=23 Cr.L.J. 272=A.I.R. 1922 Pat. 160.

—S. 211—Sanction of Court—Information to police followed by complaint to Magistrate—Complaint false.

Sanction of the Court is necessary for offence under this section if the information to police is followed by complaint to Magistrate who, after investigation, finds the complaint false. 44 Cal. 650=20 C.W.N. 1347=18 Cr.L.J. 25=25 C.L.J. 59=36 Ind. Cas. 857.

—S. 211—Sanction whether needed.

No sanction of the Magistrate is necessary for an offence under the section, if no judicial investigation was held by Magistrate. 43 Cal. 1152=24 C.L.J. 134=20 C.W.N. 1265=18 Cr.L.J. 13=36 Ind. Cas. 845.

—Ss. 211 and 182—Sanction—Search on suspicion.

During an investigation, the police were told that they should search certain houses and there was reason to suspect the conduct of the owners of those houses. **Held**, that it does not amount to a charge within the mean-

ing of S. 211, I.P.C. Prosecution under S. 182, I.P.C., must be instituted on the sanction or the complaint of the public servant to whom the false information was given. (1915) M.W.N. 272=16 Cr.L.J. 423=28 Ind. Cas. 999.

—S. 211—Sanction to prosecute—Inquiry in granting sanction—Report of Police—Magistrate—Criminal Procedure Code Ss. 201-203.

Before granting any sanction under S. 211 of the Indian Penal Code, the Magistrate ought to observe all the formalities prescribed in Ss. 201-203 of the Code of Criminal Procedure. In other words he should examine the complainant and then afterwards he might refer the matter to the Police, and when the Police report is received by him then he may determine whether the complaint is true or false. That gives him jurisdiction to exercise his discretion and determine the question as to the truth or otherwise of the complaint. There is nothing in the Code of Criminal Procedure which compels a Magistrate in express terms to examine any or all of the witnesses whom the complainant wishes to adduce, before dismissing a complaint and granting sanction under S. 211 of the Indian Penal Code. It may be contrary to justice to do that, but whether it is so or not must depend on the circumstances of each case. 11 Cr. L. J. 338=5 Ind. Cas. 971=12 Bom. L.R. 229.

—S. 211—Sanction—Commitment without sanction.

A commitment to sessions for an offence under S. 211 on the complaint of a Public prosecutor with reference to a false charge brought by the accused in relation to a proceeding in a Court of justice, was illegal as the sanction of the Court is required and as it could not delegate the duty of filing complaint to the Public Prosecutor. A person who gives a report to the police against others, who upon the report are sent for trial, commits an offence in relation to a judicial proceeding. 19 P.R. 1917 Cr=20 P.W.R. 1917 Cr=18 Cr.L.J. 548=39 Ind. Cas. 692.

—S. 211—Cr. P. C., Ss. 195, 439—Sanction—False case—Sanction to prosecute—Complaint to Deputy Commissioner as executive officer—Order sanctioning prosecution of complainant as District Magistrate.

The Petitioner made certain allegations against an overseer of a Municipality to the Deputy Commissioner of the District. On the report of the Secretary of the Municipal Committee, the Deputy Commissioner did not take any action on the complaint. The plaintiff applied to the Sessions Judge for revision but the application was rejected. On the application of the overseer the Deputy Commissioner or District Magistrate sanctioned the prosecution of the petitioner. **Held**, that the order granting sanction was illegal, for, in the absence of a regular enquiry into the complaint the District Magistrate had absolutely nothing to go upon when he granted sanction. 37 P.L.R. 1909=1 Ind. Cas. 93 (2)=9 Cr.L.J. 152.

14. Miscellaneous.

—S. 211—Miscellaneous.

Where a false charge is made against two persons only one offence is committed and not two in spite of the fact that a charge was made against two persons. A.I.R. 1934 Rang. 21=35 Cr.L.J. 1259=151 Ind. Cas. 185.



—Ss. 211, 109—Miscellaneous—Conviction for substantive offence—Aliment only—Prejudice.

Where the conviction was for the substantive offence and the sentence was sustainable only for abetment of the same and there was no ground for supposing that the accused had been prejudiced, it was not necessary to alter the conviction (1903) 7 C.W.N. 556.

—S. 211—Miscellaneous—Malicious prosecution—Case taken to High Court.

A person making a false and malicious statement to the police intending that the criminal law in motion against his enemy is liable in damages for malicious prosecution, when subsequently criminal proceedings do follow his statement. A person who not only makes a complaint, resulting in criminal proceedings, but also takes the case in review to the High Court, is liable to pay damages to the innocent person aggrieved by his action. 6 A.L.J. 5=5 M.L.T. 387=2 Ind. Cas. 424.

—S. 211—Miscellaneous—Order for prosecution, when to be made.

It is not in every case that a Magistrate considers to be false that he should direct a prosecution under S. 211. (1906) 11 C.W.N. 125=34 Cal. 42=4 Cr.L.J. 460.

—S. 211—Miscellaneous—Punishment—Extent of fine to be inflicted.

A Magistrate's order for an offence by a wealthy old man, inflicting on him a fine although lenient, ought not to be interfered with. (Per Ayling J.) The age being a consideration the accused must be fined in such a way that he would suffer as much as if he had been a younger man. (1901) 1 M.W.N. 1=17 Cr.L.J. 158=33 Ind. Cas. 638.

—Ss. 211 and 50—Miscellaneous—Refusal to sanction prosecution under S. 211.

A Court should not issue process for an offence under S. 500, when on the same facts it refuses to sanction prosecution for an offence under S. 211. 44 Cal. 970=21 C.W.N. 253=25 C.L.J. 445=18 Cr.L.J. 377=38 Ind. Cas. 761.

—S. 212—Scope and applicability—Trial for offence under—Where can be had—Harbouring absconder—Whether offence.

S. 212 applies to the harbouring of persons who have actually committed an offence and has no application to the harbouring of persons not being criminals who merely abscond to avoid or delay a judicial investigation. For a conviction under this section, it must be established that the accused knew or had reason to believe that an offence had been committed by the person harboured. Merely knowing that the person harboured is proclaimed offender is not enough, for it does not follow from this that the accused knew that the person harboured had, in fact, committed an offence.

Under S. 212, first thing to be proved is that an offence has been committed by the person harboured. Until actually he is convicted, he is like every one else, entitled to the presumption that he is innocent. Until the Court has pronounced upon the fact, the prosecution for harbouring him would be premature. The proper course is to hold up the trial till then. A.I.R. 1946 Pat. 74=24 Pat. 604=224 Ind. Cas. 103.

—S. 212—Requirements of.

Three domes found concealing in **dalan** of petitioner and arrested by **chaukidar** and villagers—Petitioner when asked as to how they came there, keeping silent—Evidence of occurrence of dacoity in neighbourhood, of process being served against domes and of proclamations made by beat of drum—Proclamations neither named those three domes nor specified dacoity of which they were suspected—Requirements of S. 212, held not fulfilled. A.I.R. 1938 Pat. 358=4 B.R. 743=39 Cr.L.J. 768=19 P.L.T. 568=176 Ind. Cas. 462.

—S. 212—Trial under—Stay of.

A trial under S. 212, Penal Code, for harbouring offenders should be stayed unless the trial of the offenders themselves has been concluded. ('37) 1937 M.W.N. 21.

—S. 212—Interpretation—No proof of accused having knowledge or reasonable belief—Conviction bad—"Know" "has reason to believe" and "offender" explained.

A person can be supposed to "know" where there is a direct appeal to his senses. Person "has reason to believe" under S. 26 if he has sufficient cause to believe the thing but not otherwise. The word "offender" used under S. 212 means a person who has contravened the provisions of any criminal law, which is punishable either with death, transportation, imprisonment or fine. Where there is neither affirmative nor any circumstantial evidence to bring home to the door of the accused that he knew or had reason to believe that the person he was harbouring was an offender within the meaning of S. 212, his conviction under S. 212 cannot be sustained. 121 Ind. Cas. 549=1930 Cr. C. 49=31 Cr. L. J. 288=A.I.R. 1930 All. 33.

—S. 213—Applicability—Public servant taking bribes.

The section applies when the person taking bribes is not a public servant. If he is a public servant the more appropriate section is S. 161 or S. 162. (1946) 224 Ind. Cas. 422=47 Cr.L.J. 623.

—Ss. 213 and 214—'Concealing'—'Screening'—Acquittal.

The words 'concealing' and 'screening' in Ss. 213 and 214 of the Code presuppose an actual commission of an offence or the guilt of the person screened and where there is no such principal offence there can be no subsidiary offence under the two sections. 14 Mad. 400 and 12-A, 432, Rel. on.

Where a person has been tried and acquitted of the principal offence, it is not open to another Court to hold for purposes of Ss. 213 and 214 of the Code that the offence was committed. 37 Bom. 658=15 Bom. L. R. 694=14 Cr.L.J. 453=20 Ind. Cas. 613.

—S. 213—Essentials for conviction—Actual concealment or screening must be proved—Subsequent prosecution—Offence not purged.

For conviction under S. 213, actual concealment or screening even for a short time may be sufficient, but there must be some concealment or screening actually proved. If such is proved and there is further the acceptance of or attempt to obtain or agreement to accept the gratification or restitution as a consideration for the same, the offence is complete. The fact that the very same person subsequently did prosecute even to



conviction would not purge the offence. 84 Ind. Cas. 649=52 Cal. 151=40 C. L. J. 278=26 Cr. L. J. 345=A.I.R. 1925 Cal. 85.

—S. 213—Ingredients of offence—Actual concealment or screening or forbearing—If necessary.

S. 213, I. P. Code, does not require that there should be an actual concealment of an offence or the screening of any person from any punishment, or the actual forbearing of taking any proceedings. It is sufficient to constitute an offence under the section, if an illegal gratification is received in consideration of a promise to conceal an offence or screen any person from legal punishment or desist from taking any proceedings. 37 Bom. 658, dist.; 52 Cal. 151, not foll. I.L.R. (1949) Bom. 334=51 Cr. L. J. 84=51 Bom. L. R. 564=3 A.I.Cr.D. 476=A.I.R. 1949 Bom. 405.

—Ss. 213 and 214—Requirements of Existence of offence—Concealed must be proved.

For a conviction under the above sections, it is essential that the screened offences should first be proved to have been committed. 23 C. 420; 37 B. 658, Foll. 46 Ind. Cas. 424 (Nag.)

—S. 214—Scope—Person tried separately for an offence under R. 81 (4), Defence of India Rules, and under S. 214, Penal Code, for concealing offence under R. 81 (4)—Conviction in both trials—On appeal, conviction under Rule 81 (4) set aside—Revision against conviction under S. 214—Held conviction under S. 214 must be set aside as Court was bound to assume that no offence under R. 81 (4) was committed—Criminal P. C., Section 403.

A Court dealing with a charge under S. 214, Penal Code, is not entitled to question or review the correctness of the decision of another Court acquitting a person charged with having committed the offence which the person before it is charged with having attempted to conceal.

The accused was tried and convicted for an offence under R. 81 (4), Defence of India Rules, for exporting certain goods without permit. He was also tried separately for offering a gift to conceal the above offence, under S. 214, Penal Code, and was convicted.

On appeal the conviction under R. 81 (4) was set aside and the accused was acquitted. The accused therefore filed a revision against his conviction under S. 214:

**Held**, the Court was bound to proceed on the assumption that no offence under R. 81 (4) Defence of India Rules, was committed. The accused could not therefore be said to have committed an offence under S. 214, Penal Code, and his conviction should be set aside. A.I.R. 1946 Pat. 101=12 B. R. 650=226 Ind. Cas. 36=47 Cr.L.J. 817.

—S. 214—Illegal gratification — Offer of money for not proceeding with compoundable offence.

The accused in breach of forest rules worked two saw-pits and when discovered by the Forest Officer offered him Rs. 5 and asked him not to proceed with the case. Held, that the offer of Rs. 5 did not amount to an offence under S. 214, I.P.C., and the fact that the Forest Officer was not authorised to compound the offence, did not

make any difference if the offence was compoundable. 6 L.B.R. 48=13 Cr.L.J. 574=15 Ind.Cas. 990.

—S. 215. Synopsis.

1. Actual or suspected thief
2. Attempt
3. Essential ingredients
4. Graver and lesser offence
5. Onus
6. Scope and applicability.

#### 1. Actual or suspected thief.

—S. 215—Scope of—Actual thief, if excluded from liability under the section.

There is nothing in S. 215 of the Penal Code which excludes an actual thief from liability under it, if in addition to committing theft, he also tries to realise money by a promise to return the stolen articles. Such an act which is independent of the act of stealing constitutes different offence. Hence an actual thief or a person suspected to be the thief can be convicted under S. 215, I.P. Code. I.L.R. (1947) All. 469=1947 A.L.J. 48=1947 A.L.W. 33=1947 A.W.R. (H.C.) 1=230 Ind. Cas. 420=1947 O.W.N. (H.C.) 19=1947 A.Cr.C. 21 (2)=48 Cr.L.J. 640=A.I.R. 1947 A. 225 (F.B.).

—Ss. 215, 379—Actual thief also taking gratification.

**Obiter.**—It cannot be said that S. 215 does not apply to the actual thief because he is under no legal obligation to bring himself to justice. All that the section says is that the person who takes the gratification shall be punished, unless he uses all means in his power to bring the actual thief to justice. No doubt the wording of the section makes it apply in the majority of cases to offenders other than the actual thief. But cases may well occur, where a thief having stolen cattle without a view to obtain money by restoring them to the owner, may offer to restore them for a gratification merely because he knows that detection is becoming imminent. Hence there is nothing illegal in the double conviction of the actual thief who also takes a gratification, (Ss. 215 and 379 Penal Code.).

But it is only in exceptional circumstances that a more severe sentence should be passed for both offences than would have been inflicted for the theft alone. A.I.R. 1941 Rang. 340=1941 Rang.L.R. 582=43 Cr.L.J. 426=198 Ind. Cas. 766.

—S. 215—Suspected thief.

A person suspected of theft may, if the prosecution fails to prove the fact of theft by him, be convicted under S. 215. A.I.R. 1938 Pat. 500=39 Cr.L.J. 887=19 P.L.T. 776=4 B.R. 818=17 Pat. 677=177 Ind. Cas. 344.

—S. 215—Actual thief.

S. 215 does not apply to the actual offender: A.I.R. 1925 Lah. 563, Foll. 103 Ind. Cas. 206=8 Lah. 263=28 P.L.R. 433=28 Cr.L.J. 670=A.I.R. 1927 Lah. 500.



## —S. 215—Actual thief.

S. 215 is not intended to apply to the actual thief, but to some one who takes any gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the offender to be apprehended and convicted of the offence. 23 All. 81; 26 M.L.J. 598, Foll. 88 Ind. Cas. 353=7 L.L.J. 477=26 Cr.L.J. 1121=26 P.L.R. 303=A.I.R. 1925 Lah. 563.

## —S. 215—The thief himself offering to recover—Guilty of.

Where a bullock was stolen and the accused took money in order to bring back the animal which he knew to be stolen and where he took no steps to bring the thieves to justice:

Held, he was guilty though he might be himself the thief. (23 A. 81 overruled.) 85 Ind. Cas. 225=22 A.L.J. 838=5 L.R.A. Cr. 145=46 All. 915=26 Cr.L.J. 481=A.I.R. 1924 All. 783.

## —S. 215—Actual thief—Defence — Accused being the thief—No defence.

It is no defence to a charge under S. 215 for the accused to say that he was the actual thief of the stolen property. The accused must take steps to bring the offender to justice. 110 Ind. Cas. 592=22 S.L.R. 450=23 Cr.L.J. 736=A.I.R. 1928 Sind 168.

## —Ss. 215 and 378—Actual thief—Applicability—Double conviction.

S. 215 does not apply to the thief himself and therefore when a man is convicted of theft, he ought not to be convicted also under S. 215. A double conviction and sentence under Ss. 379 and 215, I.P.C., is unsustainable. 2 U.B.R. (1914) 43=16 Cr.L.J. 421=28 Ind. Cas. 997.

## —S. 215—Actual thief—Applicability.

S. 215, does not apply to the thief, but to one who, in league with him gets some gratification for helping the owner to recover the stolen property without using, at the same time, all the means in his power to cause the thief to be apprehended and convicted of the offence. 23 A. 81=1900 A.W.N. 205.

## 2. Attempt.

## —Ss. 215, 511—Attempt.

In the substantive offence under S. 215, Penal Code, there is a giver and a taker: in an attempt to commit the offence there is merely a proposal or an attempt to enter into an agreement to take from a person who is being induced to give and the person making such a proposal can be convicted of an attempt to commit an offence under S. 215. A.I.R. 1941 Rang. 205=1941 Rang. L.R. 395=43 Cr.L.J. 57=196 Ind. Cas. 714.

## —S. 215—Attempt—Proposal to recover for consideration is an attempt.

In order to be guilty of an attempt of the commission of the offence under S. 215, mere propo-

sal to the owner of the lost property to recover it on the receipt of a certain amount on the condition that the thieves should not be prosecuted is sufficient. 76 Ind. Cas. 191=20 A.L.J. 927=45 All. 159=4 L.R.A. Cr. 1=25 Cr.L.J. 127=A.I.R. 1923 All. 83.

## 3. Essential ingredients.

## —S. 215—Essentials of offence under.

Section 215 aims primarily at professional trackers and other persons who, being usually in league with thieves or well aware of their proceedings, obtain money for recovery of stolen property without making any effort to bring the offenders to justice. The section has three essential ingredients: first, taking or agreeing consenting to take any gratification under pretence or on account of helping any person to recover any movable property; secondly, that the owner of such property must have been deprived of it by an offence punishable under the Penal Code; and thirdly, that the person in question, having taken or agreed to take the gratification, must not have used all means in his power to cause the offender to be apprehended and convicted of the offence. The section has nothing to do with any illegal gratification.

The complainant's bullock disappeared one day. The circumstances showed that the bullock might have strayed. The accused offered to recover the bullock if certain amount was paid by the complainant. The complainant refused to accept it and the accused did nothing further:

Held, that the second ingredient of S. 215 referred to above was not present and the accused could not be convicted. A.I.R. 1940 Pat. 548=7 B.R. 23=41 Cr.L.J. 902=190 Ind. Cas. 382.

## —S. 215—Essential ingredients—Knowledge of offender.

Knowledge of the offender is not a necessary ingredient of an offence under S. 215. It may well be that a person who receives money for discovering stolen property, may in the course of his investigations, obtain information which, if followed up, would lead to the apprehension of the offender. If he withholds that information from the proper authorities, it is obvious that it cannot be said that he used his best endeavour to cause the offender to be apprehended. A.I.R. 1938 All. 440=1938 A.L.J. 531=1 L.R. (1938) All. 681=1938 A.W.R. 362=39 Cr.L.J. 808=176 Ind. Cas. 785.

## —S. 215—Essential ingredients—Benefit of doubt.

The important point under S. 215, is that the offender should know the criminal and screen him. It is not an offence to take money from another in order to help him to find stolen property and to convict the thief. In order that the act should come within the scope of S. 215, there should be evidence first, that property has been stolen; second, that the accused knew the criminal, and third, that he has failed to use all means in his power to cause the offender to be apprehended. When some of these important points appear to be



open to reasonable doubt, the accused should be given the benefit of the doubt. A.I.R. 1935 Sind 105=36 Cr.L.J. 1464=158 Ind. Cas. 498.

#### —S. 215—Essential ingredients.

A conviction under S. 215 cannot be sustained in the absence of evidence to show that the loss of the movable property was by means of the commission of an offence punishable under the I.P.C. A.I.R. 1932 Pat. 241=11 Pat. 392=13 P.L.T. 732=33 Cr.L.J. 709=139 Ind. Cas. 76.

#### —S. 215—Essential ingredients.

Where the accused merely undertakes to endeavour to trace out and restore the lost property on payment of some remuneration, upon this circumstance alone the accused cannot be said to be guilty of an offence under S. 215, unless over and above that, the prosecution proves that the property has been lost by the commission of an offence and that the accused is endeavouring to screen the offender from justice and is not using all means in his power to cause the offender to be apprehended and convicted of the offence which he has committed. A.I.R. 1931 All. 710=32 Cr.L.J. 1072=1932 A.L.J. 103=54 All. 55=133 Ind. Cas. 800.

#### —S. 215—Ingredients.

It is necessary, in order to maintain a conviction under S. 215, to prove that the complainant had been deprived of his property by an offence punishable under the Code. A.I.R. 1931 Lah. 157=32 P.L.R. 38=32 Cr.L.J. 729=131 Ind. Cas. 369.

#### —S. 215—Essential ingredients.

To constitute an offence under S. 215, it must be proved that a person is deprived of movable property by an offence punishable under the Code. 11 Cr.L.J. 295=6 Ind. Cas. 250.

#### —S. 215—Essential ingredients—Cow lost in grazing ground—Taking money and promising to return cow, if offence.

For an offence under S. 215, it is necessary that the movable property in question should have been taken out of the possession of some person by means of an offence punishable under the Code. Where therefore the accused promised for a sum of Rs. 12 to return the complainant's cow lost while grazing in a field, but neither returned the cow nor the money, the accused is not guilty under S. 215, I.P.C. as there was no proof that any offence had been committed in respect of the cow. 9 P.R. 1915 Cr.=16 Cr.L.J. 541=28 P.L.R. 1916=29 Ind. Cas. 669.

#### 4. Graver and lesser offence.

#### —S. 215—Graver and lesser offence—Ransom had, but property not returned—Conviction for major offence under S. 420—Tenability.

When the accused person has taken a ransom for the restoration of stolen property and fails to return that property to the person, who has paid him the ransom, he can be convicted under S. 420, I.P.C., and the conviction need not be confined to one under S. 215, I.P.C.

Per Robinson, C.J.—The general rule which should guide the Courts is to convict of and punish for the most serious offence that is established, provided of course, that the accused has been charged with and has had an opportunity of meeting the charge of that offence. There is no ground for holding that the Legislature meant to confine the Court to that offence when the facts proved amount to another and more serious offence. 73 Ind. Cas. 145=1 Bur. L.J. 179=11 L.B.R. 422=24 Cr.L.J. 529=A.I.R. 1923 Rang. 37.

#### 5. Onus.

#### —S. 215—Offence under—Onus.

In the case of a prosecution for an offence under S. 215 of the Penal Code, it is not for the prosecution to prove the negative that the accused did not use all his power to cause the offender to be apprehended. It is for the defence to establish the positive fact that they did all in their power to cause the offender to be apprehended. I.L.R. (1947) All. 469=1947 A.L.J. 48=1947 A.L.W. 33=1947 A.W.R. (H.C.) 1=230 Ind. Cas. 420=1947 O.W.N. (H.C.) 19=1947 A.Cr.C. 21 (2)=48 Cr.L.J. 640=A.I.R. 1947 A. 225 (F.B.).

#### —S. 215—Benefit of exception—Onus.

Screening or attempting to screen the offender is not a necessary ingredient under S. 215.

The proviso to S. 215 is only an exception to the liability under the section and once the elements of an offence under S. 215 have been established by evidence the onus of proving that the person charged is entitled to the benefit of the exception, is on the defence. A.I.R. 1933 Cal. 599=37 C.W.N. 360=34 Cr.L.J. 1015=145 Ind. Cas. 569.

#### —S. 215—Onus.

In a charge under S. 215, the burden of proving that the accused had used all the means in their power to bring about the apprehension of the offenders is upon them. A.I.R. 1938 All. 440=1938 A.L.J. 531=I.L.R. (1938) All. 681=1938 A.W.R. 362=39 Cr.L.J. 808=176 Ind. Cas. 785.

#### —S. 215—Benefit of exception—Onus.

Once the elements of an offence under S. 215 have been established by evidence, the onus of proving that the person charged is entitled to the benefit of the exception is on the defence particularly so where there has been a spontaneous demand by the accused of money in circumstances indicating an intention not to bring the offender to justice. A.I.R. 1938 Pat. 590=4 B.R. 818=39 Cr.L.J. 887=19 P.L.T. 776=17 Pat. 677=177 Ind. Cas. 344.

#### 6. Scope and applicability.

#### —S. 215—Scope and applicability.

Person's cow missing from place where it was let loose for grazing—Accused approaching him some months later and promising to find out culprit for consideration and taking money—No evidence that cow was stolen—Accused cannot be convicted under S. 215. A.I.R. 1941 Pat. 138=7 B.R. 22=41 Cr.L.J. 922=190 Ind. Cas. 387.



—S. 215—Scope and applicability—Bullock straying at night disappearing—Person taking money and showing owner bullock tied up by somebody in jungle—It, guilty under.

The word 'deprive' in S. 215, cannot be interpreted in a narrow sense to mean "taken out of possession of." To deprive a person of any article may be either to take it away from him or to prevent him from getting possession of it if he would have done so in the normal course of events. Where, therefore, in a case, a bullock strays at night and disappears and is subsequently found to be tied up to a tree in the jungle by an unknown person, the person who tied it up in the jungle is depriving the owner of possession of it because normally a bullock which went away would return to its owner in the ordinary course and by being tied up it would be prevented from so doing. In such a case, the Court is entitled quite fairly to make the inference that the bullock had either been stolen or misappropriated dishonestly by some person. In either case, some offence is committed and that offence prevented the owner from retaining or obtaining possession of his property so that he was deprived of possession of it. A person, therefore, who takes money for pointing out the bullock so tied up in the jungle, is guilty of an offence under S. 215. A.I.R. 1938 All. 440=1938 A.L.J. 531=I.L.R. (1938) All. 681=39 Cr.L.J. 808=1938 A.W.R. 362=176 Ind. Cas. 785.

—S. 215—Scope and applicability—Accused demanding amount to get back stolen cycle.

Where a cycle of the complainant is stolen and the accused accosts him and tells him that if he gives certain amount, his cycle can be recovered, the very terms in which the complainant is approached implies that there was expected to be no questions asked as to the actual offender and no attempt at his apprehension or conviction. The accused is, therefore, guilty under S. 215, I.P.C. A.I.R. 1938 Pat 590=4 B.R. 818=30 Cr. L. J. 887=19 P.L.T. 776=17 Pat. 677=177 Ind. Cas. 344.

—S. 215 — Scope and applicability — Stray donkey.

Where the evidence shows that the accused took a sum of money and gave a receipt in the presence of witnesses under promise of return of a donkey that had gone astray and though it may be that the donkey he had to return was a donkey that was stolen, there is nothing upon the record to show that it was so, and the charge shows that the donkey was a stray donkey and not a stolen donkey, no offence under S. 215, is disclosed and a conviction under S. 215 is not maintainable even if the accused pleads guilty. A.I.R. 1936 Sind 145=30 Sind L. R. 96=37 Cr.L.J. 1038 (1)=164 Ind. Cas. 934.

—S. 215—Scope and applicability—Punishment of trafficking in crime does not apply to the thief—Failure to trace, not knowing the offender—No offence.

The primary aim of the section is to punish all trafficking in crime, by which a person knowing that property has been obtained by crime, and knowing the criminal, makes a profit out of the crime, while screening the offender from justice. The section

is not intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of his offence.

Where the accused was offered a certain sum to trace out and to restore certain horses which had been lost to their rightful owner and which work he undertook but failed and there was no evidence that the accused ever knew who the offender was:

Held, that offence under S. 215 was not established. 106 Ind. Cas. 437=50 All. 186=29 Cr. L. J. 21=8 A.I.Cr.R. 551=8 L.R.A.Cr. 158=25 A.L.J. 866=A.I.R. 1928 All. 22.

—Ss. 215 and 411 — Scope and applicability — Stolen property—Agreement with owner for return.

If a person in possession of stolen property enters into an agreement with the owner for the restoration of such property without helping to bring the thief to justice cannot be convicted of an offence under S. 215, but only of an offence under S. 411 of the Code, 23 A. 81, Fol. 26 M.L.J. 598=15 Cr.L.J. 471=24 Ind.Cas. 351.

—Ss. 216, 40—Applicability.

Person harboured wanted for offence punishable with imprisonment of less than one year—Harbourn cannot be convicted under S. 216—Definition of 'offence' in S. 40 does not affect S. 216. A.I.R. 1943 Oudh 51=1942 O.W.N. 682=44 Cr.L.J. 90=1942 A.W.R.C.C. 353 (2)=18 Luck. 617=203 Ind. Cas. 499.

—S. 216—Applicability — Knowledge subsequent to harbouring—Harbouring first without knowledge—Assisting evasion of apprehension after knowledge—Offence committed.

A person was charged for harbouring a proclaimed offender. There was no satisfactory evidence on record to show that the accused knew that the person harboured was a proclaimed offender till Police officer informed him to that effect. But after the police officer had so informed him, the accused gave false information in order to assist evading apprehension and eventually the offender was found in his house:

Held, that the false information given after having been informed that person was a proclaimed offender is sufficient to bring the accused within the purview of S. 216. 1930 Cr.C. 73=11 L.L.J. 377=A.I.R. 1930 Lah. 99.

—S. 216—Applicability—Harbouring an escaped person.

Harbouring or concealing a person for whose arrest an order has been passed by a public servant to enforce a punishment already passed is an offence under S. 216. 11 C.L.J. 109=11 Cr.L.J. 95=5 Ind. Cas. 311.

—S. 216—Essentials.

A person cannot be convicted under S. 216, I.P.C. unless it is proved by legal evidence that an order



for the arrest to the person alleged to have been harboured was made. It must also be proved that the accused knew of the order and harboured the person concerned with such knowledge. A proclamation issued under S. 87, Criminal P.C., reciting that a warrant of arrest had been issued, is neither a legal evidence of the issue of the warrant nor is it equivalent to notice of its contents either to the public or even to inhabitants of the place where it is published. There can be no proof of knowledge without proof of the issue of warrant of arrest. A.I.R. 1944 P.C. 54=48 C.W.N. 477=1944 M.W.N. 440=57 L.W. 374=10 B.R. 667=45 Cr.L.J. 721=1944 A.L.J. 388=1941 A.W.R.P.C. 40=46 Bom. L.R. 844=(1944) 1 M.L.J. 515=71 I.A. 83=I.L.R. (1945) Mad. 237=214 Ind. Cas. 1=I.L.R. (1944) Kar. P.C. 273 (P.C.).

—S. 216—Essentials—Mere finding of absconder in house—Issue of proclamation.

The mere fact that an absconder is found in the house of another person is not sufficient to involve the owner of the house in an offence under S. 216, unless all other elements of the offence are established. Among other things, it is the duty of the prosecution to prove the knowledge of the accused person as required by S. 216, and here, too, the fact that a proclamation had been made sometime before the arrest is not conclusive evidence of the knowledge of the so-called offender. A.I.R. 1939 Lah. 19=40 P.L.R. 934=40 Cr. L. J. 243 (1)=179 Ind. Cas. 651.

—S. 216—Essential—Legal warrant of arrest—Intention to prevent apprehension.

In order to convict a person under S. 216, it must be shown that the warrant to arrest the alleged offender was a legal one, and that the harbouring was with the intention of preventing him from being apprehended. 108 Ind. Cas. 27=52 Bom. 151=30 Bom. L.R. 70=29 Cr.L.J. 317=9 A.I.Cr.R. 563=A.I.R. 1928 Bom. 184.

—S. 216—Essentials—Harboured person need not be found guilty—Order of apprehension sufficient—Acquittal, a consideration in sentence.

It is not an essential ingredient of the offence under S. 216 that the person harboured should be found guilty. It is enough to show that against the person harboured order of apprehension had been issued for an offence, that is to say, for an offence alleged against him. Although, however, the acquittal of the person harboured cannot affect the legality of the conviction, it may well be taken into consideration in awarding sentence. 113 Ind. Cas. 545=52 Mad. 73=1 M. Cr. C. 253=1928 M.W.N. 588=28 M.L.W. 403=30 Cr.L.J. 183=12 A.I.Cr.R. 51=A.I.R. 1928 Mad. 1147=55 M.L.J. 503.

—S. 216—Essentials.

Accused must know that the person harboured is a proclaimed offender. 84 Ind. Cas. 1055=6 L.L.J. 478=26 Cr.L.J. 415=A.I.R. 1925 Lah. 103

—S. 216—Essentials—Proclaimed offence—Publication in Criminal Intelligence Gazette—Whether sufficient notice—Offender adopting false name—Inference—Harbouring—Proof of.

The knowledge of the harbourer cannot be presumed from a mere publication of the name of the offender in the Cr. Intelligence Gazette nor can it be inferred from the offenders adopting false name and the harbourer misdescribing him as his relation.

To establish an offence under S. 216 it must be proved that (1) public servant ordered the arrest of a certain person, (2) that the harbourer knew of such order and (3) did harbour with the intention of preventing his apprehension. 1 O.L.J. 30=15 Cr.L.J. 349=23 Ind. Cas. 701.

—S. 216—Giving meal—By itself no offence.

The mere giving of a meal to those who are proclaimed offenders is not an offence within the meaning of S. 216 because in the absence of any evidence to that effect it cannot be held that the intention of the appellants was to prevent them from being apprehended. 84 Ind. Cas. 1050=6 L.L.J. 481=26 Cr.L.J. 410=A.I.R. 1925 Lah. 289.

—S. 216—Interpretation and scope—Word "knowing" meaning of.

"Knowing" means something more than "having reason to believe." Knowing implies a fact which can be known and imports knowledge of something actual by means of authentic or authoritative information although it does not necessarily import actual evidence of the senses. A person cannot "know" of a warrant of arrest, unless it has actually been issued but he may have reason to believe that a warrant has been issued, though it may not have been issued. Hence, there can be no proof of knowledge without proof of the issue of the warrant of arrest. A.I.R. 1944 P.C. 54=48 C.W.N. 477=57 L.W. 374=1044 M.W.N. 440=10 B.R. 667=45 Cr.L.J. 721=1044 A.L.J. 388=1044 A.W.R.P.C. 40=46 Bom. L.R. 844=(1944) 1 M.L.J. 515=71 I.A. 83=I.L.R. (1945) Mad. 237=214 Ind. Cas. 1=I.L.R. (1944) Kar. P.C. 273 (P.C.)

—S. 216—Interpretation and scope.

"Harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person in any way to avoid apprehension. A.I.R. 1935 Rang. 294=36 Cr.L.J. 1384 (2)=158 Ind. Cas. 500.

—S. 216—"Harbour"—Meaning of.

The word 'harbour' in S. 216 must be construed liberally. The person at whose instance harbouring is effected commits the offence, although the house in which the harboured person stays may belong to a different person. 14 Bom. L.R. 583=13 Cr.L.J. 701=16 Ind. Cas. 509.

—S. 216—Interpretation—Assisting evasion of apprehension is harbouring—No time limit.

The word "harbour" does not only mean to provide shelter, food and clothing but includes "the assisting of a person in any way to evade apprehension." There is no time limit for the duration of this offence, which is complete as soon as it is committed. It is immaterial whether the evasion lasts six hours or six years,



73 Ind. Cas. 691=5 L.L.J. 329=24 Cr.L.J. 659=A.I.R. 1923 Lah. 223.

—S. 216—Interpretation and scope—"Order a person to be apprehended for an offence," meaning of—"Punishable," meaning of.

It is an offence under S. 216. to harbour or conceal a person for whose apprehension an order has been passed by a public servant even when such apprehension is sought to be made not for the purpose of trying him for an offence that he may have committed, but for enforcing a punishment already inflicted on him for having committed the offence. The expression "order a person to be apprehended for an offence" in S. 216, means only that the offence is the cause *sine qua non* of the apprehension. The word "punishable" in the latter part of the section is used merely for the purpose of describing particular classes of offences in relation to which the punishment indicated in the section is to be inflicted; and it does not indicate that in a particular case the offence must not have been punished. 5 Ind. Cas. 311=11 Cr.L.J. 95=11 C.L.J. 109.

—S. 216-A—Abetment of dacoity—What is.

A person is not a dacoit, in respect of whom the Court is satisfied that his connection with the gang is limited to certain acts, which in themselves do not amount to dacoity or abetment thereof though the acts may be punishable under S. 216-A. 13 O.C. 235=11 Cr.L.J. 551=7 Ind. Cas. 1006.

—S. 216-A — Applicability — Harboursing dacoits—S. 216-A, I. P. C. and not S. 110, Cr. P. Code applies.

The legislature did not desire that the provisions of S. 110, Cr. P. Code should be applied to a person suspected of harbouring dacoits, the intention being that such a man should be dealt with under the substantive portion of the Penal Code, i. e., S. 216-A. 116 Ind. Cas. 804=1929 A.L.J. 93=51 All. 459=11 A.I.Cr.R. 250=10 L.R.A.Cr. 34=30 Cr.L.J. 694=A.I.R. 1928 All. 682.

—S. 216-A—Charge under of harbouring person alleged to have committed dacoity—Acquittal of persons harboured of substantive offence of dacoity — Effect — Persons who harboured them—If can be held guilty.

When persons charged with the substantive offence of dacoity or robbery have been acquitted of that offence another person who is said to have intended to screen them from legal punishment in respect of that offence cannot be held guilty of harbouring the alleged offenders under S. 216-A. I. P. Code. I.L.R. (1047) Mad. 793=1947 M.W.N. 51=229 Ind. Cas. 167=48 Cr.L.J. 287=60 L.W. 326=A.I.R. 1947 Mad. 303=(1946) 2 M.L.J. 482.

—S. 216-A — Essentials — Not Dacoits in general—Connection with a particular dacoity essential.

It is not enough to attract the penalty of the section that a person should be harbouring dacoits

in general but the section renders it penal to harbour persons who intend to commit a particular dacoity. 87 Ind. Cas. 916=19 S.L.R. 111=26 Cr.L.J. 1028=A.I.R. 1925 Sind 295.

—S. 216-B.—Applicability—Mere knowledge of whereabouts of offender.

The word 'harbour' in S. 216-B, includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance or the assisting a person in any way to evade apprehension. Mere knowledge of the whereabouts of an offender does not amount to harbouring him.

The petitioner's son was charged with an offence under S. 17 (2), Bengal Criminal Law Amendment Act, in April 1932 and the said son absconded and could not be found. The petitioner was appointed a Special Police Officer and was directed to produce his son at the Police Station. The son was produced and the petitioner was convicted under S. 212:

Held, that merely from this fact, he was not guilty under S. 216-B. A.I.R. 1935 Cal. 550=39 C.W.N. 317=157 Ind. Cas. 1030 (1).

—S. 216-B—Assistance, what is—Every kind of assistance—Warning of approach of Police.

The words "assisting a person in any way to evade apprehension" are general and will include every kind of assistance.

The accused's brother was wanted by the Police; on the appearance of the police to apprehend his brother, the accused gave a sign to him by which he took warning and escaped.

Held: that the accused was guilty though to a very slight extent. 25 All. 261 Diss. 26 C.L.J. 241, Foll. 89 Ind. Cas. 152=12 O.L.J. 270=2 O.W.N. 260=26 Cr.L.J. 1288=A.I.R. 1925 Oudh 423.

—S. 216-B—"Harbouring," — Assistance in any manner to evade apprehension—Warning of the approach of Police—An offence.

S. 216 (B) lays down that the word "harbour" includes the assisting a person in any way to evade apprehension. The idea that it, nevertheless, does not include giving false information to the Police with a view to assisting an outlaw to escape appears little short of a negation of the law, and one might almost say that such a view constitutes a direct encouragement to defeat the forces of law and order in dealing with what can only be described as a menace to the public. A warning given to a proclaimed offender of the approach of the police is an offence under S. 216-B, I.P.C. 72 Ind. Cas. 949=24 Cr.L.J. 485 (Lah.).

—S. 216-B—"Harbouring"—False information—Warning.

Giving false information to police about proclaimed offender or warning him of approach of police in order to enable him to escape is offence. 25 All. 261, Dissented: 21 C.W.N. 1062 and 72 Ind. Cas. 949, Foll. 94 Ind. Cas. 131=7 Lah. 30=



27 P.L.R. 218=27 Cr.L.J. 563=A.I.R. 1926 Lah. 206.

—S. 216-B—Harbouring—Meaning.

In order to constitute harbouring, the words 'Assisting a person in any way' need not be limited to methods *Ejusdem Generis* with supplying other necessary things. 26 C.L.J. 141=21 C.W.N. 1062=18 Cr.L.J. 731=40 Ind. Cas. 731.

—S. 216-B—"Harbouring"—Telling lies and thereby inducing the Police to desist in their attempt—"Assisting a person to evade apprehension."

The words "assisting a person in any way to evade apprehension" must be meant to point to some method *ejusdem generis* with those specified in the section and to not include "lying" as to the whereabouts of the accused with a view to induce the Police to desist in their attempt. 1903 A.W.N. 29=25 A. 261.

—S. 216-B—Lending pony.

Where a pony was lent to the dacoits merely to facilitate them in removing the loot, Held, the offence under S. 216-B was not committed. 83 Ind. Cas. 711=22 A.L.J. 496=5 L.R.A.Cr. 90=26 Cr.L.J. 151=A.I.R. 1924 All. 676.

—S. 216-B—Scope of.

It is not a criminal offence to accept hospitality, nor, except under special circumstances, it is a criminal offence to give a false name and address. A.I.R. 1935 Rang. 294=36 Cr.L.J. 1384 (2)=158 Ind. Cas. 500.

—S. 217—Applicability and scope—Requisites.

The section makes punishable a certain dereliction of duty quite apart from the question whether bribe is paid to induce such dereliction. The dereliction must clearly be committed in the discharge of the functions of the person charged. (1946) 224 Ind. Cas. 422=47 Cr.L.J. 623 (Cal).

—Ss. 217 and 411—Applicability and scope—Police retaining property found in search—Offence not proved—Procedure for disposal—Failure to report—Effect.

A police constable retaining for himself a piece of gold found in a search for stolen property but not proved to be part of the stolen property, without reporting his possession to his superior officers under S. 523, Cr.P.C. is guilty of an offence under S. 217, I.P.C. 16 Cr. L. J. 453=29 Ind. Cas. 85.

—S. 217—Applicability and scope—Disobedience—Knowingly or not—Not proved.

Where it cannot be said that a person knowingly disobeyed any direction of law as to the way in which he should conduct himself or that he intended or knew it to be likely that by doing a certain thing he would save any person from legal punishment, he cannot be convicted under S. 217 of the Code. 15 Bom. L. R. 578=14 Cr.L.J. 441=20 Ind. Cas. 601.

—Ss. 217, 218—Essentials of offence.

For a conviction under Ss. 217 and 218, it is not necessary as in the case of a charge under S. 201 to establish that an offence has actually been committed. It would be sufficient if the circumstances are such that a reasonable inference can be drawn therefrom that the accused had a certain knowledge at the time he did the act, namely, a knowledge that he was likely by his act to save a person from legal punishment. Whether he had that knowledge or not can be inferred only from the circumstances of the case. A.I.R. 1932 Cal. 850=33 Cr.L.J. 657=139 Ind. Cas. 89.

—S. 217—Sanction—Proceedings started before sanction—Validity—Sanction given subsequently—Sufficiency.

The very nature of the offence defined in S. 217, I. P. Code, makes it clear that sanction for prosecution for the offence under the section is clearly required and the sanction has to be obtained before proceedings are started. Sanction given or obtained after the institution of the proceeding is not sufficient to validate the proceedings. 224 Ind. Cas. 422=47 Cr.L.J. 623=A.I.R. 1947 Cal. 29.

—S. 218—Applicability—Patwari filing false statement on oath—N duty to prepare—Liable under S. 193 and not under S. 218.

Where a patwari, in order to save the trouble of taking down the evidence, was directed by a revenue Court to prepare a written statement according to his papers and file it, and where the patwari made such a statement on oath, the statement cannot be called a public document which it was his duty to prepare, and therefore on proof of patwari's statement being false, he could not be prosecuted for an offence under S. 218 but under S. 193, Penal Code, for giving false evidence: 5 All. 553, Foll. 118 Ind. Cas. 232=1929 A.L.J. 512=10 L.R.A.Cr. 90=30 Cr.L.J. 874=12 A.I.Cr.R. 22=1929 Cr.C. 1=A.I.R. 1929 All. 374.

—S. 218—Applicability—Intentionally framing an incorrect public record by a public servant.

A Police Inspector was charged with having falsely entered in his diary that certain cartmen told him that they were not beaten by dacoits, Held, that this was not of itself sufficient for a conviction under S. 218, I.P.C. Where a Police Inspector without endeavouring to enquire into the truth of the entry in his diary destroyed certain records which falsified it and substituted fresh note books, he must be deemed to have framed an incorrect public record intentionally. (1911) 2 M.W.N. 44=12 Cr.L.J. 455=11 Ind. Cas. 799.

—Ss. 218, 220, 193 and 211—Effect of no complaint by magistrate—Accused charged under these sections in respect of proceeding under S. 109 Criminal P. C.—No complaint by Magistrate—Charges under Ss. 193, 211, held should be quashed—Complaint held not necessary for charges, under Ss. 218, 220. A.I.R. 1937 Lah. 802=39 P.L.R. 1011=39 Cr.L.J. 122=172 Ind. Cas. 373.



—S. 218—Essentials—Recording statements not made—Destroying those made—Recording circumstances not transpired.

A conviction under S. 218 can be maintained only where it is established that during the investigation the accused recorded statements which were not made before him or destroyed the statements that were actually made or made a record of circumstances which, as a matter of fact, did not transpire before him.

Where a Sub-Inspector recorded what was stated before him and he recorded what he actually witnessed, and where it was possible that he had a motive for recording the statement made before him knowing them to be false:

Held, that the last mentioned fact alone was no ground for a conviction under S. 218. 86 Ind. Cas. 661=7 L.L.J. 331=26 Cr.L.J. 837=26 P.L.R. 594=A.I.R. 1925 Lah. 461.

—S. 218—Gist of offence under.

Under S. 218, I.P.C., the question is not whether the accused will be able to accomplish the object he had in view, but whether he made the entries in question with the intention to cause or knowing it to be likely that he will thereby cause loss and injury. The fact that the accused conceived a foolish plan of injuring in retaliation of the disgrace inflicted upon him by his arrest, is no ground for exculpating him from the offence which he has committed. A.I.R. 1938 Mad. 595=1938 M.W.N. 345=47 L.W. 542=(1938) 1 M. L. J. 876=39 Cr.L.J. 875=177 Ind. Cas. 489.

—S. 218—Guilt of offender—Immaterial—Sufficient if offence is brought to notice officially.

For the purposes of a charge under S. 218 the actual guilt or otherwise of the offender alleged as sought to be screened from punishment is immaterial. It is quite sufficient that the commission of a cognizable offence has been brought to the notice of the accused officially and that in order to screen the offender the accused prepared the record in a manner which he knew to be incorrect. 86 Ind. Cas. 661=7 L.L.J. 331=26 Cr.L.J. 837=26 P.L.R. 594=A.I.R. 1925 Lah. 461.

—S. 218—Interpretation—"Charged".

The word 'charged' in Sec. 218 is not restricted to the narrow meaning of enjoined by a special provision of the law. 123 Ind. Cas. 841=31 Cr.L.J. 584=A.I.R. 1930 Lah. 159.

—S. 218—Offence under—Police officer—Report knowingly incorrect—Intent to injure—Guilty.

Where a Sub-Inspector of Police makes a report knowing it to be incorrect and with intent to cause injury to the complainant his act is clearly covered by S. 218. The word "charged" in S. 218 is not restricted to the narrow meaning of enjoined by a special provision of the law. 123 Ind. Cas. 841=31 Cr.L.J. 584=A.I.R. 1930 Lah. 159.

—S. 218—Patwari.

A patwari is responsible for the accuracy of all entries in the khasra and must satisfy himself

of the facts by inquiries from the persons concerned as well as by the field inspections. Where in making an entry in the khasra he must have known of a transfer of the crop by the Civil Court Amin, and that a particular person was in possession, and fails to enter his name, he is making a wrong entry knowing at the time that the entry he was making was wrong. When such entry is made with a criminal intent to cause loss to the person, offence under S. 218, is committed. A.I.R. 1935 All. 968=1935 A.L.J. 1083=1935 A.W.R. 1066=37 Cr.L.J. 131=159 Ind.Cas. 531.

—S. 218—Proof of actual commission of offence—If necessary for conviction.

For a conviction under S. 218, it is not necessary as in the case of a charge under S. 201 to establish that an offence has actually been committed. A.I.R. 1932 Cal. 850=33 Cr.L.J. 657=139 Ind. Cas. 89.

—S. 218—"Record"—Pay sheet drawn up by Railway Officer.

A pay sheet drawn by a Railway Officer is a record within S. 218 of the Code. 1 O.L.J. 209=15 Cr. L. J. 502=24 Ind. Cas. 590.

—S. 218—Scope—Stifling of truth and perversion of the course of justice—Intention to screen—If necessary.

Per Pratt, J.—S. 218 is much wider than S. 201 and embraces cases other than those in which a principal offender is screened. But even as to such cases the words of the section imply that an offence has been committed. The gist of the section is the stifling of truth and the perversion of the course of justice in cases where an offence has been committed. It is not necessary even to prove the intention to screen any particular person. It is sufficient that he knows it to be likely that justice will not be executed and that some one will escape punishment for the offence; 3 Cal. 412 Foll.

Per Fawcett, J.—It is doubtful whether it is unnecessary under S. 218 to prove an intention to screen any particular person. 63 Ind. Cas. 145=23 Bom. L. R. 823=22 Cr. L. J. 609=A. I. R. 1921 Bom. 115.

—S. 219—Essentials.

—Ss. 219, 218—The essence of the offence under S. 219, is (1) that there must be a judicial proceeding, that is a proceeding actually commenced and pending, wherein a party claims relief against another and invites the decision of the Court in regard thereto and not a fictitious one where there is no party litigating and (2) that there must be the making of a real report or a real pronouncement of an order, verdict or decision. Where there is no judicial proceeding at all, everything being a make-believe, there is no making of a report nor a pronouncement of an order, verdict or decision except the making of an entry of such a pronouncement having been made when in fact it was not so made. The accused, a Village-Munsif, charged with preparation of the register of suits filed in his Court and framing it in such a manner which he knew to be incorrect, i.e., making it appear that



a certain suit has been filed, cannot be convicted under S. 219, I. P. C., but under S. 218. A.I.R. 1938 Mad. 595=1938 M.W.N. 345=47 L.W. 542=(1938) 1 M.L.J. 876=39 Cr. L. J. 875=177 Ind. Cas. 489.

### —S. 219—'Maliciously'—Meaning.

A Village Munsif passing a decree contrary to law and without jurisdiction is guilty of maliciously pronouncing a decision under S. 219, I.P.C. 15 A. L. J. 106=18 Cr. L. J. 527=39 Ind. Cas. 495.

### —S. 220—Applicability — Contrary to law—Police officer hand-cutting and rough-handling complainant when latter did not refuse to submit to any arrest—Malicious intention to disgrace complainant on false pretext—Offence.

It is not permissible for a police officer in making an arrest to resort to confining or rough handling, when the person to be arrested submits to the custody, i. e., to the restraint which is necessary and sufficient for the purpose of the arrest. An arrest is complete when there is submission to the custody by word or act, and the police officer cannot under S. 46, Cr. P. Code, confine any person unless that person refuses to submit to custody and it becomes necessary to confine him. Where it is proved that the police officers had no intention at all of arresting a person in a legal and proper manner, and that the person to be arrested was not asked to submit to arrest and did not refuse to submit to custody, but the police officer hand-cuffed and rough-handled him deliberately and maliciously to disgrace him on a false pretext, knowing it to be false and baseless, and told the complainant to shut up when he asked for the reason for such treatment, it must be held that the appellants acted contrary to law, knowing that those acts were contrary to law, and must be held guilty of the offence under S. 220, I.P. Code. 49 Cr. L. J. 178=A.I.R. 1948 Sind 67.

### —S. 220—Keeping person in confinement.

The keeping of a person arrested on suspicion of his having committed an offence, in confinement even by a person who had legal authority to do so would be an offence under S. 220, if in the exercise of that authority a person kept another in confinement knowing that in so doing he was acting contrary to law. A.I.R. 1943 F. C. 18=47 C.W.N.F.C. 5=1943 M.W.N. 315=22 Pat. 349=24 P.L.T. 139=(1943) 2 M. L. J. 62=1 L.R. (1943) Kar.F.C. 2 Sup.=44 Cr. L. J. 466=9 B. R. 310=(1943) 5 F. C. R. 7=206 Ind. Cas. 232 (F.C).

### —S. 220—Scope and operation.

Liability under S. 220 being one under general law is not affected by the imposition of any liability under S. 61 (c) of Bihar and Orissa Excise Act. A.I.R. 1943 Pat. 229=22 Pat. 76.

### —S. 220—Magistrate usurping jurisdiction.

Where the Legislature has provided that an offence because of its gravity or because of the special knowledge required in its trial, shall be tried by a Sessions Court, a First Class Magistrate, however proper be his motives, should not

himself remove that case, as it were from its proper Court, the Court of Session, and try it himself by merely altering the numbers of the sections, for, after all the numbers of the sections are mere labels, and what is to be looked at is the allegation of the facts. Where serious offences, such as one under S. 220 against the Sub-Inspector, are to be tried, it is desirable from all points of view, of the public, Police force, the officer concerned, and justice, that these most serious cases should so far as the law permits, be committed to the Court of Session, even if a First Class Magistrate had power to try them.

The Magistrate has no jurisdiction to try an offence under S. 220. It is not a case of irregularity such as is referred to in S. 531, Criminal P. C. but is an illegality comparable to those irregularities under S. 530, Criminal P. C., which make proceedings void. A.I.R. 1941 Sind 36=42 Cr. L. J. 460=193 Ind. Cas. 454.

### —Ss. 220, 347, 342 — Police Sub-Inspector wrongfully confining persons on charge of gambling and extorting money from them by putting them under fear of prosecution.

The words "corruptly and maliciously" in S. 220, are wide enough to cover confinement for the purpose of extortion. Where a Police Sub-Inspector wrongfully confines certain persons on charges of gambling in futures and extorts money from them by putting them in fear of being challaned in Court upon offences which he knew to be false, the offence falls under S. 220 and not under S. 347 or S. 342 and is triable only by the Court of Session. A.I.R. 1941 Sind 36=42 Cr. L. J. 460=193 Ind. Cas. 454.

### —Ss. 220, 348—Joint trial of accused under S. 220 and confederate under S. 348 read with S. 114.

Where the Magistrate by usurping jurisdiction convicts an accused for an offence falling under S. 220, and his confederate under S. 348 read with S. 114 the High Court while quashing the proceedings and committing the case to the Court of Session cannot order that no further proceedings be taken against the confederate merely because he has served a part of his sentence. It is in the interests of all concerned that the confederate and the accused should be tried together for offences which are all part of the same transaction. A.I.R. 1941 Sind 36=42 Cr. L. J. 460=193 Ind. Cas. 454.

### —Ss. 220, 218, 193 and 211—Complaint by Court—If necessary.

The offences under Ss. 218 and 220, do not fall within the purview of S. 195, Criminal P.C. These offences are distinct from offences under Ss. 193 and 211, I.P.C. For the purpose of obtaining a conviction under Ss. 218 and 220, I.P.C., the prosecution had to prove facts which were distinct from the facts constituting offences under Ss. 193 and 211, I.P.C. Therefore, proceedings under Ss. 218 and 220, I.P.C., could be continued without a complaint by the Court which dealt with the proceedings under S. 109, Criminal P. C. A.I.R. 1937 Lah. 802=39 P.L.R. 1011=39 Cr. L. J. 122=172 Ind. Cas. 373.



—Ss. 220, 323, 504—Abusive words—Police Constable doing duty—Cr.P.C., S. 57—Bombay District Police Act, S. 53.

A Police constable asked the complainant not to create any disturbance on a public road. Upon the complainant's declining to do so, he demanded his name and address which were not given. The Constable, thereupon abused, arrested and dragged the complainant to the Police Chowky and detained him there till his name and address were ascertained. The Police Constable, was on these facts, convicted of offences under Ss. 223 and 504. **Held**, that the convictions under Ss. 220 and 323 could not stand, but that the accused was rightly convicted under S. 504 as he was found to have addressed the complainant as "Soowar." (1903) 5 Bom. L.R. 597.

—S. 220—Sentence—Considerations—Acts of police officer done under orders of superior officer—Relevancy.

The circumstance that the accused police officers in acting contrary to law were doing so under the instructions of their superior officers and that they had no personal grudge of their own against the complainant who was illegally confined, hand-cuffed and rough-handled, is no defence to the charge under S. 220, I. P. Code, but can be taken into consideration on the question of sentence, i. e., in reduction of the sentence. 49 Cr.L.J. 178=A.I.R. 1948 Sind 67.

—S. 221—Applicability—Private and public duties—Legal obligation wanting—No offence.

The duties of a chowkidar as a private citizen ought not to be confounded with his duties as a public servant. Where the legal obligation of the chowkidar to arrest or detain has not been established, there is no dereliction from his statutory duty within the purview of S. 221; and the chowkidar cannot be penalized for intentionally suffering a pilferer to escape from his detention. 120 Ind.Cas. 205=11 L.R.A.Cr. 8=31 Cr.L.J. 12=1930 A.L.J. 242=13 A.I.Cr.R. 126=1929 Cr. C. 663=A.I.R. 1929 All. 935.

—S. 221—Murder committed in presence of public servants—Murderer allowed to escape.

Where the applicants were legally bound to arrest a man who had committed murder in their presence and they omitted to apprehend him and did it intentionally, and there was nothing involuntary about it, they are legally guilty of an offence under S. 221. Their motive may not have been that they wanted the man to escape, but that they were afraid of getting hurt, but motive must always be distinguished from intention. A.I.R. 1936 All. 651=(1936) A.L.J. 1006=37 Cr.L.J. 1019=1936 A.W.R. 819=164 Ind. Cas. 702.

—S. 222—Intentionally aiding—Preparation to escape—Facilitating attempt—Attempt frustrated—Immaterial.

The fact that the acts proved do not amount to an attempt to escape but constitute only a preparation to escape does not exculpate the accused because the offence of which he has been charged and convicted is the offence of intentionally aiding the prisoners in attempting to escape. It cannot be gainsaid that when the accused does acts done in order to facilitate the attempt of the prisoners to escape and that he does thereby facilitate an attempt to escape he can be properly convicted under S. 222 and it makes no difference that the attempt was in fact frustrated by other circumstances. 119 Ind.

12—F. Y. D.—8.

Cas. 762=30 Cr. L. J. 1103=1929 Cr. C. 190=A. I. R. 1929 Lah. 631.

—S. 223—Applicability—Negligently suffering prisoner to escape—Conducting prisoner by night.

The only charge against an accused under S. 223, I.P.C., was that he marched the prisoner after sunset, contrary to the Magistrate's direction and the prisoner escaped; **Held**, that no offence under the section is committed. 6 M.L.T. 247=10 Cr.L.J. 293=3 Ind. Cas. 460.

—S. 223—Applicability—Police men suffering prisoner to escape—Negligence.

The accused, policemen, were conveying a dangerous prisoner in a camel-cart, having hand-cuffed him doubly and having tied a rope round his waist. The prisoner was allowed to get down in order to answer the call of nature whereupon he gave false alarm crying 'Snake' and broke away from the constables. **Held**, that the constables were not guilty of an offence under S. 223. 15 A.L.J. 883=19 Cr.L.J. 783=43 Ind. Cas. 110.

—S. 223—Criminal Procedure Code, S. 54—Applicability—Escape from lawful custody—Chowkidar.

The Police of an adjoining Native State arrested in British territory one B suspected of having committed an offence in the Native State, and made him over to one D a Chowkidar, from whose custody he escaped. **Held**, that neither the original arrest nor the subsequent custody by the Chowkidar were lawful, and, therefore, that the Chowkidar could not properly be convicted under S. 223 of the Penal Code. 3 A. 60=27 C. 366; 23 A. 266, ref. to. 1907 A.W.N. 94=29 A. 377. But see 29 A. 575.

—S. 223—Essentials.

Where a jail Warder was charged under S. 223, that he, being a public servant charged with the duty of keeping in confinement certain prisoners who were under trial, negligently suffered these prisoners to escape from confinement:

**Held**, that under the provisions of S. 223, it must be shown that there was negligence on the part of the accused and that the escape of the prisoners was the consequence of this negligence. Before the Court can decide the question of negligence it must know what the duties of the accused were and unless they are known exactly, it is impossible to find whether he was negligent in the performance of his duties and whether the escape of the prisoners was due to that negligence:

**Held also** that taking all the circumstances into account and in view of unsatisfactory state of the evidence, which was utterly insufficient to decide whether the warder was in fact negligent in the performance of his duties, he could not be convicted. (1936) 164 Ind. Cas. 265=40 C.W.N. 61=37 Cr.L.J. 918.

—S. 223—Essentials—Negligence—Nature of.

To constitute the offence it must be shown that escape was a natural and probable consequence of the negligence. 11 P.R. 1919 Cr.=20 Cr.L.J. 350=50 Ind. Cas. 830.

—S. 223—Essentials—Escape of prisoner—Negligence—Natural and probable consequence of.

For conviction under S. 223 it must be shown not only that the accused was guilty of negligence but that



the escape was at least the natural and probable consequence of his negligence. A, a Police Officer in charge of a *thana*, left the *thana* with orders to the writer (head constable) to make arrangements for the escort of certain prisoners. The Head Constable made arrangements and sent the prisoners off. From the custody of the escorts the prisoners escaped; Held, the escape of the prisoners was not the natural and probable consequence of A's negligence. 7 A.L.J. 907=11 Cr.L.J. 478=7 Ind. Cas. 411.

—Ss. 223 and 353—Applicability—Escape from lawful custody—Warrant not signed by anybody—Unnecessary hurt.

As the constable arrested the accused under the cover of a warrant which was bad in law not being signed by the Magistrate issuing it the escape was not illegal. As to other who in effecting the accused's rescue caused unnecessary hurt to the constable they were guilty under S. 323, I.P.C. (1918) P.H.C.C. 285=5 Pat. L. W. 226=19 Cr.L.J. 1000=48 Ind. Cas. 340.

—S. 224

#### Synopsis.

1. Applicability and scope
2. Consent or negligence of custodian
3. Essentials
4. Interpretation
5. Legality of warrant
6. Sentence
7. Miscellaneous

#### 1. Applicability and scope.

—Ss. 224, 225 and 147—Applicability and scope—Officer of M thana requesting help from officer of B thana for arrest of accused within B thana and by written order authorising constables to effect arrest—S constable of B thana accompanying constables of M thana and all constables arresting accused—Accused rescued by his party while in actual custody of S constable—Accused held guilty under S. 224 and his rescuers under Ss. 225/147.

In connection with a dacoity case committed within the jurisdiction of M thana the officer-in-charge of that thana had to effect the arrest of the accused residing within B thana. Having previously sent a requisition for help to the officer-in-charge of B thana, the officer of M thana gave a command certificate to three of his constables directing them to arrest the accused mentioning the particulars of the case. This certificate was endorsed by the Assistant Sub-Inspector of B thana to the effect that S. a constable and one *dafadar* should help the constables of M thana in effecting the arrest of the accused. All the constables and the *dafadar* went to the house of the accused and duly arrested him. While they were taking him back to the officer-in-charge, the accused shouted for help whereupon the whole party of accused attacked the party of constables and succeeded in rescuing the accused who at that particular time was in the actual charge of S constable of B thana.

Held, that the officer-in-charge of M thana being fully empowered to go into the jurisdiction of B thana under S. 58, Criminal P. C., could have himself arrested the accused. By virtue of his written order the constables of M thana were properly authorised to arrest the accused. Under S. 54 (1) ninthly, Criminal P. C., they

were thus fully justified in making the arrest. At the time of the rescue the accused was, therefore, in lawful custody. The fact that S constable of B thana at the time of the rescue was the constable actually holding the accused was not material. The accused was, therefore, guilty under S. 224, Penal Code, and his rescuers were guilty under Ss. 225/147. A.I.R. 1946 Cal. 314=223 Ind. Cas. 96=47 Cr.L.J. 352.

—S. 224—Applicability and scope—Accused arrested by state Police within State for offence committed in State escaping from their custody within British India.

The detention contemplated by S. 224, should necessarily be for any of the offences mentioned in the I.P.C. or under any local or special law applicable to British India. The mere fact that a State adapts the Code of British India as its own does not justify the conclusion that those Codes can be treated as original Codes. This being so a State subject who is arrested within the boundaries of a State by the State Police for any offence committed in that State, cannot be proceeded against under S. 224, if he escapes from the custody of the State Police when he is within the British territory even if that State has adapted the I.P.C. as its own Code. A.I.R. 1940 Lah. 44=41 Cr.L.J. 378=I.L.R. (1940) Lah. 570=186 Ind. Cas. 795.

—Ss. 224, 225 and 353—Applicability and scope.

Sub-Inspector not present on spot asking constable to bring certain person to thana—Use of force by constable—Scuffle following and brickbats thrown:

Held, that the person resenting cannot be convicted under S. 224, nor can persons assisting him be convicted under S. 225 and S. 353. A.I.R. 1940 Pat. 361=21 P.L.T. 144=6 B.R. 835=41 Cr.L.J. 742=189 Ind. Cas. 539.

—Ss. 224, 186—Applicability—Accused wanted for offence under S. 186—Arrest without warrant—Accused escaping.

Section 54, Criminal P.C., authorises the arrest without warrant firstly of a person concerned in cognizable offence or credibly alleged to have been so concerned. This clause does not apply where the offence for which the accused was wanted was that of obstructing a public officer under S. 186, I.P.C., which is non-cognisable. The section authorises arrest thirdly of any person who has been proclaimed as an offender under this Code and where it is not proved that a proclamation had been issued in respect of an accused wanted under S. 186, I.P.C., his arrest without warrant, is illegal and the accused commits no offence if he escapes from the custody of the constable who arrests him. A.I.R. 1936 Pat. 249=2 B.R. 227=17 P.L.T. 81=37 Cr.L.J. 318=160 Ind. Cas. 604.

—S. 224—Applicability—Proceedings under S. 109, Cr.P. Code pending.

A person who escapes from Police custody while proceedings under S. 109, Cr. P. Code, are pending against him commits an offence under S. 225-B and not under S. 224. 77 Ind. Cas. 814=18 S.L.R. 301=25 Cr.L.J. 462=A.I.R. 1925 Sind 193.

—S. 224—Applicability—Surrender after escape—Does not cure the offence.

The fact that accused surrendered himself on the following morning is immaterial. Where the accused



was rescued by a number of his friends from the lawful custody of the process-server and he took advantage of this and disappeared, and thus got out of the way of the process-server. **Held**, the offence was committed. A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of escape. 72 Ind. Cas. 67=11 L.B.R. 449=2 Bur. L.J. 19=24 Cr.L.J. 307=A.I.R. 1923 Rang. 133.

—Ss. 224 and 225—Applicability—Escape from custody of an Excise Officer.

Escape or rescue of a person arrested by an Excise Officer for falsely selling black stone as opium are offences under Ss. 224 and 225. 43 Cal. 1161=20 C.W.N. 1294=17 Cr.L.J. 379=35 Ind.Cas. 811 (F.B.).

—Ss. 224 and 225-B—Applicability—Person confined for failing to find security for good behaviour.

A person escaping from a jail confined for failing to find security for good behaviour under S. 123, Cr.P.Code, is punishable under S. 225-B and not under S. 224. 18 A.L.J. 1039=58 Ind. Cas. 831.

—Ss. 224, 225, 353—Applicability—Resistance to lawful apprehension of one's self—Warrant—Endorsement by initials—Arrest—Resistance.

An endorsement of a warrant of arrest by affixing the initials of the endorser is not invalid. Arrest by the endorsee is valid and resistance to it is an offence under the Penal Code. (1901) 5 C.W.N. 447.

—S. 224—Applicability—Escape from lawful custody—Chowkidar's custody.

A chowkidar is not a police officer within S. 59 of the Cr.P.C. and escape from his custody is no offence as such custody is not lawful. 41 Cal. 17=17 C.W.N. 978=14 Cr.L.J. 494=20 Ind. Cas. 750.

—S. 224—Applicability—Escape from custody—Judgment debtor allowed to go by decree-holder and process-server.

A person arrested in execution of a civil process was allowed to go by the decree-holder and the process-server who had arrested him; held, no offence of escape from lawful custody was committed by the judgment-debtor. 18 M. 401 and 31 M. 271, Dist. 8 M.L.T. 286=(1910) M.W.N. 592=11 Cr.L.J. 477=7 Ind. Cas. 392.

—Ss. 224, 333 and 34—Applicability—Arrest by Chaukidar—Attempt to sell stolen property—Rescue—No common intention.

The accused was arrested by a Chaukidar for attempting to sell stolen property but was rescued by certain persons. **Held**, that a Chaukidar is not a Police Officer, the charge under S. 224 cannot stand and that as at the time when the accused was arrested there was no common intention of rescue. S. 34 does not apply. 8 Cr. L. R. 61 All.

—Ss. 224, 411—Applicability—Escape from lawful custody—Actual thief arrested by private person while in possession of stolen property not an escape from lawful custody under S. 224, S. 411 not applicable to thief himself.

**Semble**: That if the owner of the bullock had himself been entitled to make the arrest, the subsequent custody of the prisoner by the Chaukidar would have been a lawful custody. 1901 A.W.N. 77=23 A. 266.

2. Consent or negligence of custodian.

—S. 224—Consent or neglect of custodian.

It has been long established that even when the escape is effected by the consent, or the neglect of the person that kept the prisoner in custody, the latter is no less guilty as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law. 31 Mad. 271, 25 M.L.T. 290, Foll. 72 Ind. Cas. 67=11 L.B.R. 449=2 Bur.L.J. 19=24 Cr.L.J. 307=A.I.R. 1923 Rang. 133.

—S. 224—Consent or negligence of custodian—Escape from lawful custody.

A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of "escape" even when the escape is effected by the consent or neglect of the person that kept the prisoner in custody. 18 M. 401 Foll. (1908) 18 M.L.J. 540=31 M. 271.

3. Essentials.

—S. 224—Applicability—Essentials to be proved—Apprehension not proved to be lawful—Custody not lawful—Accused snatched away by others and rescued—Offence—"Intentionally escapes"—Effect of.

Where the prosecution fails to establish that the apprehension of the accused was a lawful one, or that the custody in which he was kept was one in which he could be said to have been lawfully detained, S. 224, I.P.Code cannot apply. To escape or to attempt to escape from such custody is not an offence under S. 224, I.P. Code.

Where the accused has not offered any resistance or obstruction to his apprehension by the Police, but submitted to the police arrest, and subsequently he was snatched away in his hand-cuffed condition by others who broke the hand-cuffs, it cannot be said that he offered resistance or that he "intentionally" escaped from custody; and he is not guilty of an offence under S. 224. I.L.R. (1949) Cut. 623=A.I.R. 1950 Orissa 62=51 Cr.L.J. 679.

—Ss. 224, 225, 342—Essentials—Resistance to execution of illegal warrant.

For a conviction under Ss. 224 and 225, it is essential that the prosecution should show that the apprehension or arrest made or attempted was lawful in every way. A.I.R. 1932 Pat. 171=13 P.L.T. 135=33 Cr.L.J. 706=138 Ind. Cas. 844.

—S. 224—Essentials.

To sustain a charge under S. 224 or S. 225 the arrest and detention should be legal. 81 Ind. Cas. 312=18 M.L.W. 818=25 Cr. L. J. 792=A.I.R. 1924 Mad. 384.

—S. 224—Essentials—Custody—Must be lawful.

The applicant was convicted of an offence under S. 224; Sessions Judge in appeal found that applicant was



not in lawful custody, and acquitted him of the offence under S. 224 85 Ind. Cas. 44=26 Cr. L. J. 428=A.I.R. 1923 All. 34.

—S. 224—Essentials—Confinement in stocks—Escape.

Where a Govandla ryot escaped from the custody of the village servants who were directed to imprison him in stocks for using abusive language under S. 10 of Madras Regulation XI of 1816. Held, that the Lower Courts ought to have considered whether the accused was liable to punishment in stocks or not and on that ground to find whether the custody is legal or not. 18 M.L.T. 310=16 Cr.L. J. 672=30 Ind. Cas. 656.

4. Interpretation.

—S. 224—Interpretation—"For any such offence" and "charged" explained—Escape from lawful arrest on charge subsequently not proved—Still guilty.

An accused person legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law he commits the offence of escaping from lawful custody under S. 224; 18 Mad. 401 and 31 Mad. 271, Foll.

The words "for any such offence" in S. 224 mean for any offence with which a person is charged or of which he has been convicted.

The word "charged" is used in the popular sense as implying inculcation of an alleged offence as distinguished from a charge formulated after trial. It would therefore be an offence for a man to escape from custody after he has been lawfully arrested on a charge of having committed an offence although he may not have been subsequently convicted of such latter offence. 28 Cal. 253 Foll. 100 Ind. Cas. 988=29 Bom. L.R. 168=28 Cr.L. J. 380=7 A.I.Cr.R. 485=A.I.R. 1927 Bom. 96.

—S. 224—Interpretation—"obstruction"—Assemblage of crowd with lathis—Arrest abandoned through fear—No obstruction.

Where when a Sub-Inspector of Police was about to arrest an accused, a crowd carrying lathis began to assemble and the Sub-Inspector considered their appearance so formidable that he desisted from his intention of arresting the accused;

Held, that the persons forming the crowd cannot be said to have caused illegal obstruction within the meaning of S. 224 or S. 225 nor was the person to be arrested guilty under S. 224. 86 Ind. Cas. 350=23 A.L. J. 32=6 L.R. A.Cr. 95=26 Cr. L. J. 766=A.I.R. 1925 All. 308.

5. Legality of warrant.

—Ss. 224, 225 and 353—Legality of warrant.

Warrant signed by another Magistrate during absence on duty of Magistrate issuing warrant—Resistance to execution;

Held, that the warrant was legal and that his resistance constituted an offence under Ss. 224, 225 and 353, I.P.C. A.I.R. 1932 Pat. 175=13 P.L.T. 167=33 Cr. L. J. 297=142 Ind. Cas. 192.

—S. 224—Legality of warrant—Sheristadar signing warrant "by order"—Legality presumed.

Where a Sheristadar signed the warrant "by order" it was held that the statement that appeared on the face of the warrant that the Sheristadar signed "by order" can be presumed to be true and that in the absence of anything to suggest to the contrary it was held that he was actually the officer appointed by the Court to sign processes as required by rule 24 (2) of O. XXI, C.P.C. 6 C.W.N. 845, Dist. 73 Ind. Cas. 328=37 C.L. J. 331=27 C.W.N. 1042=24 Cr. L. J. 584=A.I.R. 1923 Cal. 584.

—S. 224—Legality of warrant—Arrest—Warrant not addressed by name—Form.

An arrest is not illegal because the warrant for arrest is not addressed by name to the bailiff of the Court. 15 Cr. L. J. 576=(1914) M.W.N. 498=25 Ind. Cas. 328.

6. Sentence.

—S. 224—Explanation—Sentence.

There is nothing in the explanation to S. 224, to require that a sentence of imprisonment under S. 224 must be made to run consecutively to a sentence imposed for the main offence of which the accused has been convicted. A.I.R. 1934 Bom. 462=36 Bom. L.R. 963=36 Cr. L. J. 282 (1)=153 Ind. Cas. 34.

7. Miscellaneous.

—S. 224—Miscellaneous.

The mere fact that the Police Officer put his hands on the accused's shoulders or caught hold of his wrist without the least intimation to him as to what offence he had been arrested for, can hardly amount to the accused being charged with any offence under S. 224, I.P.C. A.I.R. 1939 Oudh 81=1939 O.W.N. 63=40 Cr. L. J. 221=1939 A.W.R. 39=14 Luck. 409=179 Ind. Cas. 498.

—S. 225—Civil warrant not addressed to bailiff by name—Arrest—Legality.

A civil warrant not addressed to a particular bailiff by name is not invalid and the rescuing of a person arrested under such warrant is an offence under S. 225 of the Code. 1 L.W. 500=15 Cr. L. J. 439=24 Ind. Cas. 175.

—S. 225—Attempt to arrest not legal.

No offence is committed under S. 225 where the attempt to arrest is not lawful. 5 L.B.R. 21=10 Cr.L.J. 118=2 Ind. Cas. 619.

—S. 225—Assault on Police constable.

Accused assaulting Police constable in uniform—Matter should not be treated lightly. [Conviction under under Ss. 225 and 353 was altered to S. 323.] A.I.R. 1939 Nag. 95=I.L.R. (1939) Nag. 488=1939 N. L. J. 101=40 Cr. L. J. 905=184 Ind. Cas. 231.

—S. 225—Intention—Burden of Proof—Intention to prevent arrest and lawful power to arrest must be proved by prosecution.

Intention is an important ingredient in an offence under S. 225, Indian Penal Code, as under almost every criminal offence and it is for the prosecution to establish with what intention the accused acted. In the absence



of any clear evidence or finding to the contrary, the accused are entitled to the benefit of the doubt as to their actual intentions. Unless it is proved by the evidence on record that intention of the accused was to prevent the arrest, or that the pursuers were lawfully empowered to arrest him; persons stopping them from doing so are not liable under S. 225, Indian Penal Code. 64 Ind. Cas. 371=19 P.L.R. 1922=23 Cr. L. J. 3=A.I.R. 1922 Lah. 73.

#### —S. 225—Lawful custody.

Police Officer in arresting person not acting on his own initiative but merely on verbal order of his superior without written order under S. 56, Criminal P.C.—Arrested person is not lawfully detained within meaning of S. 225. A.I.R. 1941 Rang. 180=1941 Rang. L.R. 148=42 Cr.L. J. 629=194 Ind. Cas. 843.

#### —S. 225—Lawful custody — Arrest by Forest officer without warrant—S. 225.

Under S. 63 a Forest Officer cannot arrest, without warrant, persons committing an offence under S. 29 and his custody is not a lawful custody under S. 63 within the meaning of S. 225, Penal Code. 102 Ind. Cas. 498=54 Cal 296=28 Cr. L. J. 562=A.I.R. 1927 Cal. 516.

#### —S. 225—Offering resistance—With a view to prevent arrest amounts to.

Threatening a Sub-Inspector of Excise in order to prevent him from making an arrest amounts to offering a resistance and illegal obstruction to lawful apprehension of an offender, but where the obstruction has not been such as to constitute a serious offence the case does not call for heavy punishment. 123 Ind. Cas. 68=31 Cr.L. J. 465=A.I.R. 1930 Pat. 344.

#### —Ss. 225, 323—Rescue from the custody of Chaukidar.

An accused in a dacoity case was released by certain persons from the custody of a village **chaukidar** and in the course thereof they attacked the **chaukidar** with **lathis** inflicting a slight injury to him. The rescued accused was not a proclaimed offender nor was there a written order of Sub-Inspector directing the **chaukidar** to arrest the accused:

**Held**, that the custody of the **chaukidar** being illegal the rescuers were not guilty under S. 225, I.P.C.

**Held** also, that these persons had a right to defend the accused under S. 97, I.P.C., and were not guilty even under S. 323, I.P.C. A.I.R. 1940 Pat. 696=42 Cr. L. J. 199=7 B.R. 236=22 P.L.T. 80=191 Ind. Cas. 590.

#### —S. 225—Rescue from custody of chaukidar.

Arrest by private individual—Accused escorted in charge of **chaukidar**—Rescue of accused from **chaukidar's** custody:

**Held**, that an offence under S. 225 is committed. A.I.R. 1932 Pat. 214=13 P.L.T. 321=33 Cr. L. J. 572=136 Ind. Cas. 95.

#### —S. 225—Rescuing thief from chowkidar's custody.

A person rescuing a thief from the custody of a **chowkidar** in Bengal, does not commit an offence

under S. 225. 17 Cr. L. J. 164=33 Ind. Cas. 644 (Cal.).

#### —S. 225—Rescue from lawful custody—Criminal Procedure Code, Ss. 59 and 60—Definition.

A private person lawfully arrested a thief in the act of committing theft and made him over to a village **chaukidar** to be taken to the nearest Police station. On the way to the Police station three persons seized the **Chaukidar**, and the thief made his escape. **Held**, that the rescuers were rightly convicted under S. 225. The arrest of the thief having been in the first instance lawful, the requirements of S. 37 of the Code of Criminal Procedure were sufficiently complied with by the person arresting sending him to the Police station in the custody of the **Chaukidar**, 11 M. 480, Foll; 23 A 266 ref. to. (1907) A.W.N. 179=4 A. L. J. 483=29 A. 575.

#### —S. 225-A—Legal custody — Arrest without warrant under S. 55, Cr. Pro. Code—Confinement of arrested person—Legal custody.

Section 55, Criminal P. C., is independent of Chap. 8 of the Code, which includes S. 110, although proceedings under that chapter might follow an arrest under S. 55 as a natural sequence and a police officer can therefore arrest or cause to be arrested without warrant or an order of a Magistrate any person who comes within provisions of S. 55. And where such person is arrested without warrant or order of Magistrate, confinement of such person is legal custody within the meaning of S. 225-A. 124 Ind. Cas. 638=1930 Cr.C. 79=A.I.R. 1930 Pat. 103.

#### —S. 225-A—Negligence—Omission to close door.

Where a person properly arrested is confined in a room, omission to secure the door of the room, the main cause of escape of the prisoner from custody, is an indication of negligence. 124 Ind. Cas. 638=1930 Cr.C. 79=A.I.R. 1930 Pat. 103.

#### —Ss. 225-A and 21—Public servant—Villagers assisting a head of a village.

Villagers assisting a headman in arresting person and bringing him to a Police Station are not public servants within S. 21. (1916) 2 U.B.R. 122=18 Cr. L. J. 351=10 Bur. L.T. 170=38 Ind. Cas. 735.

#### —S. 225-B.

##### Synopsis.

1. Arrest
2. Defective warrant
3. Escape
4. Essentials
5. Obstruction, rescue, resistance
6. Revision
7. Showing warrant
8. Miscellaneous.

##### 1. Arrest.

#### —S. 225-B—Arrest by oral declaration—Legality.

An arrest by mere oral declaration is not a legal arrest and consequently a person so arrested cannot be convicted under S. 225-B, of the Penal Code. 113 Ind. Cas. 288=30 Cr.L.J. 128.



**—S. 225-B—Arrest—What constitutes.**

Mere words do not constitute an arrest. There must be touch, confinement or else acquiescence. 9 S. L. R. 141=17 Cr.L.J. 87=32 Ind. Cas. 679.

**2. Defective warrant.**

**—S. 225-B—Defective warrant—Warrant under O. 21, R. 8, Civil P. C., in execution, not bearing seal of the Court—Resistance to it if offence.**

In order that an offence under S. 225-B, I. P. C., be constituted, the apprehension must be lawful, that is to say, the warrant on which the arrest was made must have been executed with all due formalities of law. Where the warrant was one issued under O. 21, R. 8, Civil P. C., requiring the seal of the Court under O. 21, R. 24 (2) and was not so sealed, the resistance to the arrest is not an offence under S. 225-B. A.I.R. 1939 Rang. 320=1939 Rang. L. R. 445=40 Cr.L.J. 845=183 Ind. Cas. 791.

**—S. 225-B—Defective warrant — Warrant of arrest under C. P. Tenancy Act defective.**

A warrant of arrest issued under the provisions of C. P. Land Revenue Act must bear the seal of the Court which issues it. The warrant not bearing such a seal has therefore no force and the arrest under it is illegal, and in breaking arrest the person commits no offence and cannot be convicted under S. 225-B, I.P.C., A.I.R. 1938 Nag. 45=20 N.L.J. 219=39 Cr.L.J. 118=172 Ind. Cas. 335.

**—S. 225-B—Defective warrant.**

When a Court exercises the extraordinary powers under S. 136, Civil P. C., the provisions of the section must be strictly observed, and the warrant of arrest must be endorsed to the District Court in which it is to be executed. Hence, a warrant sent to the Munsif is defective, and where a person arrested under such warrant escapes, he cannot be convicted under S. 225-B. I. P. C. A.I.R. 1937 Pat. 603=18 P.L.T. 760=4 B.R. 85=39 Cr.L.J. 2=171 Ind. Cas. 894.

**—S. 225-B—Defective warrant—Release of person arrested under defective warrant.**

A warrant from a Court for arrest must be issued to some person for execution, and where no name or description of that person is given in the warrant, the person arrested can have no knowledge that the person who presents the warrant is legally authorised to do so. It is of no consequence that the person who is arrested is unable to read the warrant and has no knowledge as to whether the warrant is or is not properly filled up, but it is the duty of the Court to issue a warrant in proper form, and where a warrant is incomplete the subsequent release of a person arrested under such a warrant is not an offence under S. 225-B. A.I.R. 1932 All. 692=(1932) A.L.J. 1073=34 Cr.L.J. 455=55 A. 109=142 Ind. Cas. 887.

**—Ss. 225-B, 353—Defective warrant.**

Where a warrant for arrest was issued to the central nazir but the latter without endorsing it sent it to a registration clerk and the peons sent by the clerk to arrest the judgment-debtor were assaulted by the judgment-debtor ;

Held, that as there was no proper delegation of authority by the nazir, there was no lawful apprehension and the judgment-debtor could not be convicted under S. 225-B. A.I.R. 1932 All. 227=(1932) A.L.J. 179=23 Cr.L.J. 887=140 Ind. Cas. 118.

**—S. 225-B—Defective warrant—Omission of seal—Resistance no offence.**

The omission of the seal of the Court on a warrant renders it void and a person offering resistance to apprehension on such a warrant does not commit an offence under S. 225-B. 107 Ind. Cas. 601=9 Lah. 424=9 A.I.Cr.R. 488=30 P.L.R. 660=29 Cr.L.J. 265=A.I.R. 1928 Lah. 332.

**3. Escape.**

**—S. 225-B—Escape.**

District Munsif, in pursuance of High Courts order, issuing general order that warrants of arrest should thereafter be signed by head clerk—Successor of District Munsif issuing such warrant signed by head clerk—Warrant, held legal and escape therefrom an offence under S. 225-B. A.I.R. 1938 Mad. 536=1938 M.W.N. 316=(1938) 1 M.L.J. 667=47 L.W. 536=39 Cr.L.J. 685=176 Ind. Cas. 138.

**—S. 225-B.—Escape—Mere refusal to go with bailiff.**

Though once a man has been apprehended and effects his escape, it is immaterial whether at the time he used any force or whether the bailiff was actually present or temporarily absent, a mere refusal to go with the bailiff and sitting down is not an attempt to escape. A.I.R. 1933 Lah. 128=34 P.L.R. 668=34 Cr.L.J. 632=143 Ind. Cas. 649 (2).

**—S. 225-B—Escape—Judgment-debtor's refusal to follow process-server.**

Where a judgment-debtor who was left in the custody of the process-server on his payment of detention batta for two days, did not follow the process-server but made an escape though he appeared in Court on the third day :

Held, that the offence was of escape from lawful custody and that the fact that there was no order in writing for detention was immaterial but the offence being only a technical one, a nominal punishment would meet the ends of justice. A.I.R. 1933 Mad. 278 (279)=1932 M.W.N. 1222=34 Cr.L.J. 284=142 Ind. Cas. 242 (1).

**—S. 225-B—Escape—Illegal order —Detention in Court under—Escape—No offence.**

A Court passed order under O. 38, R. 3, as follows: "Surety is discharged. Judgment-debtor will remain arrested unless he can produce another surety". He was also orally directed not to leave the Court. In defiance to the order he left the Court. On being prosecuted under S. 225-B:

Held, as no order to find fresh security was passed the order was illegal and the judgment-debtor could not be convicted. 116 Ind. Cas. 709=30 P.L.R. 147=30 Cr.L.J. 663=13 A.I.Cr.R. 94=A.I.R. 1929 Lah. 163.



**—S. 225-B—Escape—From lawful custody—  
Not obstruction—But offence under S. 225-B.**

Escape from lawful custody of a process server does not amount to obstruction to a public servant in the discharge of his duties, nor does the act of a person in running away and shutting himself up in a room and refusing to come out constitute voluntary "obstruction", but it constitutes an offence under S. 225-B. 2 B.H.C. 128 (F.B.). Foll. 9 L.L.J. 408=8 A.I.Cr.R. 443=103 Ind. Cas. 833=28 Cr.L.J. 753=A.I.R. 1927 Lah. 708.

**—S. 225-B—Escape—Arrest not justified.**

Where an arrest of a person by the police is not justified by law, and the person escapes from police custody, he is not guilty under S. 225-B. 89 Ind. Cas. 400=26 Cr.L.J. 1360=A.I.R. 1925 Lah. 623.

**—S. 225-B — Escape — Proceedings under  
Cr. P. C., S. 109 pending.**

A person who escapes from Police custody while proceedings under S. 109, Criminal P. C. are pending against him commits an offence under S. 225-B and not under S. 224. 77 Ind. Cas. 814=25 Cr.L.J. 462=18 S.L.R. 301=A.I.R. 1925 Sind 193.

**—S. 225-B — Escape — Authority to arrest—  
Burden on prosecution to prove—Authority  
under some other provision of law—Not  
sufficient.**

When a constable arrests a man and tells him expressly that he is doing so under a particular authority, which he claims to have, to arrest him and if such arrest is resisted, it will be for the prosecution afterwards to establish that the constable who arrested the man had power to act under the authority that he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority under some other provision of law. A man is entitled to know when a constable is arresting him, under what power he is acting and if he (constable) states that he acts under certain power, which the man knows he has not got, he is entitled to object to arrest and to escape from custody when he is arrested. 81 Ind. Cas. 51=47 Mad. 442=19 M.L.W. 504=34 M.L.T. 95=25 Cr.L.J. 563=A.I.R. 1924 Mad. 555=46 M.L.J. 447.

**—S. 225-B—Escape—Confined in jail for failure  
to furnish security for good behaviour.**

Where a person escapes from a jail in which he was confined under a warrant under S. 128 of the Cr. Pro. Code, by reason of his having failed to find security to be of good behaviour, he commits an offence under S. 225-B and not S. 224, Penal Code. 74 All. 67, Foll. 43 All. 185=A.I.R. 1921 All. 281.

**—S. 225-B—Escape—Escape with consent of  
custodian.**

'Escape' in S. 225-B includes also escape which is effected with the consent of the custodian. 18 Mad. 401 and 31 Mad. 271, Foll. 8 M.L.T. 286, not Foll. 25 M.L.T. 290=(1919) M.W.N. 695=9 L.W. 216=20 Cr.L.J. 208=49 Ind. Cas. 656.

**—S. 225-B—Escape—Escape on the day of  
hearing.**

The police instituted proceedings under S. 110, Cr. P. C., against the accused and produced him before a Second Class Magistrate who passed an order of remand for his production before a First Class Magistrate. On the day of hearing the accused while on his way to Court escaped from custody. **Held**, that the escape of the accused was not an offence under S. 225-B as the Second Class Magistrate had no power to order remand under S. 167, Cr. P. Code. 39 Mad. 928=18 Cr.L.J. 403=38 Ind. Cas. 963.

**—S. 225-B—Escape—Arrest—Legality of—Oudh  
Land Revenue Act, Ss. 142, 143 — Arrest of  
defaulter.**

Where the Collector proceeds against the defaulter direct for recovery of arrears of revenue instead of the **lambardar**, the arrest of the defaulter is legal and his escape from custody is punishable under S. 225-B. 32 All. 116=7 A.L.J. 21=11 Cr.L.J. 137=5 Ind. Cas. 449.

**4. Essentials.**

**—S. 225-B—Essentials—Intentional resistance.**

An offence under S. 225-B is committed only when the resistance to arrest is intentional and that can only be when the person who makes the resistance knows that he is being or is about to be arrested. 107 Ind. Cas. 772=29 Cr.L.J. 286=9 A.I. Cr. R. 499=A.I.R. 1928 Lah. 324.

**—S. 225-B—Essentials—Mere absconding not  
sufficient—Some overt act of resistance or  
obstruction necessary.**

In order to justify a conviction of a person under S. 225-B, for the offence of intentionally offering resistance or illegal obstruction to the lawful apprehension of himself something more than mere absconding is required; there must be an overt act of resistance or obstruction; some active opposition by show of force. 74 Ind. Cas. 960=1 Rang. 218=2 Bur. L.J. 246=24 Cr.L.J. 848=A.I.R. 1923 Rang. 231.

**—S. 225-B—Essentials.**

A conviction under the S. 225 (3), I.P.C., requires proof of (1) the production by officer of the warrant of arrest and (2) the arrest or the attempt to arrest a person. 10 Cr.L.R. 3.

**5. Obstruction, rescue, resistance.**

**—S. 225-B—Obstructing arrest of a boy under  
7 years—No offence.**

Obstruction to the lawful apprehension of a boy under 7 years of age by the police for theft is no offence, for under S. 82, I.P.C., nothing is an offence which is done by a child under 7 years of age. (1915) M.W.N. 543=16 Cr.L.J. 602=30 Ind. Cas. 154.

**—S. 225-B—Obstruction to officer—What cons-  
titutes.**

An officer with a warrant of arrest must show the warrant to the person to be arrested and if the officer is obstructed in his duty, the person can be convicted under S. 225-B more than an evasion of arrest, as to constitute an offence under S. 225-B some,



thing or that the accused would not like to be arrested or that a fight would ensue on attempt to arrest, must be proved.

The accused should not be summarily tried in such a serious case. 38 All. 506=14 A.L.J. 731=17 Cr.L.J. 413=35 Ind. Cas. 973.

—S. 225-B—Rescue.

A person cannot rescue himself from the lawful custody, and the conviction against him under S. 225-B cannot stand. A.I.R. 1940 Pat. 479=6 B.R. 391=41 Cr.L.J. 381=186 Ind. Cas. 784.

—S. 225-B—Rescue—Search warrant to find a woman unlawfully detained in a house—Woman found in a field and taken custody of—Rescue from custody—No offence.

A search warrant was issued to a police officer to search a house of a particular person to find out a woman who was alleged to be unlawfully detained. She was not found in that house but was found in a field and was taken custody of. Accused rescued her from police custody:

**Held**, accused cannot be convicted under Ss. 225-B and 353 as they did not rescue the woman from lawful custody within the meaning of S. 225-B, the woman not being taken custody of in accordance with the warrant. 113 Ind. Cas. 578=30 Cr.L.J. 175=11 P.L.T. 31=12 A.I.Cr.R. 24=A.I.R. 1928 Pat. 550.

—S. 225-B—Rescuing or obstruction in apprehension.

A person who obstructs a police officer in the apprehension of a deserter from the army or rescues or attempts to rescue him from the custody of the officer is guilty of an offence punishable under S. 225-B, of the Penal Code.

A police officer may arrest without warrant a deserter from the army. 47 P.W.R. 1911 Cr.=20 P.R. 1911 Cr.=260 P.L.R. 1912=13 Cr.L.J. 234=14 Ind. Cas. 426.

—Ss. 225-B, 353—Rescue from lawful custody—Legality of warrant—Civil Procedure Code, Ss. 82, 174.

An Assistant Collector issued warrants for the arrest of certain witnesses, for whose attendance summonses had been issued, but who had not appeared in obedience thereto. The serving officer had not been able to effect personal service of the summonses, but had affixed copies to the houses of the persons to be served. The court, previous to issuing warrants, did not comply with the provisions of S. 82, C.P.C., though it was apparently of opinion that there had been due service of the summonses. The officers charged with the execution of the warrants arrested one of the witnesses, but they were attacked by N and others and the man they had arrested was rescued. N was convicted under Ss. 225-B and 353, I.P.C.—**Held**, that even if S. 225-B was not applicable the conviction under S. 353 of the Code was perfectly justified. 1905 A.W.N. 66=27 A. 491.

—Ss. 225-B and 353—Resistance.

Notice and warrant of arrest simultaneously issued by the Civil Court—Judgment-debtor refusing to accept notice and offering resistance when the warrant was sought to be executed:

**Held**, that the conviction under Ss. 225-B, and 353 was not unlawful. A.I.R. 1932 Pat. 315=13 P.L.T. 502=11 Pat. 743=34 Cr.L.J. 269=142 Ind. Cas. 160.

—S. 225-B—Resistance—Illegal warrant—Warrant for non-payment of tax ultra vires—Resistance not punishable.

Under S. 225-B resistance or obstruction to the apprehension of a person is made punishable only if the apprehension was "lawful," but where the imposition of the tax, for the non-payment of which the warrants are issued, is itself illegal and ultra vires, the resistance to their execution cannot be punishable. 107 Ind. Cas. 601=9 Lah. 424=9 A.I.Cr.R. 488=30 P.L.R. 660=29 Cr.L.J. 265=A.I.R. 1928 Lah. 332.

—S. 225-B—Resistance to lawful arrest.

Positive evidence must be adduced to prove the resistance offered to the person producing a warrant of arrest. There must be an Overt Act of resistance or obstruction. 33 P.R. 1918 Cr.=20 Cr.L.J. 64=48 Ind. Cas. 832.

—S. 225-B—Resisting chowkidar—See Cr. P. C. S. 56. 10 C.W.N. 287=3 Cr.L.J. 201.

—S. 225-B—Resistance—Warrant of arrest signed by Sheristadar of the Court—Resistance.

Where a warrant for arrest was signed by a Sheristadar duly authorized to sign warrants, and the judgment-debtor resisted its execution:—**Held**, that he had committed an offence under S. 225-B. (1902) 6 C.W.N. 845.

—Ss. 225-B, 353—Onus—Warrant—Resistance—Mis-description—Identity.

In order to have a conviction for illegal disobedience of a warrant, it is for the prosecution to show that the accused is the person against whom the warrant was issued, or in other words, that he satisfied the description of the person against whom it was issued and not on the accused to show that he was not the person. It is illegal to convict a person under Ss. 225-B and 353 when the warrant attempted to be executed was addressed to the person with a wrong description to which the accused did not answer. (1901) 5 C.W.N. 413=28 C. 399.

## 6. Revision.

—S. 225-B—Revision—Report by munsiff—Treated as complaint—Prosecution irregular—Acquittal—No revision lies.

The High Court will not interfere in revision with an order of acquittal, passed by Magistrate of competent jurisdiction, on a prosecution for an alleged offence under S. 225-B of the Penal Code, irregularly instituted on a report sent in by a Munsiff which was treated as a complaint. 86 Ind. Cas. 801=23 A.L.J. 189=26 Cr.L.J. 865=47 All. 409=A.I.R. 1925 All. 318.

## 7. Showing warrant.

—S. 225-B—Showing warrant—Warrant not shown when demanded—Arrest illegal.

Any man who is being arrested, has a right to ask the officer arresting him to show him what power he has to do so. If the arrest is under a warrant, the



man arrested is entitled to ask that the warrant be shown to him to see that he is being properly arrested and when the warrant is not shown to him and the arrest is made such an arrest will not be a legal arrest. 81 Ind. Cas. 51=48 Mad. 442=19 M. L. W. 504=34 M.L.T. 952=5 Cr.L. J. 563=A.I.R. 1924 Mad. 555=46 M.L.J. 447.

—S. 225-B—Showing warrant—Mere appraisal of the contents of a civil warrant enough—Must show if desired.

It is not necessary that a Bailiff executing a Civil warrant should in the first instance show the warrant. It is sufficient that he should apprise the person to be arrested of the contents of the warrant and show it if desired: 5 C.W.N. 843, Foll. 66 Ind. Cas. 1003=25 C.W.N. 815=A.I.R. 1921 Cal. 79.

### 8. Miscellaneous.

—S. 225-B—Complaint.

In cases under S. 225-B, the proper person to make the complaint is the officer from whom the escape or rescue, has been effected, but a complaint by another person aware of the facts is not a nullity. A Magistrate is competent to make a complaint as a common informer. A.I.R. 1933 Lah. 884=35 Cr.L. J. 86=34 P.L.R. 1020=146 Ind. Cas. 387.

—S. 225-B—Miscellaneous—Legality of warrant—Time extension by one not empowered—Endorsement by competent officer—Warrant is legal.

The Nazir of the Court is incompetent to extend the time for the execution of a warrant, but where extension is endorsed by the same officer who has originally issued the warrant and the endorsement appears on the warrant itself the warrant is legal. 93 Ind. Cas. 1049=43 C.L. J. 234=27 Cr.L. J. 553=A.I.R. 1926 Cal. 605.

—S. 225-B—Miscellaneous — Illegal custody — Judgment-debtor in the custody of a peon.

A Civil Court is not empowered to leave a judgment-debtor in custody of a peon after giving him time to pay up a decretal amount and such detention is not lawful custody within the meaning of the Penal Code. 86 Ind. Cas. 801=23 A.L. J. 189=26 Cr.L. J. 865=47 All. 409=A.I.R. 1925 All. 318.

—S. 226—Applicability—Prisoner under sentence of transportation—Escape of—If can be convicted under S. 226.

A prisoner who escapes from jail where he is confined before undergoing a sentence of transportation and is brought back cannot be convicted under S. 226 because his escape is not a return from transportation within the meaning of that section. 4 M.H.C.R. 152, Foll. 4 Bur. L.T. 261=13 Cr.L. J. 54=13 Ind. Cas. 390.

—S. 227—Conditionally released prisoner.

Under S. 227, it is for the Court to decide whether a conditionally released prisoner has violated the conditions on which remission was granted to him. Until he has been found guilty under S. 227, it is not for the jail authorities to say that he has committed an offence. A.I.R. 1933 Rang. 28=34 Cr.L. J. 447=142 Ind. Cas. 728.

—S. 227—Nature of evidence required—What must be proved by documentary evidence — What by oral.

In a case under S. 227 the conviction of the accused, its date and the sentence passed should be proved by documentary evidence. Further the facts that the accused person was granted a remission of punishment and that the conditions on which the remission was granted must also be proved by documentary evidence. But the fact that the accused is the person convicted, sentenced and granted remission and that he has committed a breach of a condition of remission may be proved by oral evidence. The Magistrate should not overlook the requirements of documentary evidence and the accused should not be questioned at all until proper evidence is on the record. 120 Ind. Cas. 692=7 Rang. 355=1929 Cr. C. 446=31 Cr. L. J. 174=A.I.R. 1929 Rang. 278.

—S. 227—Sentence — Exceeding powers under Cr. Pro. Code—Illegal.

There is nothing in either S. 227, Penal Code or Burmah Act to empower any Magistrate to pass a sentence in excess of that which he is empowered under the Criminal P.C., to pass. Thus if a Magistrate sentences a person, convicted under S. 227 of the Code, and under S. 2, Burma Act, for a period which is in excess of his power, the sentence is illegal. 120 Ind. Cas. 693=7 Rang. 358=1929 Cr. C. 464=31 Cr.L. J. 175=A.I.R. 1929 Rang. 279.

—S. 228.

### Synopsis.

1. Appeal to Privy Council
2. Contempt
3. Ingredients
4. Insulting remarks or interruption
5. Judicial proceedings
6. Printed article.

#### 1. Appeal to Privy Council.

—S. 228—Appeal to Privy Council.

Interferences with the administration of justice in civil or criminal case or deprecating the authority of the Court in any way, are quasi criminal acts and orders punishing such acts are orders in criminal cases. Appeal to Privy Council—Leave to appeal should only be granted on the principle on which leave to appeal in criminal case is given. A.I.R. 1936 P. C. 141=40 C.W.N. 801=(1936) A.L.J. 671=38 P.L.R. 541=(1936) M.W.N. 619=38 Bom. L. R. 681=1936 A.W.R. 600=64 C.L.J. 36=71 M.L.J. 665=44 L.W. 15=162 Ind. Cas. 92 (P. C.)

#### 2. Contempt.

—S. 228—Contempt—Marrying the minor girl, without Court's permission.

Where a guardian was appointed to a minor girl it being well understood at the time of the appointment that the minor was not to be married without permission of the Court and A gave away the minor girl in marriage while under the guardianship;



**Held**, that though A's conduct was a disobedience of the Court's order, it did not amount to an offence under S. 228, I.P.C.

**Held**, also, that A's conduct attracted the operation of the Contempt of Courts Act under which the High Court was empowered to punish Contempt of Courts subordinate to it in the same way as if the contempt had been of the High Court itself. A.I.R. 1933 Pat. 142=12 Pat. 1=34 Cr. L. J. 770=14 P.L.T. 605=144 Ind. Cas. 351.

**—S. 228—Contempt—Marriage with a ward of Court without consent.**

The marriage of a ward of Court requires the consent of the Court and a marriage, or connivance of marriage, with a ward of Court without such consent is, apart from any other consequences which might follow, Contempt of Court liable to be severely punished: 42 Cal. 351, Foll. 108 Ind. Cas. 668=23 S.L.R. 75=A.I.R. 1928 Sind 129.

**—S. 228—Contempt—Legal practitioner—Disciplinary power over—Subordinate Court—Jurisdiction.**

(Per Full Bench.)—No power to punish for contempt of an inferior Court now exists independently of the Indian Penal Code and the Contempt of Courts Act and no disciplinary power over legal practitioners or power to punish for contempt outside the provisions of the Indian Penal Code is vested in the subordinate Courts. 1930 A. L. J. 402=A.I.R. 1930 All. 225 (S.B.)

**—S. 228—Contempt—Exercise of discretion—Technical, slight or trivial—Court may condone—Likely interference with justice—May not interfere unless fair trial is prejudiced.**

The Contempt of Court is not a matter of mere form of technicality but of substance, and the jurisdiction to punish for contempt has to be very carefully and cautiously exercised. It is well settled that when the offence is technical or of a slight or trivial nature the Court may condone it. Even if the observation on the subject-matter of a proceeding may be likely to interfere with the course of justice and may technically amount to contempt, the Court may not interfere, if it is not satisfied that such comments were calculated to prejudice the fair trial. 1930 A. L. J. 665=A.I.R. 1930 All. 483.

**—S. 228—Contempt—Apology—Tender of—Not a sufficient justification in a serious and grave case.**

The mere fact that an apology has been tendered by the accused is not a sufficient reason to secure for him impunity from punishment in a serious and grave contempt case. *Rex v. Almon*, (1765) Wilmot's Opinions 243, applied. 39 Ind. Cas. 833=6 Lah. 528=26 P.L.R. 772=26 Cr. L. J. 1409=A.I.R. 1926 Lah. 1 (F.B.)

**—S. 228—Contempt — What is—Reasonable argument or expostulation — Not contempt—Statements amounting to—Undermining of authority.**

If reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt

of Court, but it is a very grave and serious contempt to accuse a Judge of High Court of having decided a case not according to the dictates of justice but in order to please and curry favour with others and to say that the door of justice (clearly including the door of High Court) has been closed against a particular community. Any act done or writing published, calculated to bring a Court or a Judge of the Court into contempt, or to lower its authority is a contempt of Court. Such contempt belongs to the category characterised as "scandalising a Court or a judge." *R. v. Gray*, (1900) 2 Q. B. 30 and *In re Read Huggonson* (1742) 2 Atk. 291, applied.

The principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders is not the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the Tribunal be undermined or impaired. *Rex v. Davies* (1906) 1, K. B. 32 Foll. 89 Ind. Cas. 833=6 Lah. 528=26 P. L. R. 772=26 Cr. L. J. 1409=A.I.R. 1926 Lah. 1 (F.B.).

**—S. 228—Contempt—What is—Calling the Judge "a prejudiced Judge"—Intention an inference from words used.**

The accused, tried for rioting when asked to make a statement under S. 342, Cr. P. C. called the trial judge, "a prejudiced Judge." When he was asked to withdraw the statement he refused to do so. The Judge then held a proceeding under S. 480, Cr.P.C. and the accused was convicted of an offence punishable under S. 228 of the I.P.C. On appeal:

**Held**, (Shah, J. dissenting) that, the accused was guilty of the offence charged, for his intention to offer an insult to the Judge was made out first by the words themselves, and, secondly, by the conduct of the accused.

Per Macleod, C. J.—No system of justice can tolerate unbridled licence on the part of a person defending himself or accept, as an excuse for an insult to a Judge that it was necessary for the conduct of the defence or for the establishment of his innocence.

Per Shah, J.—It is impossible to hold that in saying what the accused did say his intention was to offer an insult to the Judge. His conduct is consistent with the view that his intention was to press a defence which was adopted and adhered to without sufficient thought and which was couched in improper language and not to offer an insult to the Judge.

Per Pratt, J.—"The only question is whether the insult was intentional, and on this point it is clear that this intention is an inference attaching to the words themselves, and this inference is not rebutted by any excuse as to the motive with which the accused used the words or the object that he thought would be attained by so doing. 66 Ind. Cas. 821=24 Bom.L.R. 386=46 Bom. 973=23 Cr. L. J. 325=A.I.R. 1922 Bom. 261.

**—S. 228—Contempt — What is — Impertinent threat to witness.**

An accused person, who during the hearing of a case makes an impertinent threat to a witness in the



box, commits an offence under S. 228. 74 Ind. Cas. 260=24 Cr.L.J. 756=4 L.R.A.Cr. 8=45 All. 272=21 A.L.J. 72=A.I.R. 1923 All. 193.

**—S. 228—Contempt—Time of taking action—Even after final judgment.**

The High Courts in India have jurisdiction to punish for contempt of Court where the contempt is made by scandalous attacks on its integrity and impartiality even though after the final judgment has been delivered in a case. (Principles underlying the law of contempt of Court explained). 10 Cal. 109; 2 Q. B. 36, Ref. 69 Ind. Cas. 84=47 Bom. 76=24 Bom. L. R. 928=23 Cr. L. J. 644=A. I. R. 1922 Bom. 426.

**—S. 228—Contempt—Indirect answers—Liable under S. 179 not S. 228.**

Where a witness, though persistently asked by the Court to give certain information, persisted in giving an indirect answer:

**Held**, that this amounted to a refusal to answer question and that an offence under S. 179, was committed but not one under S. 228. 84 Ind. Cas. 706=22 A.L.J. 1100=26 Cr.L.J. 354=6 L.R.A.Cr. 14.

**—S. 228—Scuffle in Court verandah—Contempt.**

The accused had a scuffle with some other person in the verandah of a Court room and the Court Chaprasi intervened and stopped it. No interruption was caused to the Court and there was no intention to insult the Court. **Held**, that the accused was not guilty of an offence under S. 228, I.P.C. 20 Cr.L.J. 777=53 Ind. Cas. 617 (All.).

**—S. 228—Contempt of Court—Procedure.**

A coarse expression used by a litigant but not addressed to, but heard by the Court, cannot be treated as an intentional insult or an interruption of proceedings, under S. 228, I.P.C. Litigants are bound to conduct themselves in an orderly manner but too much notice should not be taken of a sudden lapse during a moment of excitement into language which is fortunately too common among the lower class of rustics and is not meant to be taken seriously. Where a litigant is detained and adopts a submissive attitude when brought before the Court later after the excitement has worn off, a due admonition of a petty fine at the most is sufficient for preservation of order. 23 P.W.R. (Cr.) 1912=13 Cr. L. J. 567=15 Ind. Cas. 983.

**—Ss. 228, 500—Cr. P. C., S. 476—Contempt.**

A notice was issued by a munsif calling upon the petitioner to show cause why he should not be criminally prosecuted for contempt of court and defamation in respect of a petition in an execution matter, praying for time in order to enable the applicant to move the District Judge to transfer the case from the file of the said Munsif to some other court. Cause was shown and the petitioner was committed to the Criminal Court for charges under Ss. 228, 500. **Held**, that the prosecution under S. 228 of I.P.C., cannot stand. The court in which an offence is committed under that section should try the offender then and there and pass orders under that section. (1907) 6 C.L.J. 713=6 Cr. L. J. 405.

**3. Ingredients.**

**—S. 228—Ingredients—Offence under—Interruption of Court's work by shouting slogans.**

S. 228, I. P. Code, makes it quite clear that the insult or interruption must be intentional. It is not enough if the work of the Court was in fact interrupted. It must be shown that the accused knew that the Court was at that time doing judicial work and that having this knowledge he intentionally shouted slogans in order to interrupt that work. I.L.R. (1948) 2 Cal. 50=52 C.W.N. 336.

**—S. 228—Ingredients of offence—Intention to insult.**

The chief ingredient of the offence contemplated by Section 228 of the Indian Penal Code, is the intention of the offender. The question is not whether a Judicial Officer felt insulted, but whether an insult was actually offered and intended. 93 Ind. Cas. 698=27 Cr. L. J. 474=A.I.R. 1925 Lah. 210.

**—S. 228—Ingredients—Intentional interruption.**

Where there were two accused and where, when the Magistrate was examining the first accused, he found that the two accused were exchanging remarks:

**Held**, that for a conviction under Penal Code, S. 228, there should be an intentional interruption to the Court and the action of the accused in the Magistrate's Court in the present case did not reasonably suggest such intention and would appear undoubtedly to have been adopted in good faith in their own interests: 10 C.W.N. 1062, Ref. 91 Ind. Cas. 242=8 N.L.J. 190=27 Cr. L. J. 66=22 N.L.J. 1=A.I.R. 1925 Nag. 403.

**—S. 228—Ingredients—Intention of offender.**

The chief ingredient in the offence contemplated by S. 228 is intention of the offender. Where his behaviour may have been objectionable but it could not be said that the petitioner pushed or detained the witness with the intention of insulting or causing any interruption to the Magistrate when he only told him not to go as he had to cross-examine him; **Held**, no offence was committed. 81 Ind. Cas. 76=25 Cr.L.J. 588=A.I.R. 1923 Lah. 88.

**—S. 228—Ingredients.**

In a case under S. 228 it is material to prove that the act complained of was done intentionally. A.I.R. 1922 Lah. 187.

**—S. 228—Ingredients—Audible remark in Court—Interruption—Intention.**

An audible remark which interrupted the proceedings in a Court of justice is not enough to sustain a conviction under S. 228. The Court must further be satisfied that the accused intentionally ordered interruption. 29 M.L.J. 274=2 L.W. 686=16 Cr. L. J. 610=30 Ind. Cas. 434.

**—S. 228—Ingredients.**

A witness refusing to answer questions by counsel or Court is guilty of the offence under S. 228 I.P.C.



To constitute an offence under S. 228 (1) there must be insult or interruption, (2) the insult or interruption must be intentional and (3) the insult must have been offered or the interruption caused to a public servant sitting in any stage of a judicial proceeding. It is not necessary that the interruption must delay the proceedings of the Court for any length of time. The point for determination is not the duration of time but the nature of the Act of the accused. 14 P. R. 1918 Cr. = 24 P.W.R. 1918 Cr. = 19 Cr. L. J. 676 = 90 P. L. R. 1918 = 46 Ind. Cas. 36.

**—S. 228—Ingredients—Offence under—Interruption—Evidence.**

When a person making a noise in Court is charged under S. 228 the record must show the stage of judicial proceeding interrupted and the evidence must establish that such interruption was intentional as such vital irregularities are not cured by S. 537, Cr. Pro. Code. 15 Cr. L. J. 621 = 25 Ind. Cas. 629.

**—S. 228—Ingredient of offence.**

The principal ingredient of an offence under S. 228 is intentional insult or interruption. Merely uttering words and not keeping silent can hardly be construed as intentional insult or interruption caused by an undefended prisoner during the course of a judicial proceeding against him, especially when there are no materials on the record for a conclusion adverse to the accused. (1906) 10 C.W.N. 1062 = 4 C.L.J. 415.

**4. Insulting remarks or interruption.**

**—S. 228—Applicability—Insult to District Magistrate at private interview—Offence.**

A private interview with a District Magistrate is not a stage in a judicial proceeding; and offering insult to that officer at a private interview is not an offence under S. 228, I.P. Code. A.I.R. 1948 Sind 97 = 49 Cr. L. J. 327.

**—S. 228—Application for adjournment—Insulting remarks in.**

It must be a matter for consideration in each individual case how insulting the expressions used are and whether there was any necessity for the applicant to make use of those expressions in the application which he was actually making to the Court. It is a matter of opinion whether a Court should or should not take notice of gratuitously insulting remarks contained in an application for adjournment. In cases where the words used and the absence of necessity for including insulting suggestions in an application clearly suggest that there was an intention to insult the Court, it is not wise for the Courts to pass over such actions in silence. [Intention to insult held present.] A.I.R. 1943 All. 97 = (1942) A.L.J. 677 = 44 Cr. L. J. 360 = 1942 A.W.R. H. C. 398 = I. L. R. (1943) All. 186 = 205 Ind. Cas. 246.

**—S. 228—Insulting remarks or interruption—Petition not properly worded.**

Though a petition for adjournment on the ground that accused intended to apply for transfer of the proceedings to another Court is not happily worded, no presumption that the intention of the petitioner was to offer insult to Court can be drawn. 38 All. 284 =

14 A. L. J. 247 = 17 Cr. L. J. 163 = 33 Ind. Cas. 643.

**—S. 228—Insulting remarks or interruption—Lawyer calling attention of Court to peon's rude conduct in preventing respectable person from entering court-room.**

The mere act of addressing a Presiding Officer of Court during the pendency of a proceeding does not amount to a culpable interruption. "Interruption" as used in S. 228, contemplates something far more serious, far more obstructive than this. Hence, the act of a lawyer in calling the attention of the Presiding Officer of the Court to the rude conduct of the court-peon in preventing a respectable person from entering a court-room does not constitute interruption within the meaning of S. 228. A.I.R. 1943 Lah. 14 = I.L.R. (1943) Lah. 791 = 44 Cr. L. J. 181 = 44 P.L.R. 511 = 204 Ind. Cas. 299.

**—S. 228—Insulting remarks or interruption—Lawyer prosecuted under S. 228 refusing to apologise—Remarks that he would make it a test case does not transgress law.**

Where a lawyer is in the position of an accused person before the Magistrate in a case under S. 228, neither the Magistrate nor any other person has any right to coerce him into submission or to extort any object guarantee out of him. If, therefore, on being hard pressed by his colleagues, he frankly asserted that he would not tender any apology on the ground that he had committed no offence and that on the question of law involved in the case he would like to secure a pronouncement from the highest tribunal by making it a test case, he would be perfectly within his right and would not transgress any law. A.I.R. 1943 Lah. 14 = 44 P.L.R. 511 = 44 Cr. L. J. 181 = I.L.R. (1943) Lah. 791 = 204 Ind. Cas. 299.

**—S. 228—Insulting remarks or interruption—Prayer for bail—Prayer refused not on merits but because lawyer put unnecessary questions—Lawyer is within his rights to resent remarks by Judge to that effect.**

An accused cannot be penalized for the fault of his lawyer. His case is to be judged on its own merits and if in the matter of the rejection of bail, the Magistrate throws odium upon the lawyer by refusing his prayer for the release of the accused on bail, for whom he was appearing, on the ground that the lawyer had put unnecessary questions to the prosecution witnesses, thus publicly attributing the misfortune of the accused to incompetence of his lawyer, the lawyer would be within his rights not only to resent the remark made by the Magistrate but also to resent the reason adduced by him for refusing bail to the accused. The conduct of the Magistrate cannot be justified on any judicial principles. A.I.R. 1943 Lah. 14 = 44 P.L.R. 511 = 44 Cr. L. J. 181 = I.L.R. (1943) Lah. 791 = 204 Ind. Cas. 299.

**—S. 228—Insulting remarks or interruption—Rude remark not addressed to Court but overheard by Court.**

If a remark is not addressed to a Court, however rude or vulgar it may be, it cannot be made the subject of an offence under S. 228, even if the Court happens to overhear it. A.I.R. 1943 Lah. 14 = 44 P.L.R. 511 = 44 Cr. L. J. 181 = I.L.R. (1943) Lah. 791 = 204 Ind. Cas. 299.



**—S. 228—Insulting remarks—Statement in application about Judge.**

A person was convicted under S. 228, for having made a statement as follows: "Probably as the rumour goes, with a view to avoid this big and stiff case for reasons best known to him, the applicants came to know that he (Mr. P. N. Agha) was reported sick of high blood pressure four days before the case actually started";

**Held**, that the Judge would have shown judicial balance by not taking notice of this passage in the application and by not taking proceedings under S. 228. A.I.R. 1937 All. 171=38 Cr.L.J. 416 (2)=1936 A.W.R. 967=167 Ind. Cas. 515.

**—S. 228—Insult to Court by assessor by his dress.**

In order to bring a case within S. 228, I. P. C., and S. 480, Criminal P. C., it must be shown that the assessor intentionally offered an insult to the Court.

Where an assessor who appeared in Court in a dress consisting of a **patheran**, a cap and a scarf, was fined for being improperly dressed:

**Held**, that there being no rule as to the dress of assessors, and there being no suggestion that this dress offended against any rule of public decency, or was intended to be insulting to the Court, the Judge had no jurisdiction to fine the assessor. A.I.R. 1933 Bom. 478=35 Bom. L.R. 1025=35 Cr.L.J. 107 (2)=146 Ind. Cas. 550 (2).

**—S. 228—Insulting remarks or interruption.**

Mere flat refusal to obey the direction of the Magistrate without more, in the shape of offensive words or gesture, cannot be called an insult and in such a case tender of apology should be accepted. (1935) 1935 M.W.N. 704.

**—S. 228—Insulting remarks.**

Where the Adhigari was sitting as a Court and the accused abused him, the offence committed is under S. 228, and not under S. 186 of the I. P. C. (1934) 1934 M.W.N. 398.

**—S. 228 — Insult — Interruption — Pleader's Conduct—Practice.**

Under S. 228, the insult or interruption in the Court should be intentional. Some latitude should be allowed to a member of the Bar in insisting in the conduct of his case upon the question being taken down or his objections noted, where the court thinks the question inadmissible or the objections untenable. There ought to be a spirit of give and take between the Bench and the Bar in such matters and every little persistence on the part of the pleader should not be turned into an occasion for a criminal trial unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the Court. (1904) 6 Bom. L.R. 541.

**5. Judicial proceedings.****—S. 228—Judicial proceedings.**

Proceedings before a Debt Settlement Board cannot be regarded as "judicial proceedings" except for the

limited purpose of S. 228, I. P. C. A.I.R. 1940 Cal. 216=44 C.W.N. 530=I.L.R. (1940) 2 Cal. 14=41 Cr.L.J. 662=188 Ind. Cas. 686.

**—S. 228 — Judicial proceedings — Charge—Prejudice to accused.**

Although the wording of the body of the charge may cover an offence under S. 228, still the accused might be prejudiced when no stress is laid on an essential element in charge under S. 228, namely, that the Court must be sitting in a judicial proceeding at the time when the insult is offered. A.I.R. 1936 Nag. 275=38 Cr.L.J. 380=I.L.R. (1937) Nag. 245=167 Ind. Cas. 378.

**—S. 228 — Judicial proceedings — Procedure—Duty of Court.**

In the case of proceedings for contempt of Court under S. 228, the record must show the nature and the stage of the judicial proceedings in which the Court interrupted or insulted was sitting and the nature of the interruption or insult, and omission to set forth the particulars as required by S. 481, Cl. (2), Criminal P. C., is not merely an irregularity which could be corrected by the application of S. 537, but is fatal to the proceedings. A.I.R. 1931 Nag. 193=14 N.L.J. 106=32 Cr.L.J. 1221=134 Ind. Cas. 684.

**—S. 228 — Sub-Registrar—Proceedings before, if judicial.**

In the absence of a direction by the Local Government as regards the Sub-Registrar being a Civil Court within the meaning of Ss. 480 and 482, Criminal P. C., an offence under S. 228, Penal Code, if committed before a Sub-Registrar cannot be dealt with under Ss. 480 and 482, Criminal P. C. 34 C.W.N. 56=A.I.R. 1930 Cal. 366.

**6. Printed article.****—S. 228—Printed article—Past life of accused—When amounts to contempt.**

Matter published in a news paper relating to the past life of an accused or to his antecedent character, particularly if it suggests an offence similar to that with which he is charged, is contempt of Court, as it must tend to interfere with the fair trial of that charge. 1930 A.L.J. 665=A.I.R. 1930 All. 483.

**—S. 228 — Printed article — Public criticism limit of—Test.**

If the scope of the inquiry or defence is very wide it cannot be expected that, while the trial is going on, public criticism on all the various subjects involved in the inquiry should be entirely withheld. General comment on these various matters or historical events, so long as they do not directly refer to the part played by the accused, cannot be seriously objected to. Such criticism would not be a comment on pending proceedings at all nor would the publications of such comments ordinarily tend to interfere with the course of justice. The test to be applied is whether the publication is likely to prejudice mankind in favour of or against a party before the case is finally heard or whether it is likely to interfere with the due course of justice. 1930 A.L.J. 665=A.I.R. 1930 All. 483.



## —S. 228—Printed article—Pending trial.

The publication of comments on a case which is pending trial in a Court amounts to a contempt of Court if the comments are such as are likely to prejudice the administration of justice in the case. 109 Ind. Cas. 675=6 Rang. 39=29 Cr.L.J. 595=10 A.I.Cr.R. 266=A.I.R. 1928 Rang. 115.

## —S. 228—Printed article—Decided case.

The publication of an article in a newspaper referring to a case which has been decided may amount to and be treated as contempt. *R. v. Gray*, (1900) 2 Q. B. 36 and A.I.R. 1922 Bom. 426, Foll. 89 Ind. Cas. 833=6 Lah. 528=26 P.L.R. 772=26 Cr.L.J. 1409=A.I.R. 1926 Lah. 1 (F.B.).

## —S. 228 — Printed article — Pending trial—Reflection on character and impartiality of Magistrate—Contempt of lower Court if amounts to contempt of High Court.

Comments in a publication reflecting on the character or impartiality of the Magistrate in the course of the criminal trial, tend to deprive the Court of the power of doing that which is the end for which it exists, i. e., to administer justice duly and impartially, and constitute necessarily a contempt of the Magistrate's Court.

Per *Macleod, C. J.*—It is not that every contempt of an inferior Court is necessarily a contempt of High Court. It is a question which must be decided on the facts of each case. If the publication of the remarks in an article impedes the due administration of justice, it constitutes a contempt of High Court and it has jurisdiction and powers to deal with it as the King's Bench Division in England has.

Per *Shah, J.*—The High Court has no power to punish contempts of Criminal Court subordinate to it as the King's Bench has. 65 Ind. Cas. 753=46 Bom. 592=24 Bom. L.R. 16=23 Cr.L.J. 177=A.I.R. 1922 Bom. 52.

## —S. 228—Printed article—Contempt of Court—Comment on pending cases—Effect on trial.

Comments on cases pending or allegations against parties to them if published amount ordinarily to contempt on the part of the offender. But the intention of the offender should also be considered. 14 Cr.L.J. 267=19 Ind. Cas. 539 (Cal.)

## —S. 230—Applicability—Coin used as ornament—Still Queen's coin.

A coin may still, within the meaning of S. 230, be deemed to be a Queen's coin even though it has ceased to be used as money, and the mere fact that a coin is being used as an ornament by soldering a ring to it does not transform it absolutely into a new article. By removal of that ring the coin in a defaced form will re-appear and may be capable of being accepted by ignorant villagers. The rules in the Resource Manual themselves require that a person who wants to have the defaced coins exchanged must at his own cost remove the solder and then tender the coins. The rules speak of a silver coin which has been defaced. It is obvious, therefore, that when these coins are tendered to a Bank they are not tendered as ornaments or other articles into which coins have been transformed, but are tendered as coins which have been defaced. 93 Ind. Cas. 154=27

Cr.L.J. 426=48 All. 603=7 L.R.A.Cr. 59=24 A.L.J. 842=A.I.R. 1926 All. 321.

## —Ss. 230, 239, 420—Definition—"Coin"—Uttering false coin—Cheating.

Where the offence charged consisted of selling, or pawning as genuine, gold mohurs of the reign of Shahjahan, silver rupees of that reign which had been gilt or in some way covered over with gold, it was held that the offence would be that of cheating and not that of uttering false coin. A gold mohur of the reign of Shahjahan cannot be deemed to be "coin" within the meaning of S. 230, as it is not used for the time being as money. 4 A.L.J. 43=1906 A.W.N. 308=29 A. 141.

## —Ss. 230, 235, 243—Murshidabad rupees, counterfeiting of.

S. 230, was not intended to and does not apply to Murshidabad rupees. 1905 A.W.N. 184=2 A.L.J. 498=28 A. 62.

## —Ss. 230, 243—Possession of counterfeit coin—"Queen's coin"—Murshidabad rupees.

Held, that Murshidabad rupees which had been declared to be current coins by Regulation XXXV of 1793, are "Queen's coin" within the meaning of S. 230, Penal Code, and consequently, the possession of counterfeit Murshidabad rupees with the knowledge that they are counterfeit is an offence falling under S. 243 of the code. (1903) A.W.N. 115.

## —Ss. 231—Essentials of offence.

In order to constitute the offence of counterfeiting coins under S. 231 it is not necessary that the intention of the accused should be the practice of deception. It is enough if the resemblance is such that a person might be deceived thereby in order to raise the presumption that the accused intended to practise deception, and the onus is on the accused to prove the contrary. 1907 A.W.N. 289=4 A.L.J. 776=30 A. 93.

## —Ss. 232, 235—Prosecution's duty to call persons present at search.

The prosecution is in duty bound to call the persons present at a search unless they were of opinion that those persons would misrepresent facts and would not state what happened, even though they believed the witnesses had formed an opinion unfavourable to the prosecution story. (1904) 9 C.W.N. 438.

## —S. 232—Removing rings from coins used as ornaments and restoring the same to circulation—Counterfeiting Queen's coin.

It is not an offence under S. 232 to remove the rings from coins which have been used to form necklaces or other ornaments, and to work up the face of the coins where the ring has been, it not being shown that any material part of the coin has at any time been removed. (1901) A.W.N. 116=23 A. 420.

## —S. 232—Sentence—Possessing implements and counterfeiting—One transaction—Sentences for both offences—Illegal.

The accused were charged under Ss. 235 and 232, Penal Code, with being in possession of implements and materials for counterfeiting King's coins and with



actually counterfeiting King's coins, and sentenced to various terms of imprisonment under each section:

**Held**, that the possession of such implements and materials is part and parcel of the transaction of counterfeiting coin and therefore the sentences passed on the appellants under S. 235, Penal Code, were illegal. 14 P.R. 1904 Cr. Foll. 71 Ind. Cas. 700=5 L.L.J. 272=24 Cr.L.J. 236=A.I.R. 1924 Lah. 78.

—**S. 235—Fact to be proved to justify conviction under—Proof of ownership of building in which counterfeiting materials are found—Necessity.**

All that is required to convict a person of an offence under S. 235, I.P. Code is that he should be proved to have been in possession of materials for counterfeiting coins. It is not further necessary that he should be the owner of the building in which the material was found stored. 1950 A.L.J. 516=1950 A.W.R. 526=A.I.R. 1950 A. 732.

—**S. 235—Offence under—Knowledge that some one else is in possession of counterfeiting materials.**

Under S. 235, I.P. Code, it is the possession of any instrument or material for the purpose of counterfeiting that is made punishable, not the knowledge that some one else is in such possession. Where the accused was in possession of these instruments, other persons who were living with him, (e.g.) his wife or his relations who have come on a short visit to his house, cannot be held guilty of this offence. 1933 Pat. 272, applied. 51 Cr.L.J. 717=A.I.R. 1950 Lah. 97.

—**S. 235—Essentials to be proved.**

Before an offence can be made out under S. 235, it is incumbent upon the prosecution to prove not only the possession of the instrument or material but also, to prove that the possession was with the intention of using the same for the purpose of counterfeiting coin or with full knowledge and belief that it was intended to be used for that purpose. If the prosecution fails to prove the necessary intention, knowledge or belief, a person cannot be convicted under that section by a mere proof of physical possession of an instrument or material. A.I.R. 1938 Mad. 393=1938 M.W.N. 89=(1938) 1 M.L.J. 482=47 L.W. 173=39 Cr.L.J. 344=173 Ind. Cas. 394.

—**S. 235—Essentials to be proved—House belonging to accused raided—Box with counterfeiting materials found—Another person with wife and children found also living in house—No evidence fixing knowledge on accused, of contents of box—Accused held not guilty under S. 235.**

A Police party raided a certain kotha belonging to the accused. A tin box was found in it and a number of articles which are used for the purpose of counterfeiting coins, were found in the tin box. One other person was also living in the kotha of the accused. He was grown up man and had got a wife and two children. The kotha was accessible both to the accused as well as to that other person:

**Held**, that it could not be said with any degree of certainty that the kotha was in the possession of the accused alone. No articles having been recovered from the box which would go to connect the accused with it, and there being no evidence whatsoever to show that the accused was in any way aware of the contents of

the tin box, the conviction under S. 235 could not be upheld. A.I.R. 1935 Lah. 39.

—**S. 235—Essentials—Mere possession no offence—Intention to counterfeit necessary.**

Mere possession of instruments and materials capable of counterfeiting coins is no offence. To constitute an offence under S. 235, possession of such instruments should be with the intention of counterfeiting coins and the intention must be proved to establish the charge.

Where the dies found were incapable of striking a complete coin:

**Held**, it cannot be inferred against the accused that his intention was to manufacture coins. 84 Ind. Cas. 247=5 Lah. 392=26 Cr.L.J. 247=A.I.R. 1925 Lah. 22.

—**S. 235—Husband and wife—Whose liability.**

Where in a case under S. 235, it is sought to make a wife liable along with her husband with whom she is living, it is necessary to prove that possession and control over the instruments and materials for counterfeiting were with her alone or with her also. The mere fact that the wife knew that certain implements and materials were in the possession of her husband and also the place where those implements and materials were to be found, does not necessarily indicate that she herself was in subordinate possession or in any kind of possession of them. A.I.R. 1933 Pat. 272=14 P.L.T. 256=35 Cr.L.J. 9=146 Ind. Cas. 474 (1).

—**S. 235—Counterfeiting coin—Knowledge—Possession of instruments.**

To sustain a conviction under the section not only possession of the instruments for counterfeiting coin is necessary, but also possession within the knowledge of the accused is necessary. 8 Bur. L.T. 131=16 Cr.L.J. 264=28 Ind. Cas. 152.

—**Ss. 235 and 243—Counterfeit coins—Possession of—House occupied by joint Hindu family—Liability—Size of articles material.**

It is not essential for counterfeit coins that they should exactly resemble genuine coins. It is sufficient that they are such as to cause deception and may be passed for genuine coins. 17 W.R. 364, Foll.

It is also immaterial that they are not of silver but are of some other inferior metal. Where the articles found are large properties and placed in a conspicuous place to which the managing member may have access and over which he could exercise control and which could not be overlooked by him, the presumption that the managing member was in possession, may fairly be made. 6 Bom. L.R. 887, Ref. But where the articles are small ones, the presumption cannot be properly raised. Where counterfeit coins and moulds were found buried in a verandah which was open, with a village path to the south of it, and a road to the west, it was held probable that they were placed there by some enemies of the accused and the accused knew nothing about them. 4 Pat. L.J. 525=(1919) P.H.C.C. 220=20 Cr.L.J. 439=51 Ind. Cas. 263.

—**Ss. 235, 243—Counterfeiting Queen's coin—Possession of instruments—Possession of counterfeit coins—Possession—Voluntary possession.**

Per Batty, J.—The first essential required by Ss. 235 and 243 is that possession of the instruments



and coin should be established against the accused person. To establish such possession it is not sufficient to show that the object in question was in such a position that the accused if he had known it might have exercised power or control over it. There must further be evidence of some circumstance indicating that he intended to exercise such power or control or that he knew that he could do so at will. The possession contemplated is not possession which has never been voluntary; and for the purpose of bringing home to any person the voluntary possession of any object, the mere proof of a fact of which he knows nothing would be valueless. The sections also require in the accused person intention or knowledge as to the use to be made of the objects in possession, and these might be implied from the nature of the objects themselves. But before that stage is reached, there must be some circumstance indicating such intention or knowledge as is inseparable from the notion of conscious retention implied in the word "possession." Such indication may arise from the position of the object in a place which is constantly used by the person accused, and which could not be overlooked by him, or from the bulk of the object itself, or from any circumstance, such as the looking up of the object, which would point to voluntary and conscious possession.

Per **Aston, J.**:—If we introduce "conscious" or "voluntary" before the word possession where that word is not so qualified in a section of the Indian Penal Code we shall be legislating instead of administering the law with inconvenient consequences such as shifting the burden of proof indicated by Ss. 114 and 106 of the Indian Evidence Act and even altering the substantive Criminal Law. (1904) 6 Bom. L.R. 887.

—S. 235 — Sentence — Exemplary—Separate convictions for possession of parts—Illegal.

The offence of counterfeiting coin is very serious and an exemplary sentence should be given. But when a man is being convicted for being in possession of instruments, or materials for counterfeiting coin, it is hardly right to convict him separately for being in possession of various parts of such instruments or materials. 123 Ind. Cas. 525=1930 Cr. C. 19=31 Cr. L. J. 527=A.I.R. 1930 Lah. 51.

—S. 235—Sentence—Possession and counterfeiting—Separate sentences—Illegal.

The accused were charged under Ss. 235 and 232, Penal Code with being in possession of implements and materials for counterfeiting King's coins and with actually counterfeiting King's coins, and sentenced to various terms of imprisonment under each section;

**Held**, that the possession of such implements and materials is part and parcel of the transaction of counterfeiting coin and therefore the sentences passed on the appellants under S. 235, Penal Code, were illegal. 14 P.R. 1904 Cr. Foll. 71 Ind. Cas. 700=5 L.L.J. 272=24 Cr.L.J. 236=A.I.R. 1924 Lah. 78.

—Ss. 239, 240—Double conviction and consecutive sentences.

Offences made punishable under Ss. 239 and 240, I.P.C., are separate and distinct offences and S. 235, Criminal P.C. permits of double conviction and consecutive sentences for offences under these sections. A.I.R. 1933 Pesh. 99=146 Ind. Cas. 7.

—Ss. 240, 243.

See Cr.P.C., S. 235. 3 C.W.N. 717=31 C. 1007.

—Ss. 240, 241—Alteration of conviction from S. 240 to S. 241.

A conviction under S. 240, I.P.C., is not sustainable in the absence of a finding that the accused had the knowledge that the coins were counterfeit at the time the accused became possessed of them. Mere delivery of coins knowing that they were counterfeit is not enough. If, however, the facts found fulfil the requirements of S. 241 the conviction can be altered from S. 240 to S. 241. A.I.R. 1936 Nag. 242=38 Cr.L.J. 174 (1)=I.L.R. (1937) Nag. 133=166 Ind. Cas. 44.

—S. 240—Applicability—Knowledge as to counterfeit coin—No evidence as to, when he became possessed—S. 241 applies.

Where there was no evidence as to whether at the time he became possessed of the counterfeit coins the accused knew them to be counterfeit, **held**, that the accused could not be convicted for an offence under Ss. 243 or 240, I.P.C., and that the accused could only be convicted under S. 241 of the Penal Code. 124 Ind. Cas. 688=31 P.L.R. 235=31 Cr.L.J. 736.

—S. 240—Onus.

Under S. 240, I.P.C., the prosecution must establish that at the time accused came to possess the counterfeit coins, he knew them to be such. (37) 1937 M.W.N. 876.

—Ss. 240, 241—Sentence.

Where the article seized from the accused's house indicate that he had some knowledge of counterfeiting and he knew that the coins were false and his action in uttering them is of a deliberate nature the matter cannot be dealt with leniently. A.I.R. 1936 Nag. 242=38 Cr.L.J. 174 (1)=I.L.R. (1937) Nag. 133=166 Ind. Cas. 44.

—S. 241—Offence under—Essentials.

If there is no evidence of the time and the manner of acquisition, the accused may be convicted under S. 241, for all that is necessary to prove under this section is the delivery of counterfeit coins to others, knowing them to be such. (1937) 1937 M.W.N. 876.

—S. 243.

Guilt under—Proof of knowledge that coins coming into his possession were counterfeit—Is necessary. A.I.R. 1950 A. 732=1950 A.L.J. 516=1950 A.W.R. 526.

—S. 243—Ingredients—Counterfeit coins in possession of the accused or his servants—Possession meaning.

In a case under S. 243 the jury must be told that they should decide whether the counterfeit coins were in possession of the accused or in possession of his clerk or servant on behalf of the accused, and if they decide that the coins were in possession of the accused they would then have to decide whether he knew at the time when he became so possessed of them, that the coins were counterfeit; and if they decide that the coins were in possession of the clerk or servant on behalf of the accused, whether, when the clerk or servant became possessed of the counterfeit coins, the accused himself knew that they were counterfeit.



**Per Mookerjee, J.**—'Possession' in S. 243 should be read in the light of S. 277, I.P.C.

**Per Choudhri, J.**, There is the idea of proprietorship present in 'possession' and intention to possession is present in becoming possessed. 44 Cal. 477=24 C.L.J. 400=21 C.W.N. 33=18 Cr.L.J. 385=38 Ind. Cas. 945 (F.B.).

**—S. 243—Accused living in house along with other persons—Facts to be proved.**

It is certainly not intended that no person in possession of a house shall be convicted of being possession of stolen property or counterfeit coin or anything of that kind if there happen to be other people living in the house and if it cannot be positively established that the person convicted had put the incriminating articles in the place where they were found. It must be shown in the first place that the incriminating articles were found in a place in the possession of the person to be convicted. In the next place, it must be shown either by direct evidence or by circumstantial evidence from which a reasonable inference can be drawn that the person to be convicted knew that these particular things were in the place where they were found. A.I.R. 1936 All. 650=1936 A.L.J. 508=37 Cr.L.J. 551=1936 A.W.R. 456=162 Ind. Cas. 295.

**—S. 243—Essential to be proved—That accused's possession of counterfeit coins was fraudulent or with intent that fraud may be committed, held not proved.**

In the course of a search of the house of the accused in connection with an offence under Ss. 457 and 380, counterfeit coins were recovered from a cloth bundle kept inside a black wooden box under lock and key. The coins were examined and it was found that they were counterfeits, and in fact there was no denial as to this. The defence was that the coins at one time belonged to the S estate and were sold as a part of the estate's property. The purchase was ostensibly made by one M but the accused had a half-share in it, with the result that the counterfeit coins fell in his share. After the purchase it was not shown that any attempt had been made by the petitioner to pass on the coins to other persons as genuine:

**Held**, that the important element of the offence that the accused was in possession of counterfeit coins "fraudulently", or with intent that fraud may be committed, had not been proved and, therefore, the charge under S. 243, had not been proved against him. A.I.R. 1936 Pat. 533=17 P.L.T. 648=3 B.R. 63=37 Cr.L.J. 1154=165 Ind. Cas. 603.

**—S. 243—Proof of guilty knowledge—Essentiality of.**

Mere residence in the house cannot make person liable for the possession of the counterfeit coins. Guilty knowledge must be proved. (1933) 1933 M.W.N. 222.

**—S. 243—Presumption of guilty knowledge.**

It is difficult to establish by positive evidence that a man in whose possession counterfeit coin is found knew when it came into his possession that it was counterfeit. This difficulty is enhanced when the accused who is in a position to give an explanation refuses to give one. In such a case, the guilty knowledge of the accused has to be inferred from the circumstances of the case and the conduct of the accused. The fact that at the time when the counter-

feit coins came into his possession he knew that they were counterfeit need not necessarily be proved by positive evidence. The fact of knowledge can be inferred from his refusal to give explanation of its possession and his conduct and circumstances of the case. A.I.R. 1943 Oudh 335=1943 O.W.N. 113=1943 A.W.R. 31=44 Cr.L.J. 542=206 Ind. Cas. 606.

**—S. 243—Presumption of guilt.**

Where eleven silver pieces of the size of a rupee along with thirty counterfeit rupees, all bearing the same year, were found concealed under *bhusa* in a locked room, the key of which was in the possession of the accused:

**Held**, that under S. 114, Evidence Act, the circumstances created a presumption of guilt in the case of the accused that the accused was in possession of the coins fraudulently or with intent to commit fraud.

The High Court will refuse to interfere where the finding of the Appellate Court is neither perverse nor unreasonable. A.I.R. 1933 Oudh 85=9 O.W.N. 1198=34 Cr.L.J. 545(2)=143 Ind. Cas. 152.

**—S. 243—Onus of proof.**

The onus to prove that the accused knew "at the time when he became possessed of the coin that it was counterfeit" is on the prosecution. Section 106, Evidence Act, do not entitle the prosecution to throw the onus as regards the time of knowledge on the accused without any qualification, but if the prosecution has succeeded in establishing circumstances suggesting that the accused knew at the time he became possessed of the coins that they were counterfeit, then and in that case alone it would be necessary for the accused to lead evidence to show that it was not at the time that he became aware of their counterfeit character. A.I.R. 1941 Pat. 26=7 B.R. 432=21 P.L.T. 940=42 Cr. L. J. 301=192 Ind. Cas. 471,

**—S. 243—Counterfeiting—Queen's coin—Possession of instruments—Possession of counterfeit coins—Possession;—See S. 235. 6 Bom. L.R. 887.**

**—S. 243—Knowledge that coin was counterfeit—Proof.**

Where a person tendered a false coin to another and asked for change which was refused on the ground that the coin was false and he thereafter tendered it to another. **Held**, it may be presumed that after the first refusal the accused knew the coin to be bad. 4 Bur. L.T. 9=12 Cr. L.J. 79=9 Ind. Cas. 449.

**—S. 251—Diminishing weight—Coin soldered to ring and used as ornament—Cutting and clipping and making up deficient weight by solder—Offence under.**

The rules in the Resource Manual themselves require that a person who wants to have the defaced coins exchanged must at his own cost remove the solder and then tender the coins. The rules speak of a silver coin which has been defaced. It is obvious therefore, that when these coins are tendered to a Bank they are not tendered as ornaments or other articles into which coins have been transformed, but are tendered as coins which have been defaced. If therefore, an accused person clips and cuts away a coin and makes up the deficient weight by solder with the intention of subsequently delivering it to a Bank, he would certainly be guilty of fraudulently defacing a coin even though on a previous occasion the coin has been used as a wearing



ornament. 48 All. 603=7 L.R.A.Cr. 59=24 A. L. J. 842=A.I.R. 1926 All. 321.

—S. 263, part 2—Essentials to be proved.

The first part of S. 263, makes it an offence to erase or remove from a stamp issued by Government for the purpose of revenue any mark put upon it for the purpose of denoting that it has been used, if that erasing or removing is done fraudulently or with intent to cause loss to Government. Therefore, for an offence under the first part of the section it is necessary to prove fraud or an intent to cause loss to Government. Under the second part of the section it is an offence to have in possession any stamp from which the mark put upon it for the purpose of denoting that it has been used has been erased or removed, if these facts are known to the person having such a stamp in his possession. That is to say, it is sufficient to prove that the person in whose possession the stamp was found knew that such a mark had been erased or removed from it and it is not necessary under this part of the section to prove that his possession was fraudulent or with intent to cause loss to Government. There is no necessity under this part of the section for the prosecution to prove that the erasure of the marks or impressions had been done by the accused person or that he had any connection with them. (1936) 164 Ind. Cas. 12=39 C.W.N. 542=37 Cr. L. J. 923.

—S. 263.

Erasure of endorsements on a stamp made by stamp vendor and its possession do not come within purview of second part of S. 263. (1936) 164 Ind. Cas. 12=39 C.W.N. 542=37 Cr. L. J. 923.

—S. 265—Essentials — Intention to defraud — Onus on prosecution.

Where the accused was getting his grain measured with two kathas, which he borrowed for the purpose from another person, who told him that the kathas were passed by the Notified Area Committee and which were seized by the police, who found them to measure five tolas more than the standard katha and prosecuted the accused who was convicted under S. 265:

**Held**, that the accused could not be convicted unless it was proved that he knew that the kathas were incorrect or that before he used them, he tampered with them. Unless this was established, fraudulent intention on the part of the accused so as to convict him under S. 265, could not be presumed, one of the principal ingredients of the offence being the use of false measure with intent to defraud. 116 Ind. Cas. 671=30 Cr. L. J. 692=1929 Cr.C. 263=13 A.I.Cr.R. 120=A.I.R. 1929 Nag. 239.

—S. 266—Evidence of knowledge and fraudulent intention.

For purposes of establishing offence under S. 266, Penal Code, the only way in which knowledge and fraudulent intention can be proved is by the possession and the use of the false weights concerned. A.I.R. 1945 Mad. 8=57 L.W. 489 (1)=(1944) 2 M.L.J. 249=46 Cr. L. J. 246=217 Ind. Cas. 146.

—S. 266—Ingredients of offence.

The prosecution has to prove that the person in possession of a false measure knew it to be false and was in possession intending that the same may be

fraudulently used. The mere fact that the capacity of the measures seized did not conform to the standard fixed by Government is not sufficient. If a dealer has a measure in his shop which has been tested by Government and certified to be a proper measure, there is no reason to presume that he could have known that it was not a correct measure or that at the time when the stamp was put on this measure, it was not up to the prescribed standard. There is in law no duty cast on the shop-keeper to have the measures tested periodically. If the measures are found to be short, there is no presumption that he was using them fraudulently. Such a presumption cannot arise unless there is evidence to show that he was aware of the fact that the measures were smaller than the standard ones. A.I.R. 1943 Mad. 589=(1943) 1 M.L.J. 486=44 Cr. L. J. 781=1943 M.W.N. 341=238 Ind. Cas. 406.

—S. 266 — Agreement between purchaser and seller that commodity sold should be measured by measure produced by purchaser.

Where both purchaser and seller are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud.

Where, therefore, it has been agreed between the seller and the purchaser that a certain commodity should be measured by a measure produced by the purchaser and purchaser has not represented in any way that the measure was the standard measure, the purchaser cannot be said to have fraudulent intent and cannot be convicted under S. 266, Penal Code. A.I.R. 1939 Bom. 455=41 Bom. L.R. 977=41 Cr.L.J. 172=185 Ind. Cas. 228.

—S. 266—Offence under Bombay Weights and Measures Act, whether makes measure false within meaning of S. 266.

The fact that an offence may have been committed under the Bombay Weights and Measures Act does not make the measures false within the meaning of S. 266, Penal Code. According to the ordinary use of language, if a measure is described as false, that means that it is something other than what it purports to be. A.I.R. 1939 Bom. 455=41 Bom. L.R. 977=41 Cr.L.J. 172=185 Ind. Cas. 228.

—S. 266 — Fraudulent intention — Purchaser and seller both aware of measure.

Fraudulent intent is essential for an offence under S. 266, I.P.C., and where both purchaser and seller are aware of the actual measure used there can be no question of fraudulent intent. 40 All. 84=15 A.L.J. 897=19 Cr. L. J. 145=43 Ind. Cas. 433.

—S. 266—Using short weights—Inspection of standard weight—Joint trial of several accused—Irregular.

On information received, the Sub-Inspector in charge of a Police Station inspected certain bazars and on his report the District Magistrate ordered prosecution of 68 persons on a charge of using short weights. All of them were tried together and the prosecution evidence was taken in one case alone. A joint reply on behalf of all the accused was then put in being a statement on solemn affirmation with reference to the list of weights found to be wrong. Treating this as a confession the



accused were all convicted. Held, (1) that the joint statement was not a confession, (2) that the method of joint trial adopted by the Magistrate was prejudicial to the accused and irregular and (3) that opportunity should have been given to each of the accused to explain his case separately. 20 P. R. (Cr.) 1913=36 P.L.R. 1914=15 Cr.L.J. 11=22 Ind. Cas. 155.

—S. 268—Public nuisance—What constitutes—Clandestine prostitution carried on in house.

If prostitution is carried on in a clandestine or hidden manner in a house, there can be no public nuisance although persons who come to know of the immoralities committed in the house may feel their moral sense outraged. 54 C.W.N. 384=51 Cr.L.J. 1241=A.I.R. 1950 Cal. 330.

—S. 268—Owners of shops constructing platforms in front of them.

Where the owners of the houses or shops occupied by the applicants have built certain platforms in front of them to enable the shop-keepers to sit on them for selling their goods and the platforms cause any common injury, danger or annoyance to the public or to the people in general, the persons who built the platforms are guilty of the act which *ex hypothesi* amounts to a public nuisance. Those who have merely rented the shops and sit on the platforms, cannot be considered to be doing any act amounting to a public nuisance. If the existence of the platform is a public nuisance, it will be so, whether any one sits on them or not. A.I.R. 1936 All. 156=37 Cr.L.J. 269=(1936) A. L. J. 200=1936 A.W.R. 194=58 All. 694=160 Ind. Cas. 269.

—S. 268.

A Muslim community or the Muslims of the neighbourhood are included in the word 'public' which is used in the expression "public nuisance." A. I. R. 1936 Oudh 154=1935 O.W.N. 899=157 Ind. Cas. 638.

—S. 268.

Per Mukherjee, J.—The sort of annoyance that S. 268 aims at is not the kind of annoyance which the religious ideas of a class of people may suffer on account of an otherwise innocent act of another section of the public.

So long as a person exercises his private rights in a proper way nobody has a right to object to the exercise of the right, simply because it does not suit the objector according to his own light and training and religious belief, that an act should be done in that way. A.I.R. 1931 All. 674=(1931) A.L.J. 624=53 All. 836=137 Ind. Cas. 587.

—S. 268—What is nuisance—Slaughtering of cattle.

Slaughtering of cattle in a village in a particular area surrounded by walls is not necessarily a public nuisance. 116 Ind. Cas. 705=30 Cr. L. J. 660=13 A.I.Cr.R. 70=A. I. R. 1929 Lah. 252.

—S. 268—Spread of prickly pear.

Allowing prickly pear to spread on to a road used by the public is a public nuisance within the definition of S. 268. 115 Ind. Cas. 242=30 Cr.L.J. 432=52 Mad. 79=28 M.L.W. 621=1 M.Cr.C. 317=A.I.R. 1928 Mad. 235=55 M.L.J. 715.

—S. 268—Right to prosecute—By public officer as such.

A public officer's right to prosecute as a member of the public, is not taken away because he did not profess to complain as an ordinary person but as a public officer. (Wallace J.) 115 Ind. Cas. 242=30 Cr. L. J. 432=52 Mad. 79=28 M.L.W. 621=1 M.Cr.C. 347=A.I.R. 1928 Mad. 1235=55 M.L.J. 715.

—S. 268—Injury to public.

The injury which constitutes public nuisance must be to the people in general, and not to particular class of people: 110 Ind. Cas. 213=50 All. 871=26 A L J 1283=10 A.I Cr.R. 201=9 L.R.A.Cr. 118=29 Cr.L.J. 661=A.I.R. 1928 All. 627.

—S. 268—Closing channel outlet inundation of villages—Public nuisance.

Where the water which used to be collected in the neighbouring villages, and which used to pass through a natural channel by way of an opening in a bandh, had been stopped, resulting in the inundation of a large area in that locality covering lands of several villages and in the destruction of the entire crop sown in that area and also making it impossible to sow further crops thereon:

Held, that the case was covered by S. 268 and the nuisance must be considered not to be a nuisance of a private character but one which may legitimately be called a public nuisance. 99 Ind. Cas. 939=4 O.W.N. 75=28 Cr.L.J. 203=7 A.I.Cr.R. 440=A.I.R. 1927 Oudh. 122.

—S. 268—Encroachment.

Encroachment however small, upon public street is offence. 20 Mad. 433 and 14 Cal. 656, Foll. 86 Ind.Cas. 1006=6 Lah. 203=26 Cr.L.J. 942=26 P. L. R. 127=A.I.R. 1925 Lah. 454.

—S. 268—Nuisance—Advantage to some, if reason for not removing the nuisance.

A common nuisance cannot be excused on the ground that it is of some advantage to the person guilty of it. 34 All. 345=9 A L J. 355=13 Cr.L.J. 183=13 Ind. Cas. 999.

—S. 268, 290—Public nuisance—Definition—Temporary obstruction of public thoroughfare:—

See Police Act, S. 34. 1906 A.W.N. 317=4 A.L.J. 44.

—Ss. 268 290—Gambling at places where

Gambling Act not in force—Public nuisance.

Gambling is not an offence such as is defined in S. 268, I P.C. (Public Nuisance). Certain persons were found to have gambled at a place where the Gambling Act was not in force and convicted under S. 290.

Held, the conviction was bad. (1903) 7 C.W.N. 710.

—S. 269—Applicability — Omission to take sanitary precautions—Section does not apply.

The accused failed to take proper sanitary precautions at his brickfield and the result was an outbreak of cholera which cost many lives. There was no doubt a criminal omission in so far as certain conditions with regard to certain sanitary measures were entered in the brick making licence and were discarded by the licensee;



Held, that no offence under Section 269, I.P.C. was proved. 81 Ind. Cas. 74=2 Bur. L.J. 11=25 Cr. L.J. 586=A.I.R. 1923 Rang. 140.

—S. 269—Infectious disease—Small-pox—Disobedience to the order of Health Officer—Madras City Municipal Act, S. 366.

Where the accused was directed by the Health Officer of Madras City to remove his small-pox stricken child to an isolation Hospital but the accused removed him to a separate and isolated house, Held, that the accused had not unlawfully or negligently done any act to spread any dangerous disease and he was not guilty. 24 Cal. 494, Foll. 38; M.L.J. 80=26 M.L.T. 386=10 L.W. 627=20 Cr. L.J. 785=53 Ind. Cas. 689.

—S. 269—Appropriation of a public thoroughfare  
See: 6 Bom. L.R. 358.

—S. 272—Essentials for conviction under S. 272.

For a conviction under S. 272, it is essential to show that an article of food or drink has been adulterated, and that it was intended to sell such article or that it was known that it would be likely to be sold, as food or drink A.I.R. 1943 Bom. 445=45 Bom. L.R. 895=45 Cr. L.J. 92 209 Ind. Cas. 515.

—S. 272—Mixing of pig's fat in ghee.

Mixing of pig's fat with ghee and selling the mixture would be noxious to the religious and social feelings of both Hindus and Mahomedans but such an act would not come within the meaning of the expression 'noxious as food' which occurs in S. 272. The word "noxious" had it stood by itself, might have had a wider meaning. 83 Ind. Cas. 1004=46 All. 94=21 A.L.J. 875=5 L.R.A.Cr. 20=26 Cr. L.J. 220=A. I. R. 1924 All. 214.

—S. 273.

Destruction of food under S. 287, Bihar and Orissa Municipalities Act, is no bar to prosecution under S. 273, I.P.C. 1934 Pat. 113=36 Cr. L.J. 496=154 Ind. Cas. 367.

—S. 273.

When food unfit for consumption is exposed for sale, the exposure constitutes an offence under S. 273. A.I.R. 1934 Pat. 113=36 Cr. L.J. 496=154 Ind. Cas. 367.

—S. 273—Mixing milk and water.

Milk is not rendered noxious by being mixed with water. The mixture of milk and water is often used as drink in the summer. So a person who exposes for sale milk adulterated with water is not guilty of an offence under S. 273. 89 Ind. Cas. 961=26 Cr. L.J. 1441=A.I.R. 1926 Lah. 49.

—S. 273—Knowledge—Must be proved.

There is no warrant in law for the presumption that the accused knew or had reason to believe that an article of food would be unfit for consumption and like other ingredients of the offence this has to be proved. 77 Ind. Cas. 1001=25 Cr. L.J. 537=A. I. R. 1922 All. 273.

—S. 273—Right to exhibit goods for sale.

Every shop-keeper has a right to exhibit his wares as he likes, but he must exercise that right so as not to annoy or cause nuisance to the public. 35 Bom. 368=13 Bom. L.R. 209=12 Cr. L.J. 258=10 Ind. Cas. 804.

—S. 273—'As food or drink'.

What is punishable under S. 273, is the sale or offer or exposure for sale of noxious articles as food or drink, and not a mere sale as a matter of trade. Where, as a matter of trade, the owner of a grain pit sold the contents of the pit before it was opened at a certain sum per maund, whether the grain was good or bad, and on the pit being opened, it was found that a large proportion of the grain was unfit for human consumption, it was held that the vendor could not be convicted under S. 273. (1905) 3 A.L.J. 840=1906 A.W.N. 23=28 A. 312.

—S. 273.

Before a person can be convicted under S. 273 it must be shown that the article which he has sold or exposed for sale was to his knowledge or belief, noxious as food or drink. 1904 A.W.N. 56=1 A.L.J. 64=26 A. 387.

—S. 273—"Noxious," meaning of—Adulteration of ghee with other vegetable oil.

The word "noxious" in S. 273, means harmful to health or unwholesome. In the absence of evidence to show that the adulteration of ghee with vegetable oil was such as to render it noxious in the above sense, such adulteration cannot be held to constitute an offence under S. 273. 12 C.W.N. 608.

—S. 273—Sale of noxious food—Wheat—Admixture of extraneous substance.

A person cannot be convicted of an offence under S. 273, for selling wheat containing a large admixture of extraneous matter, e. g., dirt, wood, matches charcoal, black seeds. (1904) 6 Bom. L.R. 520.

—S. 277—Spitting in a public well.

A place is public if people are allowed free access even without any legal right; hence spitting into a public well is an offence under S. 277 even though water in it is rendered unfit only to a slight degree. 13 N.L.R. 68=18 Cr. L.J. 650=40 Ind. Cas. 298.

—Ss. 277, 200—River—Fouling the water—Nuisance.

The fouling of the water of a river running in a continuous stream is not an offence under S. 277, but yet it may be an offence under S. 290, if the evidence shows that the act was such as to cause common injury or danger to the public. (1904) 6 Bom. L.R. 52.

—S. 278—Scope—Public, not private nuisance contemplated.

Throwing of a human skull in a highly offensive condition out of malice into a private dwelling house does not warrant conviction under S. 278. The section is directed against a public and not a private nuisance. 116 Ind. Cas. 48=10 P.L.T. 87=30 Cr. L.J. 556=12 A.I. Cr. R. 441=A.I.R. 1929 Pat. 113.



—S. 279.

## Synopsis.

1. Enhanced sentence.
2. Essentials for conviction.
3. Offence falling under different heads.
4. Offence under special law.
5. Rash and negligent driving.

## 1. Enhanced sentence.

—S. 279—Injury—Victim left unheeded—Additional sentence.

Every case of collision between a motor-car and pedestrian must be judged on its merits.

A person was fined Rs. 20 for injuring a woman carrying a load of grass, in a spacious street, by driving his car rashly and negligently. He left her lying in the street after she was so injured and went on his way. He was fined Rs. 20 by the trial Court.

**Held**, that the offence was a serious one and justified an additional punishment of 3 months rigorous imprisonment. 104 Ind. Cas. 910=4 O.W.N. 768=28 Cr.L.J. 894=A.I.R. 1927 Oudh 441.

## 2. Essentials for conviction.

—S. 279—Danger to public.

If there is no danger to the public, outside the car who are using the road no offence under S. 279 is committed. 119 Ind. Cas. 536=30 Cr.L.J. 1077=A.I.R. 1930 Sind 64.

## 3. Offence falling under different heads.

—Ss. 279, 338.

When offence falls under two-heads of I. P. C., such as Ss. 279 and 338, only one sentence should be given. (1935) 1035 M.W.N. 924.

—Ss. 279, 304-A, 338—Conviction.

Where the accused was charged with rash and negligent driving of his motor car with the result that the car collided with a lorry and caused injuries to two persons one of whom died later:

**Held**, that in the absence of definite evidence to justify the conclusion that he was driving in a rash and negligent manner, he could not be convicted under Ss. 279, 338 and 304-A.

It is not always necessarily rash and negligent to drive on the wrong side of the road. A. I. R. 1933 Oudh 391=10 O.W.N. 823=34 Cr.L.J. 1154=146 Ind. Cas. 28.

—S. 279—Separate convictions—Convictions under Ss. 337 and 304-A, I. P. C.—Separate conviction under S. 279—Sustainability.

**Held**, that a conviction under S. 279, I. P. C. cannot separately stand if the accused is convicted under S. 337 and 304 of the Code. 1929 M.W.N. 395.

—S. 279—Not proved—No conviction under section.

The finding of a Magistrate that the accused was not guilty of an offence under S. 34 of the Police Act necessarily and logically means that the accused could not be convicted of an offence under S. 279 of the Penal Code. 88 Ind. Cas. 1=23 A.L.J. 436=6 L.R.A.Cr. 143=26 Cr.L.J. 1057=A. I. R. 1925 All. 448.

## 4. Offence under special law.

—S. 279—Trial under either legal.

The facts which have to be proved in both cases, i. e., under S. 279, I. P. C. and Motor Vehicles Act, S. 5, are substantially the same, and the offence comes equally well under either definition; and there can be no question of prejudice to the accused whether the conviction is under the one or the other. 38 Ind. Cas. 998=23 A.L.J. 790=26 Cr.L.J. 1254=6 L.R.A.Cr. 150=A.I.R. 1925 All. 798.

## 5. Rash and negligent driving.

—S. 279.

Reckless racing between two tongas on public road—Sub-Inspector of Police and head constables signalling and whistling them to stop—No heed paid by tongawallas—Tongawallas chased and arrested:

**Held**, that persons driving the tongas had committed offence under S. 279. A.I.R. 1944 Lah. 163=45 Cr.L.J. 699=46 P.L.R. 93=213 Ind. Cas. 208

—S. 279.

Distinction between negligence and rashness pointed out. A.I.R. 1944 Lah. 163=46 P.L.R. 93=45 Cr.L.J. 699=213 Ind. Cas. 208.

—S. 279—Riding on pillion of ordinary bicycle in crowded street.

For a man to ride pillion on an ordinary bicycle in a crowded street is a negligent act which is likely to cause injury to the other persons and vehicles there. It would be a negligent act to carry any second person (whatever his age, build or weight) on a bicycle, who is liable to change his position or fall off if this is done on a public way where there is other traffic. A. I. R. 1940 Rang. 176=1940 Rang. I.R. 127=41 Cr.L.J. 693=188 Ind. Cas. 800.

—S. 279.

Section 279 makes rash driving or riding on a public road punishable, if such rash driving or riding endangers human life or is likely to cause hurt or injury to any other person. A.I.R. 1939 Pat. 388=20 P.J.T. 403=40 Cr.L.J. 759 (2)=183 Ind. Cas. 224.

—Ss. 279, 279/114.

Pork Inspector's car chasing car containing illicit pork—Pork Inspector instructing driver to keep chased car in sight—Both cars going at dangerous speed and ignoring traffic signals—Chased car crashing—Chasing car stopped at distance of 100 feet from crashed car—Conviction of driver of chasing car under S. 279 held was proper but sentence of imprisonment was not called for in the circumstances—



Pork Inspector held could not be convicted under Ss. 279-114. A.I.R. 1938 Rang. 97=39 Cr.L.J. 535=175 Ind. Cas. 133.

—S. 279.

Tram-car being driven fast but not at excessive speed—Camel cart being driven in same direction parallel to tram-car—Camel suddenly swerving to wrong side and cart colliding with tram—Tram driver held not guilty under S. 279. A.I.R. 1938 Sind 86=I.L.R. (1939) Kar. 13=39 Cr.L.J. 515=175 Ind. Cas. 27.

—Ss. 279, 337—Right of occupants of vehicles to be protected.

The words 'any other person' in S. 279, are very wide and do not distinctly limit to persons on a road, as distinct from the occupants of the particular vehicle which is being rashly or negligently driven. They are wide enough to include the occupants of the vehicle itself and the occupants of a motor-bus have as much right to be protected against rash or negligent driving on the part of the driver of the bus as have other people on the road:

Held, that where the driver had been convicted under S. 337, as he actually caused hurt to some of the occupants of the bus, it was not necessary that he should be convicted under S. 279 also, even if that section is applicable. A.I.R. 1936 Oudh 148=1935 O.W.N. 1026=36 Cr.L.J. 1352=11 Luck. 431=158 Ind. Cas. 305.

—S. 279—Motorist, duties of.

There is a duty on every user of the road to make a reasonable use of it for the purposes of passing along it, and to allow others to do so also. A person driving a motor car has a right to expect that the persons negligently loitering on the road would make way for him, especially when he has seen that they were aware of his approach. Even when they signalled to him to stop he is not bound to do so, whatever the rules of courtesy may be. He has the right to assume that they would get out of the way when they saw him ignore their signals.

Motorists are not the only persons who owe a duty of care; others also have responsibility and must conform to the ordinary usages of the road. A.I.R. 1934 Nag. 65=35 Cr.L.J. 696=30 N.L.R. 317=148 Ind. Cas. 541.

—S. 279—Accused taking care to avoid accident—Complainant mostly responsible—Accused, if guilty.

The appellant was on the wrong side of the road. He drove his car slowly and when he saw the complainant's car come from the opposite direction he put his hand up to give the signal that he was going to turn. The complainant was driving his car at an excessive speed but in spite of all this, the accident occurred. This accident would not have occurred if the complainant had not been driving his car at an excessive speed:

Held, that the accused was not guilty of negligence. A.I.R. 1934 Rang. 194=36 Cr.L.J. 178=152 Ind. Cas. 699.

—S. 279—Negligence, when gross and culpable.

Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and

proper care to guard against injury either to the public generally or to an individual in particular which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. A.I.R. 1934 Rang. 194=36 Cr.L.J. 178=152 Ind. Cas. 699.

—S. 279—Rash and negligent manner—Forcing way past a car in front.

Where the accused saw another car approaching him on its proper side of the road and where he ought to have drawn in behind the water-cart passing in the same direction as the accused and not have attempted to force his way past it in front of the on coming car:

Held, that such conduct on the part of the accused came within the purview of S. 5 of the Motor Vehicles Act, and that the conviction was a proper one. 88 Ind. Cas. 908=23 A.L.J. 790=6 LiR.A.Cr. 150=26 Cr.L.J. 1254=A.I.R. 1925 All. 798.

—S. 279—Wrong side—Sharp corner—Entering into crowded thorough fare—Offence more serious than under Motor Vehicles Act.

The accused was driving on a wrong side of the road at a sharp corner entering into a thoroughfare of a considerable traffic with the result that he came into collision with a motor bicycle, the side car of which was damaged. It was due to the presence of mind of the person who was riding the motor bicycle that no further damage occurred.

Held, that an offence under Section 279, Penal Code, was committed. The offence of the accused was more serious than that contemplated by Section 5 of Act VIII of 1914. That section refers to a person who is driving a car in a manner which would in ordinary circumstances be proper, but owing to the special condition of the road at the time he is riding on it, is improper. 84 Ind. Cas. 253=7 A.I.Cr.R. 503=26 Cr.L.J. 253=16 S.L.R. 147=A.I.R. 1921 Sind 97.

—Ss. 279, 338 and 114—Lorry driver permitting minor boy sitting by his side to drive lorry—If liable for accident as principal offender.

Where a driver of a motor lorry permitted a minor boy who was sitting by his side to drive the lorry and the latter unable to control the lorry while it was going at a high speed made an attempt to stop it by suddenly applying the brakes but the lorry was overturned and some passengers were injured:

Held, that in the circumstances the lorry driver was liable as a principal offender under the provisions of S. 114, I. P. Code. In fact he was the person driving through the hand and instrumentality of the boy to whom he had consciously and knowingly given the steering wheel. He was, therefore, himself liable to be punished for offences under Ss. 338 and 279, I. P. Code 4 A.I.Cr.D. 534=52 P.L.R. 193.

—S. 279—Rash driving in motor—General and special laws.

See Bombay Motor Vehicles Act. 8 Bom. L.R. 414=3 Cr.L.J. 394.



**—S. 280—Running into a boat at anchor.**

Running of a launch into a cargo boat at anchor is *prima facie* evidence of negligence since the duty of steam vessels is to keep out of vessels at anchor. 4 Bur. L.T. 140=12 Cr.L.J. 582=12 Ind. Cas. 846.

**—S. 280—Conviction under—Elements necessary.**

To support a conviction under S. 280 there must be proof of rashness or negligence as the immediate cause, which endangers human life or is likely to cause hurt or injury to any other person. In awarding a sentence the question of contributory negligence, if any, should be taken into consideration, in mitigation of the punishment. 15 C.W.N. 835=14 C.L.J. 656=12 Cr.L.J. 362=11 Ind. Cas. 130.

**—S. 282—Overloading of boats—Negligence of owner—Plea of want of direct knowledge—If affects question of guilt.**

An owner, who knowingly or negligently allows overloading of his boats so as to endanger life of persons sailing therein is liable under S. 282 I.P. Code. He cannot plead in defence that the tindal who was in actual charge of the boat was alone liable. (1948) A.L.J. 354, dist. Even if direct knowledge of the owner of the overloading is not proved, his negligence in that he did not take due care and attention will make him liable. 1950 M.W.N. 37=4 A.I.Cr.D. 142=A.I.R. 1950 Mad. 300=51 Cr.L.J. 729=(1949) 2 M.L.J. 773.

**—S. 282—Overloading boat in the middle of monsoon.**

Criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public in general or to the individual in particular which having regard to the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. Thus, in the middle of the monsoon the overloading of a boat would be dangerous and it would be culpable negligence on the part of the accused to leave the whole thing in the hands of the boatman, leaving the passengers to their fate. A.I.R. 1934 Cal. 490=38 C.W.N. 200=61 Cal. 253=35 Cr.L.J. 1373=151 Ind. Cas. 660.

**—S. 283—Cart-track lying in patta land of accused closed by them and right to do so claimed.**

Where a cart-track lies in the patta land of the accused who have put up a wall across it and claim a right to close it, the proper course would be to proceed against them under S. 133, Criminal P.C. They cannot be convicted under S. 233, I.P.C. A.I.R. 1940 Mad. 216=50 L.W. 593=1939 M.W.N. 1259=41 Cr.L.J. 391=186 Ind. Cas. 896.

**—S. 283—Intention.**

Section 283 does not refer either to a public nuisance or to the intention of the accused. It is one of the sections in Chap. XIV of the Code, which deals with offences affecting the public health, safety, convenience, decency and morals. A public nuisance may undoubtedly be caused without any deliberate intention of causing it, and S. 283, and S. 290, do not refer to the intention of the accused person. The obstruction may be caused by negligence. Where, therefore, the accused places a *charpai* on a public road and thereby

obstructs the Sub-Inspector, he commits the offence under S. 283, I.P.C. A.I.R. 1935 All. 746=36 Cr.L.J. 893=1933 A.L.J. 1057=1935 A.W.R. 814=159 Ind. Cas. 39.

**—S. 283—Public way, what is—Pathway over private land—Customary right of way—How established.**

A pathway, which lies over a private land and which is used by the villagers, and perhaps by the inhabitants of some of the villages, but with regard to which there is no testimony of universal user sufficient to raise a presumption of dedication to the public, is not a public way within the meaning of S. 283. To establish a customary right of way to the same pathway the Court must be satisfied of the reasonableness and certainty of the user and that such user was not permissive nor exercised by stealth or force and that the right has been exercised for such length of time as to suggest that by agreement or otherwise the usage has become the customary law or the particular locality. 33 C.W.N. 915=A.I.R. 1930 Cal. 286.

**—S. 283—Essentials for conviction—Obstruction causing danger or injury necessary for conviction.**

Proof of obstruction to the road so as to cause danger or injury to any person using the road is necessary for conviction. Therefore where one accused pleaded to be excused, admitting that he obstructed the road under mistake without admitting that danger or injury was caused to any person, conviction cannot be had. 81 Ind. Cas. 195=25 Cr. L. J. 707=A.I.R. 1925 Lah. 153.

**—S. 283—Responsibility for obstruction—Obstruction by contractor—Owner not liable.**

Where building materials are supplied by a contractor who places them on the public road, the person for whom they are supplied cannot be convicted unless he has sanctioned the act. 61 Ind. Cas. 52=19 A.L.J. 25=22 Cr.L.J. 331=A.I.R. 1921 All. 192.

**—S. 283—Obstruction—Actual obstruction if necessary.**

Where a *prabha* left lying in a public road could not fail to cause obstruction to a person who had occasion to pass along the road, Held, that though obstruction to any individual was not expressly proved, it was a matter of necessary inference. 38 Mad. 305=16 Cr.L.J. 560=29 Ind. Cas. 832.

**—S. 283—Obstruction to public way.**

In a case of doubt or difficulty the private reasonable right of a house holder to carry on his business must yield to the public right of user of the street. 35 Bom. 368=13 Bom. L.R. 209=12 Cr.L.J. 258=10 Ind. Cas. 804.

**—S. 283—Obstruction, causing in a public way by erection of hut encroaching upon public thoroughfare and not by exposing goods for sale, by lease thereof—Lessee, not liable.** (1904) 8 C.W.N. 369.

**—S. 283—Obstructing public way or line of navigation.**

See 7 C.W.N. 423.



—S. 287—Applicability—S. 304-A distinguished—Under S. 207, rash act not directly cause of death.

Section 304-A only applies to such acts of the accused as are rash and negligent and are directly the cause of death of another person.

F took lease of a flour mill with M as partner who was to act as manager. R was employed to act as Mistri. A shaft with a leather belting was installed in the mill but part of the belting protruded outside the building. Two girls playing nearby were caught in the belting, one being killed and the other crippled.

**Held:** that the offence by M and R was under S. 287 and not under S. 304-A. They had negligently omitted to take care of the machinery as was sufficient to guard against probable danger to human life but they never intended to cause the injury. The girls had no right to go to the mill compound.

But F who had not taken any active part in the management of the mill could not be held liable even under S. 287. 31 P.L.R. 853=127 Ind. Cas. 153=A.I.R. 1930 Lah. 453.

—S. 289.

Tethering horse in narrow street where people cannot pass without going near its hind legs comes within S. 289. A.I.R. 1940 Sind 172=41 Cr.L.J. 818=I.L.R. (1940) Kar. 445=190 Ind. Cas. 64.

—S. 289—Letting loose domestic animals.

If animals dangerous by nature are let at large, the presumption is in favour of injury to human beings, but domestic animals like a dog are not presumed to be dangerous; hence in order to convict the owner of a dog under this section he must be proved to have known that the dog had a tendency to bite human beings. Essential for a conviction under S. 289, I.P.C. 19 Cr.L.J. 1=42 Ind. Cas. 913 (All).

—S. 289—Negligent management of animal.

Allowing a vicious animal to be at large knowingly raises presumption that the person letting it loose, knows that there is probable danger to human life or limb. 18 Bom. L.R. 682=17 Cr.L.J. 383=35 Ind. Cas. 815.

—S. 289—Essentials necessary to prove.

For a conviction under S. 289, it must be established in the affirmative that the animal in question was likely to cause grievous hurt or danger to human life and that the accused knowingly or negligently omitted to take proper care of such animal. (1904) 1 A.L.J. 605.

—S. 290.

#### Synopsis.

1. Collection of crowd
2. Essentials for conviction.
3. Joint owner
4. Jurisdiction of Court
5. Occupier and Proprietor of premises—Liability
6. Public nuisance.

#### x. Collection of crowd.

—S. 290—Collection of crowd—Sale of Satta tickets—Crowd of customers obstructing traffic—No offence.

Where it was alleged that a person was selling satta tickets at his shop with the result that 10 or 15 customers collected outside and obstructed the traffic in the public street adjoining the shop:

**Held,** that the facts did not constitute an offence under S. 290. The assembling of 10 or 15 customers and the obstruction of traffic could not be considered to be the direct or necessary consequence of the offer of satta tickets for sale; 28 Ind. Cas. 110; A.I.R. 1928 Mad. 1235 and 14 Mad. 364, Dist. 1929 Cr.C. 368=A.I.R. 1929 Lah. 801.

—S. 290—Person responsible for the crowd is more guilty.

If a crowd collects and obstructs the traffic so as to cause a nuisance, the person who is directly responsible for the crowd collecting is obviously not less, but more guilty than the other persons who form the crowd and this would be equally the case whether he were inside or outside his shop at the precise moment when the police appeared. 83 Ind. Cas. 695=22 A.L.J. 662=5 L.R.A.Cr. 98=26 Cr.L.J. 135=A.I.R. 1924 All. 568.

#### 2. Essentials for conviction.

—S. 290—Annoyance to one person sufficient.

It is necessary in order to establish a charge of committing a nuisance in a public place to the annoyance of residents or passengers in the locality, to prove that somebody was annoyed. Annoyance to one person is sufficient. If a public servant, likely a municipal employee whose duty it is to look after the cleanliness of the streets sees anybody easing himself in a public place or street he is not unlikely to be annoyed. 77 Ind. Cas. 188=21 A.L.J. 772=4 L.R.A.Cr. 218=25 Cr.L.J. 332=A.I.R. 1924 All. 194.

#### 3. Joint owner.

—S. 290—Joint owner.

A joint owner is responsible in law for nuisance caused by his property. 115 Ind. Cas. 242=30 Cr.L.J. 432=52 Mad. 79=28 M.L.W. 621=1 M.Cr.C. 317=A.I.R. 1928 Mad. 1235=55 M.L.J. 715.

#### 4. Jurisdiction of Court.

—S. 290—Act committed outside British India—Annoyance to person within British India—Jurisdiction of Court.

The accused conducted a marriage procession with music and fireworks in French territory. He was charged in a British Indian Court under S. 290, I.P.C., on the ground that people residing in British territory in the vicinity of the place where the procession was held were disturbed:

**Held,** that as the offence was committed in French territory, the British Indian Court had no jurisdiction to try the same even though the persons who were annoyed by the music and fireworks lived in British territory. Section 179, Criminal P.C., would not apply to a case of this kind;



**Held further**, that even if S. 179, Criminal P.C. would apply to a case of this kind, an offence like this could not be enquired into in British India without a certificate or sanction of the Political Agent or the Local Govt. of the place where the offence was committed, as required by S. 188, Criminal P.C. A.I.R. 1935 Mad. 189=1934 M.W.N. 1316=41 L.W. 82=36 Cr.L.J. 467=68 M.L.J. 211=154 Ind. Cas. 146.

—S. 290—Criminal Procedure Code, S. 133—Order directing removal of nuisance—Injunction of Civil Court.

When a Civil Court issues an injunction restraining A at whose instance an order under S. 133 of Cr.P. Code has been passed directing B to remove an alleged nuisance from interfering with nuisance B is not liable to be convicted under S. 290 for the disobedience of its order, because the Criminal Court is bound by the order of the Civil Court. 34 P.W.R. (Cr.) 1917.

5. Occupier & Proprietor of premises—Liability.

—S. 290—Public nuisance—Occupier of premises and proprietor—Criminal liability.

Speaking generally where the user of premises gives rise to a nuisance the person liable under S. 290 is the occupier for the time being, whoever he may be. A proprietor who is not in occupation of the premises is not liable, unless his conduct amounts to an abetment of an offence under that section. The general rule for Criminal Law is that a master is not criminally answerable for the acts of his servant. 46 Cal. 515=22 C.W.N. 1062=22 C.L.J. 262=19 Cr.L.J. 915=47 Ind. Cas. 287.

6. Public nuisance.

—S. 290—Slaughter of cattle, when amounts to nuisance.

If a person wilfully slaughters cattle in a public street so that the groans and blood of the poor beasts are heard and seen by the passers-by, he would commit acts that would necessarily cause nuisance to every one of them, Hindu, European, Muhammadan or other, who is not utterly devoid not merely of refinement, but also of all proper feeling and he undoubtedly would be punishable under S. 290. In determining whether the slaughtering of cattle amounts to public nuisance in each case it will be a question of fact whether the killing was done in such circumstances as to constitute a public nuisance; and in determining that question of fact, in order to obtain a clear and unbiased view, it is advantageous to put out of one's mind all questions of the particular feelings and religious convictions of particular sects; to forget whether the parties are Hindus or Muhammadans to ask oneself whether, had the killing been done, for example, by a butcher in the course of his profession, it would in fact constitute a common nuisance:

**Held**, on facts that the place of sacrifice of the cow by the Muhammadans could not be said to be in any sense a public one, it being a semi-private place bounded on three sides by walls of buildings and a wall  $3\frac{1}{2}$  feet high on the fourth, and that though the case was a marginal one in view of the time and the situation of the place in which the sacrifice was committed, an offence under S. 290, could not be said to have been committed. The fact that some of the Hindus did happen to see the sacrifice of the cow did

not justify the inference that the sacrifice was committed with the intention of annoying those Hindus. A.I.R. 1942 Pat. 471=44 Cr.L.J. 30=21 Pat. 315=24 P.L.T. 16=203 Ing. Cas. 282.

—Ss. 290, 268—Public nuisance.

Where there is an accumulation of water on the fields of the owners of land on the other side of the river, as result of the riparian owners of land on one bank of the river throwing up an embankment on their own land to protect their fields from floods, it cannot be said that the embankment causes a common injury to the public in the vicinity. Consequently, an embankment of this kind even if it tends to cause injury to some owners of property cannot be described as public nuisance. The persons erecting such embankment cannot, therefore, be convicted under S. 290, I.P.C. A. I. R. 1940 Pat. 577=21 P. L. T. 514=42 Cr.L. J. 72=6 C.L.T. 43=191 Ind. Cas. 82.

—S. 290—Passing urine in public place in village.

The mere act of passing urine in any public place would not amount to an offence punishable under S. 290, I. P. C. The essential ingredient of the offence is that the act must cause any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or must necessarily cause injury, obstruction, danger or annoyance to the persons who may have occasion to use any public right.

Where a respectable man of fifty-five years passed urine in grazing ground **promboke** under cover of a tamarind tree in a village to which the Towns Nuisances Act did not apply:

**Held**, that such an act does not generally cause any annoyance to the villagers in general and the accused was not guilty of an offence under S. 290, I.P.C.

**Held further**, that the fact that the act took place in the full view of the Police Sub-Inspector could not make it an offence. A.I.R. 1937 Mad. 130=1936 M.W.N. 1151=44 L.W. 806=38 Cr. L. J. 120=166 Ind. Cas. 36.

—S. 290.

Public nuisance may undoubtedly be caused without any deliberate intention of causing it and S. 283 and S. 290 do not refer to the intention of the accused person. A.I.R. 1935 All. 746=36 Cr. L. J. 893=1935 A. L. J. 1057=1935 A.W.R. 814=156 Ind. Cas. 39.

—S. 290.

The question whether letting of clear water on a public road is a public nuisance will depend on various matters such as the quantity, frequency, locality and feeling of public. 1932 M.W.N. 111.

—S. 290—Noise for keeping thieves away—Nuisance, not committed.

A chawkidar is perfectly within his right as a chawkidar to make noise so as to scare away thieves and bad characters from the house of his master even though by so doing he may hurt the susceptibilities of the highstrung and nervous neighbour. His action does not amount to public nuisance. 96 Ind. Cas. 876=29 O.C. 302=3 O.W.N. 526=27 Cr. L. J. 1020=A.I.R. 1926 Oudh 414.



—S. 290—Public nuisance—Placing of charpoy temporarily on road.

No offence of causing public nuisance is committed by placing a charpoy on the road in the bazaar temporarily. 10 A.L.J. 362=13 Cr.L.J. 830=17 Ind. Cas. 574.

—S. 290—Public nuisance.

Where the manager of a bone-mill permitted a large stock of bones to remain uncovered in the open for a long time so as to become rotten and to emit a smell noxious to people living in or passing by the vicinity:—**Held**, he was not doing an act which he was entitled to do in carrying on his trade in a reasonable way and was therefore guilty of committing a public nuisance. In order to constitute an offence under S. 290, it is not necessary that the alleged nuisance should emit smell injurious to health; it is sufficient if it be offensive to the senses. (1906) 5 C.L.J. 40=34 C. 73.

—S. 290—Public nuisance.

See S. 268. 7 C.W.N. 710.

—Ss. 290, 447 — Public nuisance — Criminal trespass—Public nuisance not charged.

Where a man was charged with criminal trespass but found guilty of either trespass or public nuisance, and the appellate court while acquitting him of criminal trespass held that S. 290, was wide enough to cover the offence:— **Held**, that the conviction was bad in that it proceeded on a charge the accused was not called on to meet. (1901) 5 C.W.N. 567.

—S. 290—Skinning animal—Public nuisance.

The skinning of a dead animal is not, in itself, a public nuisance. 15 Cr.L.J. 600=12 A.L.J. 349=25 Ind. Cas. 352.

—S. 290—Water diverted into a person's land—Obstruction to public path—Owner of land not liable.

Conviction of the accused under S. 290 where some persons diverted the water of a stream into his land, with the result that a path was obstructed, is wrong and should be set aside. 10 Cr.L.J. 10=2 Ind. Cas. 424 (Mad.).

—S. 290.

See S. 277.

6 Bom. L. R. 52. Supra.

—S. 290.—See Police Act, S. 34, Cl. 4. 4 A.L.J. 44=1956 A.W.N. 317.

—S. 291—Proceeding for offence under—Acquittal—Fresh proceeding for offence under S. 188, I.P. Code.—Need for sanction.

Where a person has been proceeded under S. 291, Penal Code, for flagrant disobedience of an order of the Court to discontinue a nuisance and acquitted before anything can be done against such person under S. 188, Penal Code, a complaint is necessary under S. 195, Cr. P. Code and S. 493 is no bar to such proceedings. 1930 Cr. G. 1231=A.I.R. 1930 Lah. 1055=129 Ind. Cas. 224.

—S. 292—Obscenity—Test — Books on sexual life—If obscene.

The test of obscenity is this, whether, the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands the publication in question may fall.

Books intended to give advice to married people, and particularly husbands, on how to regulate the sexual side of their lives to the best advantage, that is to say, with a view to promoting their health and mutual happiness, serve a useful purpose when properly written, and they are published on a large scale and widely circulated in all civilised countries including Britain and the United States of America. If such books are effectively to fulfil their intended purpose it is obvious that they must be written in fairly plain language in order to be understood. It cannot be said that the publication of such books should be barred altogether because of the danger, against which it is undoubtedly every difficult to provide effective safeguards, that they may fall into the wrong hands. 48 Cr.L.J. 910=A.I.R. 1947 Lah. 383.

—S. 292—Picture of nude woman.

A picture of a woman in the nude is not *per se* obscene, when there is nothing in it which would shock or offend the taste of any ordinary or decent-minded person. Unless the pictures of nude females are an incentive to sensuality and excite impure thoughts in the minds of ordinary persons of normal temperament who may happen to look at them, they cannot be regarded as obscene within the meaning of S. 292. For the purpose of deciding whether a picture is obscene or not one has to consider to a great extent the surrounding circumstances, the pose, the picture, the suggestive element in the picture, the person into whose hands it is likely to fall, etc., No hard and fast rule can therefore, be laid down for the determination of the matter. A.I.R. 1940 Cal. 290=71 C.L.J. 257=44 C.W.N. 479=41 Cr.L.J. 617=I.L.R. (1940) 1 Cal. 581=188 Ind. Cas. 526.

—S. 292—Publication—Test of obscenity.

In a prosecution under S. 292, the test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of that sort may fall. The test is not whether it will exert a harmful influence on men of wide culture, but how it affects young people of either sex whose minds are impressionable.

The motive of the publishers in publishing the book does not prevent the book from being obscene if the descriptions are obscene. The motive may be taken into account as regards the question of sentence; but whether it is obscene or not depends on the material itself and not upon the reasons for its publication. Where a man publishes a work manifestly obscene he must be taken to have intended the inevitable consequences.

Although in a prosecution under S. 292, it is better and advisable to indicate in the charge how and in what particulars the book is obscene, yet if the accused is not prejudiced in his defence and the prosecution maintains that the whole book is obscene, mere failure of the prosecution to mention particular passages is no reason for interfering in revision. A.I.R. 1932 Cal. 651=36 C.W.N. 985=56 C.L.J. 123=60 C. 201=33 Cr.L.J. 771=139 Ind. Cas. 461.



—S. 292—What constitutes offence—Advertisement of photos containing word "asan" not necessarily obscene.

An advertisement of Kok Shashtra contained words, "coloured pictures (photos) of 84 postures (asan) of men and women with interesting descriptions of these." The advertisement did not contain any posture offensive to senses nor did it suggest any indecent, obscene or immoral ideas.

**Held**, that there was nothing obscene in the word "asan" and it did not necessarily mean the posture formed at co-habitation the advertisement did not come within the purview of S. 292. 110 Ind. Cas. 805 = 10 A.L.C.R. 463 = 29 Cr.L.J. 773 = A.L.R. 1928 Pat. 649.

—S. 292—Religious books—Extracts.

A passage in a religious book may become obscene if it finds a place in a journal intended for the public.

Where the consequences of a publication are likely to introduce in the minds of readers impure thoughts and to insinuate revolting ideas not present in their minds before, the publication is an offence under S. 292. I.P.C. 10 Cr.L.J. 505 = 5 P.R. Cr. 1917 = 39 Ind. Cas. 473.

—S. 292—Descriptions exciting sensuality ought to be avoided in public print.

There should be no printing of descriptions exciting sensuality but descriptions of diseases with appropriate remedies therefor intended only for doctors and patients are not criminal. 18 Cr.L.J. 126 = 7 P.W.R. 1917 Cr. = 25 P.R. 1917 Cr. = 37 Ind. Cas. 478.

—S. 292—Obscene publication—Literary eminence, no justification—Test obscenity—Religious book.

The literary eminence of the author of the book containing obscene matter does not justify the offence under the above section. Where there is a tendency to deprave and corrupt the minds of the readers open to such influences, is the criterion to be applied in determining the question as to whether a particular matter published is obscene or not. 20 B. 193. 32 C. 247, Foll. The publisher of an obscene matter is taken to have intended the natural consequences of the publication. Beyond this the question of intent is not essential to an offence under the section. A publication describing illicit love for another man's wife, and selling at a low price which places it within the reach of all leaves no doubt about its obscene nature in law in spite of the publisher's intention being only to publish classical works. 5 L.W. 237 = 18 Cr.L.J. 153 = 22 M.L.T. 169 = 37 Ind. Cas. 521.

—Ss. 292 and 153—Virulent attack on the head priest of Dawood Bohras.

There were acute differences among the members of the Dawoodi Bohra community as to the exact position of their head priest. The head priest pronounced a kind of social and religious excommunications. Other events subsequent to this rendered the feelings between these parties very acute. The accused who belonged to the minority published two pamphlets, the first of which was published in Ramzan and the second was an elegy on a person who died about the Ramzan month. In the first pamphlet there was

provoking language in which there were vulgar abuses and ridiculed the head priest and his followers. The second extolled the merits of the deceased and contained approbrious epithets to the head priest and his followers who created difficulties in the burial of the deceased. These pamphlets were distributed broadcast among the followers of the head priest. **Held**, Per **Shah J.** that an offence under S. 292, was not committed by the publication of the first pamphlet since applying the test whether the tendency of the matter charged as obscene was to deprave and corrupt those whose minds are open to immoral influences it could not be said that the pamphlet was obscene.

Per **Hayward, J.**—The pamphlet offended against S. 292 as it presented to the mind or view something which delicacy, purity and decency forbade to be expressed. Corruption and depravity of mind are encouraged by the employment of filthy language tending to debase the high purpose of sexual relations even when it is used primarily to arouse religious passions at least retort and repetition of filthy languages will necessarily lower the standards of morality. 22 Bom.L.R. 196 = 62 Ind. Cas. 401.

—S. 292—Obscene book—Test.

The test of obscenity is whether the language complained of would corrupt those whose minds are open to immoral influences. The form of expression and not the actual meaning is important. Distinction should be drawn between obscenity and frankness of expression. 15 Bom. L.R. 307 = 14 Cr.L.J. 248 = 19 Ind. Cas. 504.

—S. 292—Religious books—Extract of passages—Test of obscenity.

A religious publication is not obscene within S. 292 as its tendency is not to deprave moral but if extracts from it contain objectionable matter and have a tendency to deprave or corrupt minds which are open to immoral influences then the fact that they formed part of a religious publication is no ground for publishing it.

The test to determine whether a publication is obscene or not is to see if the tendency of the matter charged as obscene is to deprave and corrupt the minds of the people reading it and if a book has this effect the sale of it is a criminal offence though the author has an ulterior object which is innocent and laudable. 39 Cal. 377 = 15 C.L.J. 151 = 13 Cr.L.J. 177 = 13 Ind. Cas. 993.

—S. 292—Distributing obscene pamphlet—Definition—Intention.

The test of obscenity, with reference to a charge of distributing obscene literature is whether the tendency of the matter is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this kind may fall. If a publication is detrimental to public morals and calculated to produce a pernicious effect in depriving and debauching the minds of the persons into whose hands it may come, it will be an obscene publication which it is the intention of the law to suppress. The question whether a publication is or is not obscene is a question of fact. If a publication is in fact obscene, it is no defence to a charge of selling or distributing the same that the intention of the person so charged was innocent. (1905) A.W.N. 203 = 28 A. 100.



## —S. 292—Obscenity, test of.

The test of obscenity is whether the tendency of the matter is to deprive and corrupt the minds of those who are open to immoral influences and into whose hands publication may fall. L.R. 3 Q.B. 360, Foll. 3 A. 837; 20 B. 193 ref. to. (1904) 32 C. 247=2 Cr.L.J. 201.

## —S. 294—Sentence.

A sentence of three months for an offence under S. 294 is unduly severe. 2 Bur. L.J. 98=A.I.R. 1923 Rang. 253.

## —S. 294-A. Synopsis.

1. Not authorised—Meaning of.
2. Chit fund
3. Drawing—Meaning of
4. Goods—Meaning of
5. Keeping lottery office
6. Lottery—Meaning of
7. Publication of proposal to pay
8. Scope
9. Miscellaneous.

## 1. 'Not authorised'—Meaning of.

## —S. 294-A—'Not authorised'—Meaning of—Burden of proof of authorisation—Evidence Act, S. 105—'Keeping'—Meaning.

The words 'not authorised' in S. 294-A mean no more and no less than 'unless authorised or not having been authorised or without authority' and are in the nature of an exception or proviso to S. 405 of the Evidence Act so that the burden of proof of authorisation lies on the accused. 1 K.B.D. 540, Dist.

The mere act of taking income-tax from a club on the profits of lotteries does not constitute authorisation by Government under S. 294-A. The members of the Committee of a club who exercise full control over club matters inclusive of premises, 'keep' the premises of the club within S. 294-A.

Where a house is kept open for a double purpose viz., as a honest social club and also for gaming purposes, it is a house kept open for purpose of gaming it being not necessary to show that it is used exclusively for gaming.

A drawing list setting out the list of the winners and containing on the back an announcement of a subsequent sweep and the settling day and requiring all tickets to be taken in the name of a member, etc., is a proposal within S. 294-A.

A collector who is a Revenue Officer is not authorised to sanction a lottery. 7 Bur L.T. 187=15 Cr.L.J. 243=7 L.B.R. 319=23 Ind. Cas. 195.

## 2. Chit fund.

## —S. 294-A—Chit fund.

By an order, the Govt. declared conducting chitfund as illegal but added that those who were conducting them should wind them up as soon as possible, adding that prosecutions need not be launched unless there were indications of fraud. The object of the Govt. in

issuing their order in the form they did was to withhold the prosecutions of persons who were running lotteries in ignorance of the law, provided that they did their best to wind up the lottery and to pay everybody who had subscribed to the lottery. The District Magistrate granted the accused time to re-pay the subscriptions. But on his failure to do so, he was prosecuted for conducting chit fund.

Held, that if he conducted a lottery that was illegal, he was liable to be punished under S. 294-A whatever the action of the Crown might subsequently have been. The order of the Govt. that he should wind up the lottery within a certain time and that he should re-pay the subscriptions within a certain time did not amount to an authorization of the lottery prior to that date. A.I.R. 1938 Mad. 715=47 L.W. 573=1938 M.W.N. 431=(1938) 1 M.L.J. 724=39 Cr.L.J. 916=177 Ind. Cas. 640.

## —S. 294-A—Kuri chit fund.

A Kuri was promoted for raising funds for a temple. It consisted of 625 subscribers, each subscriber agreeing to pay at the rate of Rs. 3 per month for 50 months, in all amounting to Rs. 150 per ticket. On the 25th of every English month after March 25, 1929 one ticket was to be drawn out of the 625 tickets and the winning ticket paid as prize, Rs. 150, without any liability to pay for future instalments. Fifty such tickets were to be drawn in 50 months and at the end of the 51st month the 575 subscribers who had not drawn prizes were to be repaid without interest, the total amount of their subscription, viz., Rs. 150. The plaintiff took two tickets in the kuri, and had paid Rs. 270 representing 45 monthly payments on the two tickets. He filed a suit against the promoters for a refund of the amount subscribed. In defence it was contended that the agreement between the parties being in respect of a lottery unauthorised by Govt. was for an illegal object; and was, therefore, unenforceable at law.

Held, that the plaintiff was entitled to recover as his claim was governed by S. 84, Trusts Act, and he was not in *pari delicto* with the promoters who were personally liable to refund the amount.

Held, per Full Bench (Venkataramana Rao, J. contra) that the chit fund amounted to a lottery and the promoters committed an offence under S. 294-A, I.P.C. A.I.R. 1936 Mad. 225=70 M.L.J. 36=43 L.W. 77=1936 M.W.N. 89 (2)=59 M. 562=162 Ind. Cas. 68 (F.B.).

[Overrules (1) A.I.R. (Vol. 14) 1927 Mad. 583=103 Ind. Cas. 318.

(2) A.I.R. (Vol. 12) 1925 Mad. 870=90 Ind. Cas. 420.]

## —S. 294-A—Chit fund—Certainty of distribution of profits—Drawing by lots—Not a lottery.

The plaintiff and the defendant promoted a 'Chit Fund.' A capital fund of Rs. 500 a month was raised by 500 subscribers, subscribing, each one rupee per mensem. At the end of the month, there was a drawing by lot and the subscriber, who drew the ticket was paid Rs. 50 and his connection with the transaction forthwith ceased. This process was repeated month after month, till the end of the 49th month. At the close of the 50th month, each of the remaining subscribers was paid Rs. 50 and the stake-holders divided the profit and the fund was dissolved.



**Held** that the chit fund was not a lottery.

**Per Venkatasubba Rao, J.**—In this case, while chance determines the disposal of the interest earned, there is absolute certainty, with reference to the distribution of the capital fund itself. Though it may be said it is a small element of chance that tempts some to join the fund, the dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift.

The word 'lottery' is not defined either in the Indian Penal Code, or Act 5 of 1844, nor in the English Statutes. When the scheme has for its object the carrying on a legitimate business, the fact that it provides for the distribution of its profits in certain events by lots will not vitiate the scheme. All chit funds, the main object of which is the promotion of co-operation, prudence and thrift ought to be regarded as legitimate, even though there is an element of chance. If by the time a society of this kind became known to the public, all its members were ascertained and there is no invitation to any member of the public to join it, it cannot be said that any person keeps a lottery office, at which the public were invited to join and to pay, within the meaning of the English Acts or S. 294-A of the Indian Penal Code. That is it is not that every lottery constitutes an offence but the keeping of a lottery office, which is a standing invitation to the public, that constitutes the offence.

(English and Indian Cases Law discussed.) (1858) 1 S. 54; 1 M.H.C. 448 and 22 Mad. 212 **Wallingford v. Mutual Society** (1880) 5 A.C. 685, Foll. 1919 M.W.N. 570 and A.I.R. 1925 Mad. 281 Dist. 90 Ind. Cas. 420=21 M.L.W. 403=1925 M.W.N. 655=48 Mad. 661=A.I.R. 1925 Mad. 870.

### 3. Drawing—Meaning of.

—S. 294-A—See also, Contract Act, S. 30—**Lucky numbers calculated arithmetically in lottery is no drawing.**

Section 294-A contemplates a physical drawing. The word "drawing" in S. 294-A cannot be ignored and must be given its natural meaning, i.e., lucky numbers being drawn out of an urn, box or other receptacle. It does not mean conducting.

Hence, a person who conducts a lottery in which the lucky numbers are calculated arithmetically is not guilty under S. 294-A. A.I.R. 1942 Mad. 404=(1942) 1 M.L.J. 228=55 L.W. 95=1942 M.W.N. 170=43 Cr.L.J. 751=1 L.R. (1942) Mad. 802=201 Ind. Cas. 617.

—S. 294-A—**Scheme of lottery not contemplating drawing by mechanical or human agency involving their chance extraction.**

The meaning of the term 'drawing' in relation to a lottery is that the lots should be drawn by some mechanical or human agency involving their chance extraction. Where under a scheme there was no physical or mechanical 'drawing' to determine the lucky lots which depended on a sort of arithmetical progression based on an original number to be determined merely by the chance death of a bondholder, then the publication of a scheme involving such a lottery is no offence under S. 294-A. A.I.R. 1934 Lah. 840=35 P.L.R. 753=16 L. 51=36 Cr.L.J. 785=155 Ind. Cas. 590.

—S. 294-A—**Lottery—Actual drawing essential—Five rupee notes in some cigarette packets—Publishing pamphlet setting out facts—No offence.**

The accused, who was a dealer in cigarettes had caused five-rupee notes to be placed in some packets and any purchaser of a packet of the cigarettes sold by the accused stood a chance of getting a packet of the cigarettes containing a five-rupee note. He also published a pamphlet in which these facts were set out. He was accused under S. 294-A of publishing a proposal relating to a lottery.

**Held**, that the word "drawing" is used in S. 294-A in its physical sense and that the actual drawing of lots is an essential ingredient of the offence under S. 294-A. Although the transaction in question amounted to a lottery. [*Barret v. Burden* (1893) 63 L.J.M.C. 33; *Hunt v. Williams*, (1888) 52 J.P. 821; *Taylor v. Smetten*, (1883) 11 Q.B.D. 207]; as there was no such "drawing" and further as there was no proposal to pay any sum on any event or contingency relative to the drawing of any lot, no offence under S. 294-A was committed; 35 P.R. 1917 Cr.; A.I.R. 1925 Bom. 26, Rel. on; P.R. No. 17 of 1910 Dist. 112 Ind. Cas. 777=30 Cr.L.J. 9=53 Bom. 57=11 A.I.Cr.R. 515=30 Bom. L.R. 1426=A.I.R. 1928 Bom. 550.

—S. 294-A—**Drawing—Meaning of—Lottery.**

The section does not attack lotteries themselves; what has been rendered punishable is the running of public lotteries. The offence is that of keeping any place for the purpose of drawing any unauthorised lottery. The word 'drawing' is used in the section in its physical sense and the actual drawing of lots is an essential factor in a lottery is that there should be a scheme for distribution of a prize and prizes to be determined solely by chance and if chance so decrees that no prize is to be distributed to the adventures and the stakes are to be appropriated by the organiser of the lottery, the scheme is nevertheless a lottery.

Two specific cases of lottery discussed. 35 P.R. 1917 Cr.=33 P.W.R. 1917 Cr.=18 Cr.L.J. 768=41 Ind. Cas. 144.

### 4. Goods—Meaning of.

—S. 294-A — **Goods — Includes immovable property.**

The expression "goods" in S. 294-A applies not only to movable but also includes immovable property. 99 Ind. Cas. 36=50 Mad. 479=24 M.L.W. 655=1926 M.W.N. 949=38 M.L.T. 136=28 Cr.L.J. 4=7 A.I.Cr.R. 172=A.I.R. 1927 Mad. 66=51 M.L.J. 685.

### 5. Keeping lottery office.

—S. 294-A—**Keeping lottery office—Office for running lottery kept—Lottery moneys received—Offence made out.**

The conditions for the application of first clause of the section are complied with, when it is shown that the accused did keep an office where they carried on the necessary preliminary work for running a lottery and received the lottery moneys and which they held out to the public as the place where the lottery would finally be drawn. 69 Ind. Cas. 272=16 M.L.W. 757=23 Cr.L.J. 688=32 M.L.T. 340=A.I.R. 1923 Mad. 187=44 M.L.J. 595.



—S. 294-A—Keeping a Lottery Office—Lottery—Scheme for distribution of prizes—Construction of Penal statute.

For the purposes of S. 294-A office or place means a place or office where the actual drawing of the lottery takes place. Keeping an office for preliminary business is not indictable under the section.

Lottery is a scheme for the distribution of prizes by lot or chance. 14 P.W.R. 1910 Cr.=17 P.R. 1910 Cr.=11 Cr.L.J. 382=92 P.L.R. 1910=6 Ind. Cas. 620.

6. Lottery—Meaning of.

—S. 294-A.

Transaction between definite number of persons—Each one getting his money's worth though some getting less and some more by lot.

**Held**, no offence committed under S. 294-A. A.I.R. 1934 Mad. 136=66 M.L.J. 76=149 Ind. Cas. 489.

—S. 294-A—Scheme for giving of gramophones as prizes to subscribers to monthly chits.

The accused, a cycle and gramophone dealer, started chits for giving away cycles and gramophones as prizes. There were to be 100 subscribers in each section. Each subscriber had to pay Rs. 3 per month and the transactions covered a period of 20 months. There was to be drawing every month for 20 months; the subscriber whose name was drawn was given a cycle or a gramophone and he was relieved from further payment. In the 21st month each of the non-winners was given a cycle or gramophone. The accused was charged under S. 294-A.

**Held**, that the transaction was clearly a lottery, the accused may be said to have kept a place namely, his shop, for the purpose of drawing a lottery and as he had published the scheme he was guilty of an offence under the latter portion of S. 294-A. A.I.R. 1934 Mad. 464=1934 M.W.N. 265=57 M. 923=40 L.W. 26=35 Cr.L.J. 1232=67 M.L.J. 163=150 Ind. Cas. 1119 (D.B.).

—S. 294-A—Sweets purchaser getting ticket entitling him to try his luck at lottery.

Where the applicant shop-keeper had invited every customer to try his luck for half an anna, it was given out that the purchaser of every packet of sweets for half anna was entitled to a separate ticket and each ticket meant a separate chance in lottery.

**Held**, that what was purchased by each customer of the applicant was not only the packet of sweets, but also a chance in the lottery, that the customers collectively contributed towards a certain fund out of which the accused was able to give away prizes. Calling that fund his profits, or a separate prize-fund made no difference and that the transaction was a lottery within the meaning of S. 294-A. A.I.R. 1934 Sind 69=28 S. L. R. 112=35 Cr. L. J. 1249=150 Ind. Cas. 1093.

—S. 294-A—Lottery, what constitutes.

A lottery is a scheme for distributing prizes by lot or chance. In its simplest form the adventurers contribute to a fund which they agree among themselves shall be unequally divided upon the happening of an agreed event. But it is not essential that the

fund out of which the prizes are provided should consist only of sums contributed by the adventurers. Nor does the fact that every adventurer in any event obtains some or even full value for his subscription prevent the scheme from being a lottery. Where therefore in a scheme every person who purchases a ticket at the entrance of a show by so doing contributes to the common fund from which the prizes are taken and every purchaser of a ticket stands an equal chance to draw back four hundred times as much as he had put in the schemes comes within the meaning of 'lottery'.

In the offence provided for under S. 294-A, the actual drawing is an essential ingredient. The word 'drawing' is used in this section in its physical sense and when the section was enacted in 1870, it seems probable that the only form of lottery envisaged by the Legislature was a lottery run on the usual lines in which the winning numbers are actually drawn out of an urn, box or other receptacle. A.I.R. 1934 Sind 149 (2)=36 Cr.L.J. 219 (2)=152 Ind. Cas. 911.

—S. 294-A—Irish Sweepstake.

A circular of the Irish Sweepstake found in the possession of the accused disclosed that the Irish Hospital Sweepstake was expected to reach the large total of L. 50,00,000 or seven crores of rupees and that applications for tickets were to be made with Rs. 7-8-0 per ticket to the accused. The circular also stated that the above money would be divided on each unit of L. 10,00,000 as follows; 50 first prizes of L. 30,000 or over four lacs of rupees each, 50 second prizes of L. 15,000 or over two lacs of rupees each, 50 third of L. 10,000 or over 1½ lacs of rupees each, 1200 prizes of Rs. 12,000 to Rs. 15,000 each and 5,000 cash prizes of L. 2000 or Rs. 2750 each:

**Held**, that having regard to the correspondence disclosed the case of the accused fell within the mischief of S. 294-A.

**Held**, also that although ignorance of law would be no excuse, in awarding sentence, the fact that the accused was not cognizant of the fact that the Irish Hospital Sweepstake was an unauthorized lottery, might be taken into consideration. A.I.R. 1933 Cal. 332=56 C.L.J. 539=34 Cr.L.J. 518=143 Ind. Cas. 113.

—S. 294-A—Company for raising of funds for charitable purposes—Offer of cash bonuses to donors by drawing lots—Legality of object.

The memorandum of association of a limited company stated that one of the objects of the company was to raise general donation funds to carry out charitable objects. The Articles of Association and the prospectus issued by the company adumbrated scheme to the following effect. Every donor of Rs. 100 to a fund called the Poor Houses Special Donation Fund was given a donation certificate. One lakh of such certificates was to form a series. Out of the interest accruing on the funds so subscribed not less than 75 per cent. was to be utilized every year in granting cash bonuses ranging from Rs. 500 to Rs. 5000 to 200 donation certificate holders, the names of the donors that were to get such bonuses being determined by means of drawings. It was also provided that if a certificate holder died before he got a prize, his heirs will receive Rs. 500 as Death Relief Bonus. On an application to wind up the company on the ground that the company was formed for an illegal purpose:



**Held**, (i) that the cash bonus scheme was a lottery; (ii) that the fact that the prize money was provided from the interest received from investments and not from the principal did not make any difference; (iii) that the company in keeping an office for the conduct of this lottery and publishing in its articles and prospectuses the scheme of the lottery was acting in contravention of S. 294-A; (iv) that as a very substantial part of the business carried on by the company was consequently illegal there was sufficient ground for ordering the compulsory winding up of the company.

The fact that the company was formed for the purposes of benefitting charities and the lottery was merely annexed to the original business did not make the business of the company a legal one.

A wagering contract is not necessarily a lottery. A.I.R. 1933 Mad. 16=1932 M.W.N. 904=33 Cr. L.J. 792=63 M.L.J. 554=26 L.W. 610=55 Mad. 26=139 Ind. Cas. 644.

#### —S. 294-A—Lottery, what is.

A scheme by a company which purports to grant interest-bearing loans on personal security to persons chosen by lot falls within S. 294-A, Penal Code. A.I.R. 1933 Mad. 129=63 M.L.J. 917=36 L.W. 942=141 Ind. Cas. 177 (2).

#### —S. 294-A—Lottery—What amounts to.

By an advertisement in a newspaper the accused invited the public to subscribe a large sum of money for an association whose avowed object was to relieve people in debt or distress. There was no provision for return of the capital and though one-sixth of the interest derived therefrom was to be used for the objects of the association, the remainder was to be divisible every three months as cash bonuses to the subscribers, and these bonuses were to be distributed by lot.

**Held**, that the whole transaction amounted to a lottery within the meaning of S. 294-A. A.I.R. 1932 Rang. 143=10 R. 232=33 Cr.L.J. 696=138 Ind. Cas. 687.

#### —S. 294-A—Lottery—Meaning.

The giving of prizes out of profits of sale only to the lucky persons only possessing the lucky tickets without every person who has gone in getting something in return for his money, is lottery. 17 Cr.L.J. 143=9 Bur.L.T. 124=33 Ind. Cas. 319.

### 7. Publication of proposal to pay.

#### —S. 294-A—Second part—Proposal and sale.

A large number of lottery tickets were found in the shop of the accused. The name of the accused had been entered in the counterfoils, in space provided for the name not of the purchaser of the ticket but of the seller of the ticket to the ultimate purchaser. A printed document headed by the name of the accused in large capitals containing a proposal to purchasers to buy shares each amounting to 1/72nd in lots of twelve tickets of the Irish Free State Hospital Sweepstake, and reciting that the holder of the document was entitled to 1/73rd share of any prize won by any one of the twelve tickets was also found:

**Held**, that the proposal and sale had been established within the meaning of S. 294-A.

**Held also** that publication was established by the very fact that the proposal forms had been printed in press. A.I.R. 1941 Sind 91=42 Cr.L.J. 613=194 Ind. Cas. 704.

#### —S. 294-A.

To publish the words "detailed prize lists will be supplied to all subscribers" is an offence under S. 294-A, I.P.C. 1937 M.W.N. 731.

#### —S. 294-A—Publication.

Delivery of ticket books of a lottery is sufficient publication. A.I.R. 1926 Sind 213, Dist. 124 Ind. Cas. 347=1930 Cr.C. 97=A.I.R. 1930 Lah. 81.

#### —S. 294-A—'Proposal to pay—Lottery ticket—Statement that prizes if any due will be paid—If proposal to pay.

A lottery is an arrangement for the distribution of prizes by chance among persons purchasing tickets. If in a lottery ticket it is stated that the prize if any due on the number of ticket will be paid, the ticket does contain a proposal inviting person to take part in the lottery, and by acquiring the ticket the purchaser or acquirer accepts the proposal. Distribution of ticket with such a proposal amounts to publishing the proposal.

**Kennedy, J. C.**—A mere casual and gratuitous delivery of a lottery ticket is not necessarily the publication for a proposal within the meaning of S. 294-A. 95 Ind. Cas. 313=20 S.L.R. 192=27 Cr. L. J. 777=A.I.R. 1926 Sind 213.

#### —S. 294-A—Publication of terms for prizes on horses winning at Derby races is offence.

The accused issued a circular for the sale of tickets for prizes on horses winning at the Derby races, on starters, and for other special prizes. The circular stated that the "Sweep will be closed on . . . and the draw under the supervision of the patrons stated in the tickets will take place on . . . Prize winners will be notified by telegrams."

**Held**: that the accused published a proposal to pay a sum for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number of figure in a lottery and was liable to punishment. It was not necessary that the payment proposed to be made should be made by the person advertising. 87 Ind. Cas. 516=26 Cr.L.J. 980=27 Bom.L.R. 363=A.I.R. 1925 Bom. 243.

#### —S. 294-A—Publication that lottery tickets were had at a place—If proposal.

The publication that lottery tickets can be had at a particular place is not sufficient to constitute a publication of a proposal to pay any sum on any event or contingency relating or applicable to the drawing of any ticket in any lottery not authorised by Government as provided in the second paragraph of S. 294-A. 83 Ind. Cas. 1006=26 Cr.L.J. 222=26 Bom.L.R. 968=A.I.R. 1925 Bom. 26.

### 8. Scope.

#### —S. 294-A—Scope—Keeping lottery office—Publication of proposal—Scope of Civil law.

The Criminal Law by S. 294-A, I.P.C. only makes punishable the keeping of an office for holding a lottery



and the publication of proposals for drawing a lottery. The civil law however goes further and prevents obligations arising out of lotteries being enforced in a Court of law, whether the lottery is held in an office to which the public have access or in a private place to which admission is not to be had for the mere asking. 92 Ind. Cas. 968=22 M.L.W. 772=1925 M.W.N. 857=A.I.R. 1926 Mad. 168=49 M.L.J. 791.

### 9. Miscellaneous.

#### —Ss. 294-A, 420—Lottery or swindling concern.

Where it is suspected that a company holds or has held a lottery within the meaning of S. 294-A, Penal Code, or that it is a swindling concern within the meaning of S. 420, all the books of the company may well be relevant for the purpose of determining the nature of the offence, if any committed, and the Police will not be wrong in investigating all the books and seizing them under the provisions of S. 165, Criminal P. C.

Where the books of such a company are seized it is only proper that reasonable facilities are made by the Police to give access to the officers of the company to the books, to enable them to prepare and submit balance sheets and other documents in accordance with the Companies Act. A.I.R. 1932 Lah. 581=33 Cr.L.J. 678=33 P.L.R. 824=138 Ind. Cas. 751.

#### —S. 294-A.

District Magistrate acting under S. 155 (2), Criminal P. C., can order investigation into a case under S. 294-A, Penal Code, even though such offence cannot be tried without complaint by Local Government or by any officer empowered by Government in this behalf. A.I.R. 1932 Lah. 581=33 P.L.R. 824=33 Cr.L.J. 678=138 Ind. Cas. 751.

#### —S. 295.

#### —Ss. 295, 379, 144, 143 and 425—Hut on agricultural land, turned without knowledge of land-lord into mosque—Pulling down of such hut by persons other than land-lord—Offence committed.

The use of a hut on an agricultural land, without the permission of the land-lord, as a public mosque with the **azan** or public call to prayers is entirely unwarranted; and if the hut is not a mosque but a particular community were only attempting to convert it into one, it is clearly not "a place of worship" under the law. Where none of the members of the community was in a position validly to make the implied dedication, a mere fact of saying **azan** does not make it a public mosque. The hut cannot also be regarded as "any object held sacred by any class of persons" within the meaning of S. 295. Nothing of religious reverence, or sacred character, could attach to the hut apart from its attempted conversion into a mosque as this attempt itself is contrary to law; to allow any sacred character to the hut would be to enable the community under the guise of religion to vest the shed as a public mosque in the religious body for whose observance it was to be used, to the detriment of the land-lords, who had only settled the land with the tenant for agricultural purposes. Where the **azan** or public call to prayers is found to have begun only about a year before, the landlords do not lose by prescription their right to eject the tenant for the attempted perversion or misuse of the land, rendering it unfit for the purposes of the tenancy. Though this would not entitle others some of whom are amongst the land-lords of the village, to take the law into their hands yet their destruction of the hut does not constitute an

offence under S. 295. The conviction under this section is bad in law.

That the hut standing on this land, though it was destroyed, was not a mosque properly so called does not mean the failure of the charges under Ss. 144 and 143. Where the common object of destroying the mosque makes no reference to S. 295, and the destruction of the hut, even if it was not a mosque, clearly amounts in the circumstances to mischief as defined in S. 425, Penal Code, it follows that the unlawful assembly must be taken to have had the common object of committing mischief in respect of the hut. The conviction under S. 144 or S. 143, as the case may be, is proper.

Where the charges under S. 379 did not refer to the common object of the unlawful assembly, but the charges of theft were intended by the Magistrate to refer to the acts of individual accused apart from their doings as members of the unlawful assembly and there was no finding that any of the accused individually took away any of the materials of the hut, the conviction under S. 379 against the accused cannot be sustained. A.I.R. 1941 Pat. 492=42 Cr.L.J. 579=23 P.L.T. 81=194 Ind. Cas. 476.

#### —S. 295—Ahir wearing sacred thread after due ceremony—Brahmins breaking it away.

In popular estimation **Ahir** are not regarded as anything higher than **Sudras**.

If **Ahirs** are **Sudras** and therefore not entitled to wear the sacred thread, it cannot be said that wearing the sacred thread is a part of their religion and therefore the damaging or destroying of a thread, worn by them in assertion of a mere claim to higher Rank, by **Brahmins** who are entitled to wear such thread cannot be an insult to their religion, nor can an **Ahir** be supposed likely to regard such an act as an insult to his religion. But even supposing for the sake of argument that **Ahirs** are entitled to wear the sacred thread, the **Brahmins** by breaking the sacred thread or threads regarded as sacred by the **Ahir** do not bring themselves within scope of S. 295. It is clear that the accused cannot by any means be supposed to have the intention of insulting the religion of the **Ahir**. Though it is conceivable that if a **Mohammadan** or a **Christian** or an **atheist** tore off the sacred thread which was being worn by a **Hindu** entitled to or even claiming to be entitled to wear it and the assailant at the same time indicated disrespect for the thread, such a person might be conceived to know that the person whose thread was so treated would be likely to consider it an insult to his religion. But where persons observing the same religion break the thread of someone whom they regarded as an upstart wearing something which he was not entitled to wear, neither the victim of assault would be likely to consider that act an insult to his religion nor the assailants could be considered to have the knowledge that he was likely so to do. In such a case, the conviction of the **Brahmin** assailants under S. 295, cannot be sustained. A.I.R. 1940 Oudh. 348=41 Cr.L.J. 550=1940 O.W.N. 509=15 Luck. 696=1940 A.W.R. 230=188 Ind. Cas. 128.

#### —Ss. 295, 297.

Four accused entered the premises of the complainant and only one of them demolished the wall which he was constructing and took the **pindi** of the **Naika Gossain** which was worshiped by the by the complainant and his family, from the niche and threw it into a drain. The accused were charged and convicted under S. 295:



**Held**, that the complainant and his family members could not constitute a class of persons within the meaning of S. 295, the framing of the charge and conviction under S. 295 was, therefore, erroneous. The accused could, however, be convicted under S. 297 in view of Ss. 236 and 237, Criminal P.C. A.I.R. 1940 Pat. 414=21 P.L.T. 121=41 Cr. L. J. 810=189 Ind. Cas. 867.

**—S. 295—Sentence — Criminal trespass into Hindu temple — Consecutive sentences for both offences—Improper.**

When the accused enter into a Hindu Temple and damage its property, the offence under S. 447 is inseparable from that under S. 295 and it is improper to pass consecutive sentences for each of the offences under the sections, for both really are one and the same offence. 82 Ind. Cas. 37=25 Cr. L. J. 1173=A.I.R. 1925 Oudh 50.

**—S. 295—Entry by untouchables—Untouchable entering temple and defiling sacred object.**

When custom observed for many centuries ordains that an untouchable whose very touch is in the opinion of devout Hindus pollution should not enter the enclosure surrounding the shrine of any Hindu God and when an untouchable with that knowledge deliberately enters a temple and defiles the idol he commits an offence within the purview of S. 295. 76 Ind. Cas. 299=25 Cr. L. J. 155=A.I.R. 1924 Nag. 121.

**—S. 295—Essentials—Intention or knowledge to insult.**

The accused, when he was rebuilding his house, had no idea that he was likely to do any damage to the walls of the mosque by placing the ends of his rafters in them. He could not have known that such damage was likely to result as would be considered by Mohammadans as an insult to their religion.

**Held**, that the accused was not guilty under S. 295. 67 Ind. Cas. 586=3 L. L. J. 247.

**—S. 295—Killing of dedicated bull — Whether offence.**

The killing of a dedicated bull for the sake of the meat is not an offence under S. 295 of the Penal Code. 21 Cr. L. J. 453=56 Ind. Cas. 437 (Pat.).

**—S. 295—Defilement—Pollution—Caste.**

A Moothan, of the Sudra caste in Malabar, can enter the Nallambalam or outer precincts of a temple, without polluting the temple within S. 295, I.P.C. The word 'defile' in the section cannot be confined to the idea of making dirty but must also be extended to ceremonial pollution. 41 Mad. 980=24 M.L.T. 181=19 Cr. L. J. 960=47 Ind. Cas. 812.

**—S. 295—Killing of cow.**

The killing of cow even if done with the intention of offending the religious susceptibilities of others is no offence under S. 295, Penal Code. 10 P.R. 1918 Cr.=1 P.W.R. 1918 Cr.=160 P.L.R. 1917=19 Cr. L. J. 314=44 Ind. Cas. 330 (F.B.).

**—S. 295-A—Book published before enactment of S. 295-A.**

12—F. Y. D.—10.

Where a new edition of a book published before enactment of S. 295-A, is published after its enactment, its author can be convicted under that section when his connection with the publisher is proved. A.I.R. 1941 Oudh 310=1941 O.W.N. 480=42 Cr. L. J. 429=16 Luck. 674=1941 A.W.R. 118=193 Ind. Cas. 516.

**—S. 295-A.**

Under S. 295-A, the prosecution must prove more than under S. 298; they must show insult for the sake of insulting and with an intention which springs from malice and malice alone. To a charge under this section, therefore, it would be a defence to say: "I had no malicious intention towards a class, but I did intend to wound or shock the feelings of an individual so that attention might, however rudely, be called to the reform which I had in view." What is punishable under S. 295-A is not so much the matter of the discourse, written or spoken, as the manner of it. The Court must therefore look with great care at the words used. If the words used caused persons to feel insulted but were only such as might possibly wound and in fact did so, then there would be no offence under the section; if the words used were bound to be regarded by any reasonable man as grossly offensive and provocative, and were maliciously intended to be regarded as such then an offence would have been committed. It is no defence to a charge under S. 295-A, for anyone merely to say that he was writing a pamphlet in reply to one written by adherent of another religion who has attacked his own religion. If he chooses to write such a pamphlet, he must take care of the language which he employs. A.I.R. 1939 Rang. 199=40 Cr. L. J. 640=1939 Rang.L.R. 302=182 Ind. Cas. 96.

**—S. 296 — Offence under — Disturbance of religious procession.**

A procession can be lawfully engaged on a highway in the performance of religious worship or religious ceremonies and it does not change its character merely because the music has been stopped before a mosque. It cannot therefore be contended that as the music had stopped when the disturbance took place, the processionists were not then lawfully engaged in the performance of religious worship or religious ceremonies within the meaning of S. 296, I.P. Code. I.L.R. (1948) Nag. 657=A.I.R. 1949 Nag. 132=50 Cr. L. J. 329=1948 N.L.J. 340.

**—S. 296—Erection of mosque on undertaking by Muhammadans of locality that they would not raise objection to Hindus playing music on highway—Undertaking, if binding on entire community—Playing of music, if per se offence.**

A new mosque was allowed to be built on objections having been raised by the Hindus on certain undertakings by the leading and influential Muhammadan residents of the locality. The undertaking was not to raise any "obstruction to music of any kind in Hindu houses or in connection with temple processions going and coming along the highroad":

**Held**, that the undertaking was binding on the entire Muslim community. Consequently, the playing of music near the mosque would not by itself amount to an offence under S. 296, unless there was something more in the nature of substantial and not merely fanciful disturbance of the worship. A.I.R. 1945 Mad. 496=(1945) 2 M. L. J. 200=58 L. W. 409=1945 M.W.N. 569.



## —S. 296.

There is nothing in S. 296, I. P. C., to justify the conclusion that the persons themselves engaged in performing of religious worship or ceremony cannot cause disturbance to another community. A.I.R. 1943 Nag. 199=I.L.R. (1943) Nag. 295=1943 N.L.J. 352=44 Cr. L.J. 782=208 Ind. Cas. 417.

## —S. 296.

For the purpose of S. 296, three persons gathered together for purposes of worship are sufficient to constitute an "assembly." A.I.R. 1940 All. 291=1940 A.L.J. 206=41 Cr. L.J. 647=1940 A.W.R. 85=188 Ind. Cas. 649.

## —S. 296—Tazia procession.

Where some Muhammadans took a tazia procession through a private grove as a result of which a dispute ensued between Hindus and Muhammadans and the accused were convicted of an offence under S. 296, and it appeared that the Muhammadans had not established any right to take the tazia through the grove:

**Held**, that no offence under S. 296 was committed. A.I.R. 1933 Oudh 196=40 O.W.N. 582=34 Cr. L.J. 778=144 Ind. Cas. 540.

## —S. 296—Causing disturbance—Spreading false rumour.

The essential ingredient of an offence under S. 296 is the doing of an act which causes a disturbance. The mere spreading of false rumours, although they result in serious consequences, cannot amount to 'causing a disturbance.' 17 A. L. J. 820=20 Cr. L. J. 421=51 Ind. Cas. 197.

## —S. 296—Persons carrying temple flags—Obstruction—Whether an offence.

The carrying of flags through public streets in a procession of certain Lodhas to a temple with the sanction of public authorities is the performance of religious ceremony and the persons carrying them constituted an assembly lawfully engaged in religious ceremony. An attack on such a procession is an offence under S. 296. 34 All. 78=8 A.L.J. 1150=12 Cr. L.J. 573=12 Ind. Cas. 837.

## —S. 296—Procession in public streets before the mosque—Procession during the notified hours.

No persons have any right to pass a mosque with music so as to disturb religious worship going on therein during the hours notified as the hours of religious worship. Under S. 296, I. P. C., the accused need not have active intention to disturb religious worship. It is sufficient if knowing they were likely to disturb it by their music, they took the risk and did actually cause disturbance. 34 Mad. 92=7 M. L. T. 430=11 Cr.L.J. 400=21 M.L.J. 71=6 Ind. Cas. 774.

## —S. 296—Disturbing assembly lawfully engaged in worship—High way—Religious procession.

A person cannot be convicted of an offence under S. 296 for having taken possession of drums from certain boys who were beating them on a public road to summon people for a procession during **Muharram**, which he restored to them the next day. 33 P.W.R. 1909 Cr. =119 P.L.R. 1909=10 Cr. L.J. 445=3 Ind. Cas. 981.

## —S. 296—Religious processions—Vadagalais and Tengalais:—See S. 43.

26 M. 554=13 M.L.J. 171. See also: Highway.

## —S. 296—Disturbing assembly lawfully engaged in worship—Highway—Religious procession.

**Held**, that as no assembly can be lawfully engaged within the meaning of S. 296 on a highway, the accused could not be convicted of an offence under that section for having taken possession of decrees from certain boys who were beating them on a public road to summon people for a procession during **Muharram**, which the accused restored to them the next day. The chief court in quashing conviction of the accused refused to consider whether the action of the accused constituted a technical offence under any other provision of law. 33 P.W.R. 1909 (Cr.)=119 P.L.R. 1909=3 Ind. Cas. 981.

## —S. 297—"Trespass"—Interpretation.

The word "trespass" used in S. 297, I.P.Code, is not to be interpreted with any reference to S. 441, I.P.Code. 53 C.W.N. 106=A.I.R. 1949 Cal. 104=50 Cr. L. J. 135.

## —S. 297—Ss. 297, 441—Meaning and scope of "trespass."

Section 297 fully deals with offences to which it refers and is self-contained and requires interpretation by no reference to S. 441. The word "trespass" in S. 297, means any violent or injurious act committed in such place and with such knowledge or intent as defined in that section. Section 297 does not refer to "religious feelings," though the kind of feelings, which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sepulchre, to feelings of a spiritual nature than a material kind, feeling associated with such sacred places. It does not punish acts which are merely of earthly vanity or pride.

That S. 297 is not limited to feelings of a religious nature is clear by the fact that in S. 298, which follows it, "religious feelings" are expressly referred to, Section 297 does not refer only to "intention." It refers also to trespass which is likely to wound the feelings.

The complainant erected stones in memory over his dead daughter and two children, over their ashes in the cremation ground. The complainant's son-in-law, eleven years after the death of his wife, as a result of a dispute about money matters with the complainant went to the cremation ground and deleted the name of the complainant from all the stones on the ground that they were erected out of money provided by him:

**Held**, that on the evidence and circumstances of the case the accused's (son-in-law's) trespass was committed with something more than knowledge; it was committed with intent to wound the feelings of the complainant. It was done in a spirit of spite and vindictiveness, and it was by injuring the complainant's feelings that the accused's feelings of spite and vindictiveness had to be satisfied. This was not a case where the feelings which were wounded were merely worldly feelings of vanity and pride. The fact that the stones were erected out of the money



provided by the accused did not give him the right to enter the cremation ground and delete the name of the complainant therefrom. A.I.R. 1941 Sind 33=42 Cr. L. J. 454=I.L.R. (1941) Kar. 316=193 Ind. Cas. 616.

—Ss. 297, 295.

Four accused entering complainant's house and one of them demolishing wall being constructed by him and throwing away **pindi** of Naika Gossain worshipped by complainant and his family into drain—Conviction under S. 295 is erroneous—Accused can be convicted under S. 297 by reason of Ss. 236 and 237, Criminal P.C. A.I.R. 1940 Pat 414=21 P.L.T. 121=41 Cr. L. J. 810=189 Ind. Cas. 867.

—S. 297.

**Quaere.**—It is very doubtful whether those accused who are guilty of an offence under S. 297, can be convicted under S. 448 as well and awarded a separate sentence on a charge of trespass so framed. A.I.R. 1940 Pat. 414=21 P.L.T. 121=41 Cr. L. J. 810=189 Ind. Cas. 867.

—S. 297—Damage done to graves in the land.

The word 'trespass' in S. 297, has not the same meaning, as that attached to the expression 'criminal trespass' in S. 441, and it means 'any violent or injurious act committed in such place and with such knowledge or intention as is defined in the section'.

Although certain persons may have been found by the Civil Court to be the owners of certain land, and have been put **khas** possession thereof by the Civil Court, that does not entitle them to disturb any graves that may be found existing in that land or to damage any structure that may have been raised over such graves, if by such act or acts the feelings of any person interested in the graves are likely to be wounded. A.I.R. 1932 Cal. 459=36 C.W.N. 544=33 Cr. L. J. 517=137 Ind. Cas. 872.

—S. 297—Essentials — Entering mosque for prayer—Uttering abuses — Intention to insult made out but trespass was not—Not liable.

The petitioner had gone to mosque for midday prayer as usual; when the service was over he was asked by some others why he had on former occasions abused the moulvi and the congregation. On his attempting a denial, witness was sent for and an altercation followed, the petitioner then began to abuse all and sundry employing obscene epithets and uttering threats:

**Held**, that the intention of wounding the feelings of the moulvi and congregation was quite clear but the alleged "trespass" was not and that the conviction under S. 297 was wrong.

**Held** further, that the mere fact that the petitioner was a trustee does not take this case out of the purview of S. 297, and in the circumstances an offence under S. 504 was committed and that being a cognate offence conviction was altered under that section. 81 Ind. Cas. 41=1 Rang. 690=25 Cr.L.J. 553=A.I.R. 1924 Rang. 106.

—S. 297—Not the trespass in S. 441.

Section 441 cannot be read into S. 297 with any intelligible result. The term "trespass" in S. 297 appears

to mean any violent or injurious act committed in such place and with such knowledge or intention as is defined in that Section. 81 Ind. Cas. 41=1 Rang. 690=25 Cr. L. J. 553=A.I.R. 1924 Rang. 106.

—S. 297 — Evidence and Procedure — Local Inspection—Magistrate's own opinion is not evidence—Practice.

In a case under S. 297, the magistrate went to the alleged burial ground accompanied by pleaders representing both parties and proceeded to have the ground removed at various spots which were pointed out to him.

He unearthed, two small bones which he thought were human collar bones, and also found some matting and some pieces of bamboo. On this inspection he came to the conclusion that the place was a burial ground and convicted the accused:

**Held**, that this proceeding was entirely irregular. If he had desired to have very sure evidence adduced as to whether this land was a graves-yard it is possible that an investigation of the character which he himself conducted personally as to the results of which he himself in effect gave evidence, might have with due reverence been carried out by properly qualified official persons and their evidence in Court afterwards might have been of great assistance and value to him. Judicial officers cannot and are not legally permitted to find out for themselves the facts of a case they have to decide. 81 Ind. Cas. 602=1 Pat. L.R. (Cr.) 256=25 Cr. L. J. 954=A.I.R. 1923 Pat. 537.

—S. 297—'Trespass'—Meaning of.

The word trespass in the section must be taken in its original meaning and there is no reason to restrict the meaning of the word which covered any injury or offence done and to couple it with entry upon property. 18 A. 395; 33 A. 773, Foll. Where A was found in a mosque having sexual intercourse with a woman B, both A and B were held guilty under this section. 73 Ind. Cas. 935=45 All. 529=21 A.L.J. 455=4 L.R.A.(Cr.) 79=24 Cr. L. J. 711=A.I.R. 1924 All. 9.

—S. 297—Disturbance of funeral ceremonies—Prevention of digging grave.

Where certain persons prevented the grave diggers from digging a grave for the corpse of the complainant's son, on account of the complainant not having joined the **Khilafat** party.

**Held**: that they had not committed any criminal offence. 65 Ind. Cas. 424=20 A.L.J. 93=23 Cr.L.J. 72=A.I.R. 1922 All. 184.

—S. 297—Offence under — Essentials of — 'Trespass', meaning of.

The essence of an offence under S. 297 is trespass, and before a person can be convicted under that section it must be proved that there was a trespass by him with the intention and in the place mentioned in the section. The term 'trespass' is used in its strict legal sense and means an unjustifiable intrusion upon property in possession of another. 56 Ind. Cas. 235 (Pat.).

—S. 297—Disturbances to persons assembled to perform funeral ceremony.

The accused came to the cremation ground and told the complainant and his relatives not to



cremate the body of their daughter and on being asked why, said that they would state this reason to the police. **Held**, that the mere utterance of the words 'do not cremate the body' unaccompanied by any attempt to prevent the cremation or to interfere if the cremation was persisted in, was not a disturbance within S. 297 of the Penal Code. 2 P.R. (1919) Cr.=44 P.L.R. 1919=4 P.W.R. 1919 Cr.=20 Cr. L. J. 145=49 Ind. Cas. 337.

**—S. 297—'Trespass'—Land of accused—Digging up old graves—Presumption.**

'Trespass' in S. 297 of the Penal Code, has not the same meaning as in 'criminal trespass' defined in S. 441 and denotes a wrongful Act; and the act of a person who destroyed or disturbed a place of sepulchre with the intention of wounding the feelings of any person or with the knowledge that the feelings of any person are likely to be wounded was wrongful and amounted to a trespass within S. 297 no matter whether the land in which the 'place of sepulchre' was included did or did not belong to such person. 18 A. 395; 33 A. 773; 40 C. 548, Foll. **Held Per Le Rossignol, J.**—'Trespass in' S. 297 of the Penal Code must be construed in its natural sense, i.e., unauthorised entry upon the property of another. Assuming that the sale of a 'closed graveyard' might be valid, the sale could not in law pass to the vendee any proprietary rights in the graves which existed on the land at the time of sale. 27 P.P.R. 1913 (P.C.), Dist. The accused must be presumed to have known that by the destruction of graves, be they old or new, the feelings of the persons whose relatives were buried in the graves were likely to be wounded. 23 P.R. (Cr.) 1915=40 P.W.R. (Cr.) 1915=16 Cr. L. J. 683=30 Ind. Cas. 731.

**—S. 297—Burial ground—It must be in use—Trespass—Meaning of.**

It is not necessary for the purpose of S. 297 that a burial ground should be in use. Trespass in that section means any violent or injurious act and is not restricted to the same meaning attached to 'criminal trespass' in S. 441. 40 Cal. 548=14 Cr. L. J. 117=17 C.W.N. 534=18 Ind. Cas. 677.

**—S. 297 — Digging up graves and exposing bones of dead bodies.**

A joint owner who dug up the graves and exposed the bones of the persons buried, in spite of the remonstrances of their relations, is guilty under S. 297. 33 All. 773=8 A.L.J. 927=12 Cr. L. J. 532=12 Ind. Cas. 300.

**—S. 297—Trespass on sepulchre—Sepulchre—Meaning of.**

It is not necessary to prove that the trespass was committed on a place set apart for funeral rites or as a depository for the remains of the dead. It is sufficient if it is proved that the trespass occurred on any place of sepulchre. The trespass contemplated in S. 297 is such a trespass as is defined by the I.P.C.

A place where only isolated and secret cases of burial have taken place in the course of many years, cannot be called a sepulchre. 10 Cr.L. J. 160=2 Ind. Cas. 825 (Bom.).

**—Ss. 298, 299 — Muhammadans slaughtering cow.**

Where the Muhammadan accused are charged with slaughtering a cow and there is no finding that insulting words were uttered or insulting gestures were made or that anything was done with the deliberate intention of wounding the religious feelings of the Hindus, the conviction of the accused under S. 298 cannot stand. A.I.R. 1942 Pat. 471=44 Cr. L. J. 30=21 Pat. 315=24 P.L.T. 16=203 Ind. Cas. 282.

**—S. 298,**

It is no defence to proceedings under S. 298, that religious feelings were deliberately shocked or wounded by the defendant in order to draw attention to some matter in need of reform. A.I.R. 1939 Rang. 199=40 Cr. L. J. 640=1939 Rang. L. R. 302=182 Ind. Cas. 96.

**—Ss. 298, 299—Killing of cow in full view of Hindu houses.**

Section 298 is much wider in its scope than S. 295 and includes any action which is known to wound the religious feelings of others.

Motive is not to be confused with intention. If a man knows that a certain consequence will follow from his act it must be presumed in law that he intended that consequence to take place although he may have had some quite different ulterior motive for performing the act.

**Held**, that the accused must have known that the killing of the cow in the presence of Hindus would lead to wounding of their religious feelings and he must be supposed to have intended the necessary consequences of his acts and is guilty under S. 298. A.I.R. 1937 All. 13=1936 A.L.J. 1197=38 Cr. L. J. 202=1936 A.W.R. 1024=166 Ind. Cas. 373 (1).

**—Ss. 298, 426—Wounding religious feelings—Mischief—Pollution of food at a caste dinner.**

Throwing a shoe adjacent to where some people were seated for a dinner with the object of polluting the food and making it impossible for them to partake of the dinner is not mischief under S. 426, which deals with a physical injury arising from a physical cause. Nor is it within S. 298. 1901 A.W.N. 212=24 A. 155.

**—Ss. 299 and 300.**

See also Penal Code, Ss. 302 and 304.

**Synopsis.**

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### 1. Applicability and scope.

#### —S. 299—Applicability—Injury not likely to cause death.

Where it cannot be said that the injuries were likely to cause death, Section 299 will not apply. The words in S. 299 "or with the knowledge that he is likely by such act to cause death" must be read in the light of the language of Section 300. 73 Ind. Cas. 49=9 O.L.J. 490=26 O.C. 18=24 Cr.L.J. 513=A.I.R. 1923 Oudh 97.

#### —Ss. 299 (3), 300 (2) and (4) and 304 (Second part)—Scope and applicability.

Per Pollock, J.—The third clause of S. 299, the fourth clause of S. 300, and the second part of S. 304, I. P. Code, are intended to apply primarily at least, to cases in which there was no intention to cause death or bodily injury, such as reckless driving or shooting, and the second clause of S. 300 is intended to apply, primarily at least, to cases in which the accused knew that the particular person was likely, from some peculiarity of constitution or other special cause to die of an injury that would not ordinarily cause death. Where there was an intention to cause bodily injury and death has ensued, the question will ordinarily be whether the injury which the accused intended to inflict was sufficient in the ordinary course of nature to cause death or was merely likely to cause death, and that will depend mainly on the weapon used, the force with which it was used, the number of blows struck, and the part of the body injured. I.L.R. (1945) Nag. 931=222 Ind. Cas. 389=47 Cr.L.J. 441=A.I.R. 1946 Nag. 120=1945 N.L.J. 612.

#### —S. 300, paras 1, 2 and 3—Scope.

Held, that the language of para. 1 of S. 300 was not limited to the case where the victim was a sick man; it was enough if the accused knew that the injury was likely to cause the death. The effect of S. 86, was to bring the offence within the purview of S. 300, para 2.

Held, further that the offence also fell under S. 200, para 3 and hence the accused was guilty of murder. A.I.R. 1942 Pat. 420=23 P.L.T. 725=21 Pat. 250=9 B.R. 36=43 Cr.L.J. 883=202 Ind. Cas. 637.

#### —S. 300, cls. (1) and (3), scope and applicability.

Clause (1) of S. 300, contemplates the intention to cause death. Intention is always a question of fact

and when proved, is an almost necessary inference from established facts. As a basic rule, one may say that when the doer of an act knows that his act will result in death, he should be deemed to have intended to cause death. Every man is in law deemed to know and to intend the natural and probable consequences of his act. Clause (1) would, therefore, apply only when either the culprit or culprits knew or must have known that death would be the result of his or their act. For cases that fall within cl. (3), it is not necessary that the culprits should have knowledge of death so long as the intended injuries are sufficient to cause death. The question of the sufficiency of these injuries is a matter of evidence and presumably a medical witness is in the best position to give evidence on the point. The correct principle is that a case falls within cl. (3), when the degree of probability of death is very great and certainly so where death is the inevitable result of the intended injuries, whether the culprits intended death or not or even did not know that death would result. Each case has to be judged in the light of the degree of the probability of death and not in the light of the intelligence or knowledge of the culprit, because to do so would place an almost intolerable and unjustifiable burden on the prosecution. A.I.R. 1939 Lah. 245=I.L.R. (1939) Lah. 77=41 P.L.R. 443=40 Cr.L.J. 712=182 Ind. Cas. 900.

#### —S. 300 (i), (ii), (iii) and (iv)—Knowledge or intention — Distinction between several subsection.

One broad distinction between S. 300, cl. (iv) and the first three clauses, is that in the latter the important thing is the intention to kill, while the former says nothing about it. 263 P.L.R. 1914=31 P.R. 1914 Cr.=45 P.W.R. 1914 Cr.=15 Cr.L.J. 610=25 Ind. Cas. 522.

#### —S. 300, para. (2)—Intention to cause such bodily injury, etc., meaning of.

Per Mosely, J. in order of reference. — The expression "intention to cause such bodily injury as is likely to cause death" merely means an intention to cause a particular injury which injury is, or turns out to be, one likely to cause death. It is not the death itself which is intended, nor the effect of the injury. A.I.R. 1940 Rang. 259=42 Cr.L.J. 124=1940 Rang. L.R. 441=191 Ind. Cas. 306 (F.B.).

#### —S. 300, para. (2) — Applicability.

Illustration (b) to S. 300 appears to indicate that this paragraph was only intended to be invoked when some injury which would not in the ordinary course of nature cause death was known to be likely to cause death by the offender in consequence of the latter being aware of some abnormal condition of the deceased. This appellant could not possibly have known that the wounds he inflicted were likely to cause death. In the absence of any evidence to indicate that a blow on a particular part of a person was intended to be given on a more vital part it must be held that the offender inflicted the blow where he intended. Therefore the second paragraph of Section 300, I. P. C. does not apply. 73 Ind. Cas. 49=9 O.L.J. 490=26 O.C. 18=24 Cr.L.J. 513=A.I.R. 1923 Oudh 97.

—S. 300 (3) contains new definition of culpable homicide amounting to murder—Knowledge of effect of injury, if necessary—Meaning of S. 300 (3).



Section 300, sub-s. (3), contains new definition of culpable homicide which is not contained in S. 299 and says that it amounts to murder. This sub section does not mean any more than doing an act with the intention of causing such bodily injury to any person as is or turns out to be sufficient in the ordinary course of nature to cause death. Knowledge of the effect of the injury is not required. A.I.R. 1940 Rang. 259=1940 Rang. 441=42 Cr.L.J. 124=191 Ind. Cas. 306 (F.B.).

—S. 303, para. (3)—Scope—No intention to cause death—No injury likely to cause death—Death by supervening causes—No offence of murder.

Appellant failed to pay rent and deceased reported that he was of bad character. While the deceased was supervising the cutting of jungle by 4 labourers and his two sons, the appellant appeared, and aimed a lathi at him and, when the deceased caught it, took into his right hand his *banha* and struck the deceased twice on the leg, and when he fell on the ground, once on the shoulder and then ran away. The deceased was then taken to the Thana and thence to hospital where he died, as the Medical officer reported perhaps due to shock of the wounds or haemorrhage. Held: if there was any intention to cause death and death was caused by a wound or wounds inflicted in pursuance of that intention the case would be one of murder, even though none of the wounds which the accused inflicted before being interrupted were of a character which would, within the knowledge of the accused or in the ordinary course of nature, have proved fatal. No intention to cause death is proved and consequently, the case will not fall within the first paragraph of section 300. Nor again can the blow be said to have been struck with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. Death from haemorrhage perhaps due to having been carried more than 6 miles cannot therefore, be said to have been a normal result of the wound. The case, therefore, does not fall within the third paragraph of section 300. 73 Ind. Cas. 49=9 O.L.J. 490=26 O.C. 18=24 Cr.L.J. 513=A.I.R. 1923 Oudh 97.

—S. 300, fourthly—Consideration of, when arises.

Where knowledge on the part of an accused person is established under S. 300, a further question as to whether the accused struck the blow without any excuse for incurring the risk of causing such bodily injury as was likely to cause death arises. Such question, however, does not arise where one of the three intentions under S. 300 is established. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

—S. 300, cl. (4), when applies.

Clause (4) of S. 300, comes into play only if no other clause applies and where the intention of the assailants as inferred from the result of their act could at least be that of causing such bodily injuries as the assailants would have known to be likely to cause the death of their victim, the invocation of cl. (4) is altogether erroneous. A.I.R. 1937 Lah. 593=39 P.L.R. 327=38 Cr.L.J. 1073=171 Ind. Cas. 351.

—S. 300, Para (4), applicability of.

The provision in the fourth part of S. 300, I. P. C., applies to a person who commits an act of the nature referred to and has no intention of causing an injury

to any particular individual. Where the accused has deliberately fired shots at the deceased, this provision does not apply. A.I.R. 1937 Cal. 432=41 C.W.N. 1187=38 Cr.L.J. 863=170 Ind. Cas. 29.

—S. 300, para (4)—Scope.

The fourth paragraph of S. 300 can never be invoked in a case where there was intention of causing specific bodily injury to a particular person. Illustration (b) shows that it only applies to a case of dangerous action without an intention to cause specific bodily injury to any person. 73 Ind. Cas. 49=9 O.L.J. 490=26 O.C. 18=24 Cr.L.J. 513=A.I.R. 1923 Oudh 97.

## 2. Attack by several persons.

—Ss. 299, 300, 302 and 325—Assault by several persons on one woman causing injuries leading to death—Some assailants not identified—Offence—Conviction under S. 332—Propriety.

Where the victim of an assault by several persons dies of injuries which were caused by the violence not of one single person but of several persons belabouring the victim, some of whom have not been identified, it is not safe to convict the accused of the offence of murder. The safer course would be to convict the accused of the offence of grievous hurt under S. 325, I. P. Code. 3 A.I.Cr.D. 147=A.I.R. 1949 Ajmer 49=50 Cr.L.J. 1003.

—Ss. 299, 300 and 302—Offence under—Merciless beating—Death by consequent shock and haemorrhage.

If a number of persons armed with formidable weapons administer a prolonged, merciless and indiscriminate beating to a man and he dies by the consequent shock and haemorrhage, the offence committed is murder, because the assailants in such a case must be attributed the intention to cause such injury as is likely to cause death, and they cannot be heard to say that they did not intend what was a likely result of their act and that they did not intend to cause death because either intentionally or by accident no vital parts of the body were hit. 49 P.L.R. 137=A.I.R. 1948 Lah. 58=49 Cr.L.J. 26.

—Ss. 299, 300, 302 and 149—Concerted attack on deceased—Multiple injuries inflicted—Intention is to kill deceased or at least to inflict injuries sufficient to cause death in ordinary course—Death sentence held appropriate except in case of one accused who was young and under influence of other accused.

Two persons were attacked by a number of persons armed with deadly weapons and were done to death. One of the deceased persons had ten injuries two of which were on the head and in view of the fact that they had fractured the skull, the doctor was of opinion that each one of them was sufficient to cause death in the ordinary course. The other deceased person had as many as 25 injuries spread on all parts of his body. His right ulna bone and two ribs were fractured. Death was due to shock caused by all the injuries collectively:

Held, that taking into consideration the concerted attack to which the dead men were subjected and the multiple injuries that were inflicted upon them, there could not be any doubt that the intention of their



assailants was to kill them or at least to inflict injuries that were sufficient to cause death in the ordinary course;

**Held further** that as the offence was premeditated and brutal and there were no extenuating circumstances, the sentence of death under S. 302/149 was appropriate in the case of all the accused except one who being the nephew of the principal accused and very young (20 years old) it could be said that he had acted under the influence of the older members of the party particularly his uncle and, therefore, his sentence should be commuted to transportation for life. A.I.R. 1946 Lah. 229=221 Ind. Cas. 629.

—Ss. 300, 302, 147 and 149.

Unlawful assembly with object to obstruct procession—Stones thrown and other violent acts done—One member of assembly stabbing Sub-Inspector of Police who dying as result—Accused participating in throwing stones—Accused held, guilty under S. 147 only and not under S. 149 read with S. 302—Only one member held, guilty of murder. A.I.R. 1942 Lah. 59=43 P.L.R. 712=43 Cr.L.J. 428=198 Ind. Cas. 796.

—Ss. 300 and 302.

Use of threatening words by two of accused that none of the persons should be left alive, held, did not show that rest of the accused shared homicidal intention with them—These accused alone held guilty of murder and rest of hurt. A.I.R. 1942 Mad. 446=55 L.W. 192=1942 M.W.N. 298=(1942) 1 M.L.J. 460=43 Cr.L.J. 813=202 Ind. Cas. 311.

—Ss. 300 and 302—Convictions for different offences.

Eight persons prosecuted for murder—Death of deceased by spear wound—Only one man armed with spear;

**Held**, that all were guilty of rioting and only one who was armed with spear was guilty of murder. (1942) 23 P.L.T. 684.

—Ss. 300, 304, 147, 149—Unlawful assembly—Conviction under S. 304, requirements of.

In the case of an unlawful assembly, conviction under S. 304 must depend upon one of the two alternatives—either that the person convicted has been proved individually to have committed the offence or that the person convicted has been proved to have been a member of an unlawful assembly, that is to say, of an association of persons having a common unlawful object. A.I.R. 1942 All. 225=1942 A.L.J. 255=1942 A.W.R. 109=43 Cr.L.J. 654=201 Ind. Cas. 518.

—Ss. 300, 302 and 34—Murder and robbery—Only one instrument used—Who gave blow not known—Offence.

A woman was found robbed and murdered in a village. The three accused who produced the stolen property belonged to the same village and were acquainted with the deceased. No explanation was offered by them as to the possession of the property but they merely denied its production. The instrument with which the murder was committed was a crowbar;

**Held**, that the accused were guilty of robbery but the fact that they were not willing to admit that they took part in the robbery which was proved against them ought not to prejudice the question whether they committed murder at the same time.

**Held**, further, that as there was only one instrument used, it was probable that only one of the assailants gave the actual blow, and as it was not known who was the assailant, the accused could only be convicted if it was found that there was common intention to commit murder within S. 34, Penal Code. The circumstances and the evidence showed that the accused committed this robbery, and that pursuant to their common intention to rob the deceased and avoid detection, they had the further intention of murdering her, and that they carried that intention out. A.I.R. 1941 Bom. 139=I.L.R. (1941) Bom. 315=43 Bom. L.R. 144=42 Cr.L.J. 697=195 Ind. Cas. 208.

—Ss. 300 and 302.—A body of six persons went to the house of the deceased with the common object of abducting a woman and murdering the deceased. On their arrival they separated into two bodies, one entrusted to abduct and another to murder. The murder was committed by the latter body:

**Held**, that each gang was guilty of murder under S. 302, as the murder was committed in pursuance of the common object of the unlawful assembly. A.I.R. 1941 Lah. 117=I.L.R. (1940) Lah. 554=42 Cr.L.J. 475=193 Ind. Cas. 666.

—Ss. 300, 302, 149.—Where the common object of the unlawful assembly of assailants was to attack, it cannot be said that only some of the accused should be found guilty under S. 302 read with S. 149. A.I.R. 1941 Oudh 517=42 Cr.L.J. 758=1941 O.W.N. 981=1941 A.W.R. 265=195 Ind. Cas. 630.

—Ss. 300 and 302.—Four persons taking part in commission of murder—No evidence to prove which of the accused committed crime:

**Held**, that in the circumstances of the case even if there was no evidence to prove as to which of the persons present in the house committed the murder, all the four could be convicted of murder. A.I.R. 1941 Pat. 550=22 P.L.T. 1035=7 B.R. 802=42 Cr.L.J. 603=194 Ind. Cas. 622.

—Ss. 300 and 302.—**Held**, on facts, that there was no proof that the common intention was to cause injury known to be likely to cause death, though the combined effect of the injuries actually caused was likely to cause death. The offenders, however, knew that they were likely to cause not only hurt but grievous hurt and that the common intention of the party was to cause grievous hurt, for not only the common assault but also the individual assault committed by the accused was an extremely severe one. A.I.R. 1941 Rang. 301=1941 Rang. L.R. 258=43 Cr.L.J. 123=197 Ind. Cas. 131.

—Ss. 299 and 300—Attack with dangerous weapons by several persons—Instantaneous death—Persons inflicting injury not known—Offence.

If there was a joint attack with dangerous weapons by four or five persons on one man and the latter died almost on the spot as a result of the injuries



inflicted on him, at least the offence of culpable homicide must be said to have been made out, and the mere fact that it is not possible to say who inflicted the fatal injury will not be sufficient to support the finding that no offence of murder of culpable homicide had been committed. A.I.R. 1940 Mad. 43=1939 M.W.N. 879=50 L.W. 557=41 Cr.L.J. 337=186 Ind. Cas. 525.

—**Ss. 300 and 302—Party of accused opening fire on party of deceased in revenge for insult—Accused firing but hitting no one—His companions firing and killing deceased.**

A party of the accused consisting of three, opened fire on the party of the deceased in revenge for an insult of which the brother of the deceased was originally guilty. The shots fired by the accused did not hit any one but his two companions fired and hit the deceased:

**Held**, that S. 34, Penal Code, applied and the accused was guilty of murder. In the circumstances of the case, however, the sentence of death was reduced to one of transportation for life. A.I.R. 1940 Lah. 485=42 P.L.R. 614=42 Cr.L.J. 82=191 Ind. Cas. 125.

—**Ss. 300, 302, 149 and 34—Unlawful assembly—Joint responsibility.**

Where one of the members of an unlawful assembly who is armed with a spear commits an offence under S. 302, when the unlawful assembly was prosecuting its common object which was unlawful, every member of the assembly is equally responsible under the terms of S. 149. It is immaterial whether any member individually intended to commit that offence or not. "Intention" is dealt with in S. 34, and can be considered in those cases only which are governed by it. A.I.R. 1940 Lah. 53=41 P.L.R. 802=41 Cr.L.J. 348=186 Ind. Cas. 603.

—**S. 302 — Murder with robbery — Common intention — Possession of stolen property by one of accused—Common intention.**

Where it is shown that only one person is present at the scene of the theft and it is clear that the crime has been committed, it may well be that the logical conclusion to be drawn from that is that the possessor of the stolen property is the person who committed the crime; but in a case in which there are several persons involved and the question of common intention arises, great care must be taken not to assume that a person merely found in possession of stolen property should have attributed to him, for this reason alone, a common intention respecting the guilt of murder:

**Held**, after considering the facts and the circumstances of the case that the accused was guilty of robbery. A.I.R. 1939=Rang. 361=41 Cr.L.J. 44=184 Ind. Cas. 545.

—**Ss. 300, 302, and 149.**—Where a number of persons armed with lethal weapons gather together with the common object of assaulting a person, it clearly indicates that their common object was to cause grievous hurt with the weapons and that the death was the likely result of the beating they intended to administer. In such a case death is the likely consequence for which all the persons are responsible and as causing death in such circumstances is murder, all are guilty of it by virtue of S. 149. A.I.R. 1939 Lah.

245=I.L.R. (1939) Lah. 77=41 P.L.R. 443=40 Cr.L.J. 712=182=Ind. Cas. 900.

—**Ss. 299 and 300—Conviction of all.**

Where the injury resulting in death has been caused by one of several persons and it cannot be said by which of those persons it has been caused, the persons concerned can all of them only be convicted by the application either of the abetment sections or by the application of S. 34. A.I.R. 1939 Oudh 49=1939=O.W.N. 7=40 Cr.L.J. 187=1939=A.W.R. 27=14 Luck. 378=179 Ind. Cas. 338.

—**Ss. 300, 304, 302 and 325.**

Death caused by single blow on head with lathi—Other injuries on body not indicating determination to beat deceased to death—Case does not come under S. 302 but would come under second part of S. 304—But where it is not known which of several persons actually struck fatal blow, case would properly come under S. 325. A.I.R. 1939 Oudh 49=1949 A.W.R. 27=14 Luck. 378=40 Cr.L.J. 187=1939 O.W.N. 7=179 Ind. Cas. 338.

—**Ss. 300 and 302—Sudden fight ensuing subsequent to exchange of abuse resulting in death—Common intention to commit murder cannot be inferred—Each participant only responsible for his acts.**

Where, from the circumstances, it appears that the common intention of a party of accused was merely to abuse the other party for their insulting behaviour and possibly to use fists and accordingly there was an exchange of abuse between the parties and a sudden fight subsequently ensued resulting in death of one of the opposite party, a common intention to commit murder cannot be inferred. The whole affair is one of a sudden fight in which each participant is responsible only for the individual acts which can be proved against him and the accused in such a case cannot be convicted for any offence other than one under S. 323, I.P.C. A.I.R. 1938 Lah. 747=40 Cr.L.J. 84=178 Ind. Cas. 605.

—**Ss. 299 and 300—Offence committed.**

Where two or more persons unite together and strike a series of blows with dangerous weapons on the body of the deceased, that it is impossible to identify any one of the wounds with any one of the assailants and nevertheless, if the deceased dies as a result of the injuries received, each of the assailants is guilty of the offence of murder. Where one assailant commits the offence by yielding to the threats of other, it is no mitigation of the circumstances. A.I.R. 1938 Pat. 258=39 Cr.L.J. 554=4 B.R. 568=19 P.L.T. 476=175 Ind. Cas. 300 (S.B.)

—**Ss. 299 and 300—Convictions.**

If it is clear from the evidence who had delivered the fatal blow, that accused would be guilty of murder. But where one person was guilty of murder and two of a lesser offence, and it was not established which accused committed murder and which the lesser offence, none of the accused could be found guilty of murder if there was no common intention between them. A.I.R. 1937 Mad. 792=46 L.W. 486=(1937) 2 M.L.J. 490=1937 M.W.N. 1124=39 Cr.L.J. 139=172 Ind. Cas. 382.



**—Ss. 300 and 302—Accused acting in concert—Inference.**

Where it is not known which of the two accused has actually killed the deceased, but there is no manner of doubt that both of them acted in concert, both are guilty of murder. 1937 M.W.N. 1233.

**—Ss. 300, 302 307, 34—Two accused attacking deceased suddenly—Injury by one causing death—Offence of each.**

Where in a sudden fight, the two accused stabbed the deceased and the injury of only one of them was responsible for causing death, only that accused was guilty of murder who caused that injury; the other was guilty of attempt to murder for causing such injury which he knew to be likely to cause death. 1937 M.W.N. 725.

**—Ss. 300, 302 and 34.**

Where two persons charged under S. 302-34 can be held guilty of murder, it must be held that their common intention was the common intention to commit the crime of murder. A.I.R. 1937 Rang. 24=38 Cr.L.J. 284=166 Ind. Cas. 701.

**—Ss. 300 and 302.**

Where a concerted attack is directed against the head of the victim which was smashed, the attack is made with the knowledge that the injury inflicted is sufficient in the ordinary course of nature to cause death and the offence is murder; and whether the attack is an attack by an individual or a concerted attack by more than one person, each person will be presumed to know the consequences of his act. It is not necessary that the common action should be the result of a premeditated plan, but the precise intention of the assailants acting in concert is a matter of inference from their conduct. A.I.R. 1937 Nag. 335=39 Cr.L.J. 131=I.L.R. (1937) Nag. 388=172 Ind. Cas. 367.

**—Ss. 300 and 302—Concerted attack with bamboos.**

Where two ordinary Burmans went to the house of the deceased with bamboo sticks and not *das*;

**Held**, that their common intention was not a common intention to commit the offence of murder. But when these two persons went together, each armed with male bamboo, it must have been within the contemplation of one of them that the result of their assault upon the deceased was likely to be his death, and hence, it must be presumed that they had the common intention of causing such injury as was likely to cause the death of the deceased. Consequently, the common intention was to commit the offence of culpable homicide not amounting to murder. A.I.R. 1937 Rang. 24=38 Cr.L.J. 284=166 Ind. Cas. 701.

**—Ss. 300 and 304—Death caused during fracas—Person taking subsidiary part—Nature of evidence.**

It is necessary in cases where there is a fracas and especially where intention is more particularly drawn to a person who is guilty of the act of stabbing, that the evidence against persons who are taking a subsidiary part should be consistent and clear from the beginning before it can be acted upon by a Court of justice. A.I.R. 1937 Rang. 4=38 Cr.L.J. 366=166 Ind. Cas. 994.

**—Ss. 300, 302, 24—Common intention—Held, that the accused shared the common intention to murder.**

The primary intention of the accused and his confederates, W and P was to abduct T. The accused was armed with a *dashe* and he knew that his two confederates would also come equally armed to the place of ambush and they would resort to the use of force, if necessary, for the purpose of achieving their object. When they arrived at the place of ambush, he found that his confederates were not only armed with *dashe* but with guns also, and that one of them, W actually used his gun against K:

**Held**, that the accused should have then known that his confederates were prepared to go to the length of committing murder, if necessary, to achieve their object and if he did not share their intention to commit murder, if necessary to achieve their object, what he should have done was to abstain from taking further part in the matter. But he did not. Instead he used his *dashe* freely. And from that moment he must be deemed to have the same intention to commit murder as his two confederates. A.I.R. 1936 Rang. 28=37 Cr.L.J. 449=161 Ind. Cas. 297.

**—Ss. 300 and 302.**

Scuffle between two parties—Deceased running to help his father—Accused No. 2 stabbing him with spear—Accused No. 1 then chopping his hand—Another member of the accused's party again stabbing him:

**Held**, that accused No. 1 ought to be convicted of murder although his was not the hand which inflicted the undoubtedly fatal wound. 1936 M.W.N. 644.

**—Ss. 300 and 302.**

If a party of persons armed with lathis make a concerted attack upon the deceased killing him on the spot after inflicting injuries on the head, they are all guilty of murder and they must have known that their acts were likely to cause death. 1935 M.W.N. 51.

**—Ss. 300 and 304.**

If the deceased received several injuries by the hand of several persons and it is not possible to locate whose injury caused death, the person inflicting a blow with a heavy *dang* is guilty under S. 324 only. (1935) 1935 M.W.N. 54.

**—Ss. 300, 302 and 149.**

Where a number of men make an attack with lathis on certain men and one of the latter is killed, all the men making the attack are guilty under S. 149 and other sections. It is not a matter of importance whose *lathi* blow actually injures the deceased A.I.R. 1935 All. 930=1935 A.W.R. 1064=37 Cr.L.J. 85=1935 A.L.J. 1114=159 Ind. Cas. 409.

**—Ss. 300, 302 and 149—Large number of men armed with spears rushing and plunging spears—Offence.**

If a number of men armed with spears rush at another and plunge their spears into his body, then there is only one inference in law, and indeed in fact, which can be drawn, and that is, that the common intention of the assailant was to kill their victim. All the accused are, therefore, punishable under S. 302 read with S. 149, I.P.C. A.I.R. 1935 All. 362=1935 A.W.R. 53=37 Cr.L.J. 32=159 Ind. Cas. 155 (2).



—Ss. 300 and 302—Common intention—Determination.

A mere common intention to commit murder in certain circumstances might not of itself, be sufficient to justify a finding that the accused and his companions had, at the time of the actual occurrence, the common intention of murdering a person. In order to decide whether or not the accused and his companions had the common intention of murdering him, it is necessary to consider what happened immediately before he was shot. A.I.R. 1935 Cal. 526=39 C.W.N. 199=36 Cr.L.J. 1220=157 Ind. Cas. 829.

—Ss. 300 and 302—Striking several times on vital part—Offence.

Where several persons armed with lethal weapons, such as lathis and kantas, assault a single person and strike him several times on a vital part of the body, not only the person who actually inflicted the fatal blow, but all are guilty of causing his death, in as much as the death was caused in the prosecution of a common object, and the rioters, even before they moved to action, knew that death was likely to be committed in the prosecution of their common object. A.I.R. 1935 Oudh 110=36 Cr.L.J. 249=11 O.W.N. 1543=153 Ind. Cas. 81.

—Ss. 300, 302 and 149.

Where the common object of an unlawful assembly was only to be at the members of the opposite party, and during the prosecution of this object, one of them, on the spur of the moment and without premeditation, thrust a spear into the abdomen of a member of the opposite party and killed him:

Held, that it could not be said that the murder was committed in prosecution of the common object of the assembly and the other members of the assembly could not be held guilty of murder under S. 302 read with S. 149, inasmuch as they could not be imputed with a knowledge that the murder was likely to be committed in prosecution of their common object. A.I.R. 1935 Oudh 52=11 O.W.N. 1456=36 Cr.L.J. 268=10 Luck. 320=153 Ind. Cas. 96.

—Ss. 300, 302 and 34—Murder pre-arranged.

Whether the accused is alone and actually fires a fatal shot or whether he is with others and one of them fires the fatal shot is immaterial when the murder is pre-arranged. In such a case, S. 34 will apply to all participants, however many in number. A.I.R. 1935 Pesh. 75=36 Cr.L.J. 958=156 Ind. Cas. 433.

—Ss. 300, 302, 149—Large number of people attacking and killing deceased—Each individual's part not distinguishable—Offence.

Where a large number of people attack and cause the death of a man and there is no evidence to show what individual action any one particular man took and it is not possible to assume common intention to kill, it should be held that the death was caused by the persons as a whole and those persons should be charged under S. 149 read with S. 302. A.I.R. 1935 Rang. 406=37 Cr.L.J. 196=159 Ind. Cas. 1050.

—Ss. 300, 302 and 34.

Per Baguley, J.—If, from the evidence as a whole and all the surrounding circumstances of the case, the Court is of opinion that a legitimate deduction may be made that at the time the robbery occurred the

band of robbers, or any of them had formed the intention of committing robbery, and if necessary, of killing in order to carry out the robbery successfully, each and all of the robbers who had formed that common intention are liable to be convicted under S. 302 read with S. 34. A.I.R. 1935 Rang. 89=36 Cr.L.J. 605=13 R. 210=154 Ind. Cas. 881 (F.B.)

—Ss. 300, 302, 149—Mob murdering certain men—Common object—Inference—Accused not pleading innocent intention—Onus of proof that they did not share common object.

It may well be that a perfectly lawful assembly of citizens may become later a riotous mob and it may be that in the mob there will be a number of innocent people who do not share the common object of the rioters. When a person is found to be amongst a mob of rioters, the law will presume that he shares their common object and intention. If he does not share that common object and intention, the onus is upon him to prove his innocence. What the common object and intention of a mob is, can only be inferred from its actions.

Where a mob has murdered certain men, the only inference which can be drawn is that the common object of the mob was murder. If any of the accused did not share that common object, it is for them to prove that fact. When the defence is not that they were amongst the gathering of villagers with an innocent intention but that they were not there at all, they are bound to rebut the presumption that they shared in the common object of the mob. A.I.R. 1934 All. 776=35 Cr.L.J. 919=4 A.W.R. 191=149 Ind. Cas. 210.

—Ss. 300 and 304.

Where four persons strike the deceased together and it is not known whose lathi caused the fatal injury, still all of them can be held guilty under S. 304. A.I.R. 1934 All. 739=35 Cr.L.J. 1302=3 A.W.R. 835=151 Ind. Cas. 364.

—S. 304.

Death ensuing in riot—Rioters can be convicted under S. 304 read with S. 143 unless any one of them can show that he had not the common object of the assembly in prosecution of which death took place. A.I.R. 1934 All. 881=1934 A.L.J. 640=35 Cr.L.J. 1494=4 A.W.R. 783=152 Ind. Cas. 108.

—Ss. 300, 302, 34 and 114.

Two persons going to commit robbery armed with guns—Persons retreating on coming of villagers—Shots fired while trying to escape. One of the villagers killed from shot fired by one of the persons.

Held, that the other person also was guilty under S. 302 read with Ss. 34 and 114. A.I.R. 1934 Cal. 10=61 Cal. 190=36 Cr.L.J. 803=155 Ind. Cas. 599.

—Ss. 300 and 302.

Death caused by seven accused—No clear evidence as to who inflicted the fatal wound or of common intention to murder—Conviction can be only for grievous hurt, 1934 M.W.N. 729.



## —Ss. 300 and 302.

When three accused intended to harass K and S suddenly intervened and was stabbed, all cannot be convicted of murder. 1934 M.W.N. 893.

## —Ss. 300, 302 and 34—Intention to kill expressed by one accused to another—Liability of both.

When two people attack another armed with **dah** and there is evidence that one of them announced his intention of killing, both these persons are liable for the act committed by one of them under S. 34. Even if S. 34 cannot be brought into play, S. 114 will apply. A.I.R. 1934 Rang. 98=35 Cr.L.J. 905=149 Ind. Cas. 33.

## —Ss. 300, 302 and 149.

Where all the accused in a case were proved to have joined in the abduction of the deceased, but it was doubtful who, if any, of the accused committed the murder and where there was the possibility of some others having joined in the offence of murder after the offence of abduction had been completed, and the ingredients of an offence under S. 149 were not proved:

**Held**, that it would not be safe to convict any of them of murder and they were entitled to the benefit of the doubt in respect of the charge. A.I.R. 1933 Lah. 1035=35 Cr.L.J. 426=147 Ind. Cas. 401.

## —Ss. 300, 302 and 149.

Unpremeditated fight as a result of abuse and sudden quarrel resulting in injury to some—Unlawful assembly is not constituted and accused would be guilty of only rioting and not under S. 302 read with S. 149 although some of them might be guilty under S. 302 for the acts committed by them. A.I.R. 1933 Lah. 928=35 Cr.L.J. 301=147 Ind. Cas. 109.

## —S. 302—Common intention to commit robbery—Commission of different acts by different culprits in furtherance of common intention.

Where the common intention of the culprits was to commit robbery and in furtherance of that intention, different acts were committed by different persons, and A having gone to fetch P for carrying out that common intention, C shot down Q in furtherance of the same:

**Held**, that as the shooting down of Q was done in furtherance of the common intention, notwithstanding the absence of A from the scene of occurrence, A must be deemed to have been participating in the joint criminal action in the course of which the murder was committed and hence must be held constructively liable under S. 302. A.I.R. 1933 Lah. 819=35 Cr.L.J. 72=34 P.L.R. 1003=14 Lah. 814=146 Ind. Cas. 376.

[52 Ind. Cas. 395=A.I.R. 1919 Lah. 256 and A.I.R. 1914 Cal. 901 Held overruled by A.I.R. 1925 P.C. 1 (P.C.)].

## —Ss. 300, 304, 34, Part II, 325—Conviction in the alternative under the two sections—Identity of author of fatal injuries not known—Conviction.

Where a person was killed as a result of fatal injuries inflicted on his head, but the author of the injuries is not known, then unless there is a suggestion that S. 34, Penal Code applies, each of the accused must be held responsible for his own act and not for that of his co-accused. A.I.R. 1933 Lah. 865=34 Cr.L.J. 1210=146 Ind. Cas. 221 (1).

## —Ss. 300 and 302—Joint commission of offence—Common intention.

The mere fact that several persons took part in a crime, in the absence of a common intention, is not sufficient to convict them of that crime. Under S. 34, the existence of a common intention being the sole test of joint responsibility, it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. (1933) 142 Ind. Cas. 741=34 Cr.L.J. 404=15 N.L.J. 404.

## —Ss. 300, 302 and 149.

Where a gang of persons with the common object of committing a dacoity is arrested and one of the members of the gang, in order to make an escape fires at the pursuers and one of the pursuers does, the other members of the gang cannot be convicted of an offence under S. 302 read with S. 149 although it may appear that the members of the gang carried arms in order to overawe the people of the village. A.I.R. 1933 Oudh 53=34 Cr.L.J. 101=9 O.W.N. 977=140 Ind. Cas. 892.

## —Ss. 300, 302, 34—Accused inciting others to cut the deceased to death—Death of deceased as a result—Offence committed by accused, nature of.

The accused and certain others armed with **dah** and spears attacked a house and the accused incited the others to set fire to the building and they set fire to the house; and on his inciting them to cut the deceased, they cut a woman to death:

**Held**, that the accused took an actual part in the assault and that under the provisions of S. 34, he was as much guilty of murder as the actual person who delivered the blow. A.I.R. 1933 Rang. 236=11 Rang. 354=35 Cr.L.J. 41=146 Ind. Cas. 392.

## —Ss. 300, 302, 304, 323—Joint assault—Fatal injury inflicted by one—Liability of all the assailants for murder—Common intention to kill.

Four coolies of a tea estate persons of very primitive belief and rudimentary intelligence, thinking that another person had by sorcery made one of them dumb, set upon him while he was sitting in a courtyard. One of them finding a knife in the pocket of the victim took it out and stabbed him fatally. All the four dragged him and buried him in a well. The Jury found the person who had used the knife guilty of murder but acquitted the three others of the charge of murder:

**Held**, that all the accused having taken part in the affray from the beginning with the intention to kill the deceased, all the four were guilty of murder. A.I.R. 1932 Cal. 815=33 Cr.L.J. 663=139 Ind. Cas. 81 (F.B.).

## —Ss. 300, 302, 304-II, 325—Joint assault—Death caused by single blow—Actual assailant unknown.

The fact that there were two assailants and only one blow was struck and that it is not shown who struck that blow is not sufficient to reduce an offence which otherwise amounts to murder, to one under S. 304-II or S. 325, Penal Code.

[The High Court reduced the sentence to transportation for life on a consideration of all the circumstances of the case including the fact that the origin of



the fight was shrouded in obscurity]. A.I.R. 1931 Lah. 538=32 P.L.R. 537=32 Cr.L.J. 1083=133 Ind. Cas. 887.

—Ss. 300, 302, 34, 325—Fatal blow by one—Liability of others—Absence of common intention, effect of.

Section 34 deals with the doing of separate acts similar or diverse, by several persons; and if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself. But if there was no common intention to cause hurt to the deceased and the fatal blow struck by one of the accused was an unpremeditated act springing from the mind alone, then the other accused are not constructive participators in that act even though they may have struck one or more blows. Further, it cannot be held that though they did not participate in the act of murder owing to the absence of a common intention, still they are liable for a lesser offence arising out of the act of the other accused. A.I.R. 1931 Lah. 749=12 Lah. 442=32 Cr.L.J. 1219=32 P.L.R. 925=134 Ind. Cas. 793.

—Ss. 300 and 302.

When several persons join in beating another with lathis and inflict such serious injuries on him that he dies shortly after the beating, all are guilty of the offence of murder without distinction. A.I.R. 1931 Lah. 536=32 Cr.L.J. 645=32 P.L.R. 414=131 Ind. Cas. 122.

—Ss. 300 and 302.

Per Dalip Singh J.—If a large number of persons go to assault one man with dangs, it may be held that death is likely to ensue; this presumption, however, does not apply with the same force in the case where a large number of people are assaulting a similar large number of people even though some of them are armed with dangs and sticks. A.I.R. 1931 Lah. 513=32 Cr.L.J. 888=132 Ind. Cas. 381.

—Ss. 300 and 302.

Per Coldstream, J.—Where two men together repeatedly strike another on his head with lathis with sufficient force to break his skull in several places, their offence must be held to fall under S. 300 (Thirdly), for their intention could not be other than to inflict such injury as is sufficient in the ordinary course of nature to cause death. (31) 134 Ind. Cas. 205 (206)=32 P.L.R. 401=32 Cr.L.J. 1127.

—Ss. 299 and 300—Several persons joining with common object—Proof of intention to commit murder—Liability of persons actually present.

Where one of the accused is shown to have been present when the fatal blow was struck and it is further proved that he shared with the others the intention to cause death or injury sufficient in the ordinary course of nature to cause death he can be justly convicted of murder even though there is no proof that he struck any blow to the person murdered and that the person was killed by the blows struck by the other persons alone. 8 Rang. 603=130 Ind. Cas. 355=32 Cr.L.J. 495=1931 Cr.C. 17=A.I.R. 1931 Rang. 1 (F.B.).

—Ss. 300, 302 and 109—Conspiring to kill—No evidence who dealt the fatal blow—All guilty of abetment of murder.

It was found that two accused and the approver conspired to commit theft and in pursuance of that conspiracy to kill H in order to enable them to commit theft but there was no direct evidence as to who dealt the fatal blow:

Held, that the accused are guilty of abetment of murder under S. 302 read with S. 109. 11 Pat. L.T. 520=127 Ind. Cas. 566=A.I.R. 1930 Pat. 164.

—Ss. 300 and 302—Intent to rob and if need be to kill any one obstructing—One person killed—Liability constructive.

Some persons went to another's house with the object of robbery, but with the intention of killing anyone who would obstruct them in the attainment of their object, and killed one person in the prosecution of such intention.

Held: that their liability was constructive it being impossible to say which of them was directly responsible for the death and punishment of death would not be justified. 120 Ind. Cas. 180=11 L.L.J. 20=31 Cr.L.J. 41=A.I.R. 1929 Lah. 292.

—Ss. 300 and 302—Doubt as to who struck the fatal blow—All guilty of murder.

Where it cannot be found who among the assailants struck the blow which proved to be fatal all the assailants can be held guilty of murder: 35 All. 329, Foll. 118 Ind. Cas. 473=1929 Cr.C. 529=30 Cr.L.J. 944=A.I.R. 1929 Nag. 325.

—Ss. 300 and 302—At least two fatal injuries on the head—Could not have been caused by same instrument—Both liable for murder.

Where two assailants, bearing dangerous instruments assaulted the deceased and all the blows were aimed at the head, with the result that two fatal injuries were caused, and these injuries were such as could not be caused with one and the same instrument.

Held: that each of the two assailants was responsible for one of the fatal injuries and therefore, both were guilty under S. 302. 118 Ind. Cas. 50=30 Cr.L.J. 870=A.I.R. 1929 Nag. 125.

—Ss. 300 and 302—Fight between two parties—A member of one party struck with stick one of the other party—The latter struck the other on the head which proved fatal—Others not guilty on account of constructive liability.

Certain persons who were members of party A had the common unlawful object to resist a process-server and agents of the decree-holder who formed another party B and to cause hurt to their persons. Marpit began between the two parties in which, party A was faring badly. Then suddenly, S, a member of party B came on the scene and inflicted a blow with his stick on P, a member of party A, and in return P gave a blow to S causing a wound on his head which proved fatal:

Held, that the members of party A other than P were not guilty for the offence of murder on account of their constructive liability under S. 149; 20 W.R. Cr. 5 (F.B.), Foll.

Held, further that under the circumstances P could not be said to have committed offence under S. 302, but only of culpable homicide punishable under



S. 304. 114 Ind. Cas. 449=30 Cr.L.J. 307=A.I.R. 1929 Nag. 14.

—Ss. 300, 302 and 149—Assailants armed with weapon found in immediate presence of deceased—Conviction under Ss. 302—149 is proper.

Where a small body of Mahomedans numbering between 50 and 100 was attacked without any proved provocation by several hundred Hindus and was pursued to some distance, as a result of which one Mahomedan died almost on the spot, another was fatally wounded and died eight days later and six Mahomedans were injured in less serious manner, and it was found that each of the accused was armed either with a sword, spear or lathi and they were found in the immediate presence of the persons actually killed:

**Held**, that conviction under S. 302 read with S. 149 would be right. 109 Ind. Cas. 120=26 A.L.J. 139=9 A.I.R. 249=9 L.R.A. Cr. 30=29 Cr.L.J. 472=A.I.R. 1928 All. 280.

—Ss. 300, 302 and 34—Common intention to murder—One did the deed—All guilty as principals.

Where four persons took a woman out with the knowledge and with the purpose that one of their number should murder her, and one of their number did murder her, then that murder is done in furtherance of the common intention of all and all the four men are guilty of the crime as principals under S. 34. 98 Ind. Cas. 113=27 Cr.L.J. 1265=A.I.R. 1927 Sind 85.

—Ss. 300 and 302—Armed to murder any resisting robbery—Two did the deed—All are liable.

Where four persons armed with deadly weapons fully prepared to commit murder in the event of resistance and two of them actually committed murder before any resistance was offered to them. **Held** that each of the robbers is equally guilty of the offence of murder. A.I.R. 1925 P.C. 1 (P.C.) Foll. 89 Ind. Cas. 718=26 Cr.L.J. 1406=A.I.R. 1926 Lah. 63.

—Ss. 300 and 302—Unlawful assembly—Armed to strike any resister—All liable if anyone of them inflicted fatal injury.

Where five persons assembled at the water-head to take water by force and armed themselves with deadly weapons to strike and vanquish anybody who should stand in their way and prevent them from accomplishing their purpose.

**Held**, that they constituted an unlawful assembly and became guilty of rioting when they used their deadly weapons in pursuance of their common object, and further that as every one of them knew that these weapons were likely to be used with deadly effect, they were all responsible if any one of them inflicted a fatal injury. 92 Ind. Cas. 217=7 L.L.J. 576=26 P.L.R. 820=27 Cr. L. J. 233=A.I.R. 1926 Lah. 4.

—Ss. 300 and 302—Joint attack.

Where the appellant and his son jointly attacked the deceased and it resulted in death, the accused were rightly convicted for murder. 95 Ind. Cas. 603=5 Bur. L. J. 12=27 Cr.L.J. 827.

—Ss. 300 and 304.

Where it was clear that one of the accused caused the fatal injury, but, under the circumstances, it was impossible to say which of them caused that injury:

**Held**, that either of them cannot be convicted under S. 304. 86 Ind. Cas. 341=7 L.L.J. 44=26 Cr.L.J. 757=A.I.R. 1925 Lah. 318.

—Ss. 300 and 304.

Where five persons armed with dangerous weapons made an attack upon another and death was due to a single blow inflicted by one of them but who that one was, was not proved:

**Held**, they could not be convicted under S. 304 read with S. 34 but should be convicted under S. 325 read with S. 100 or rather S. 114, as they had armed themselves with dangerous weapons. 86 Ind. Cas. 337=6 L.L.J. 385=26 Cr.L.J. 753=A.I.R. 1925 Lah. 117.

—Ss. 300 and 304.

Where only one blow was struck on the head which resulted in the death and there was no evidence to show which of the accused struck the fatal blow:

**Held**, none of them can be convicted of culpable homicide. 85 Ind. Cas. 941=26 Cr.L.J. 653=6 L.L.J. 268=A.I.R. 1924 Lah. 555.

—Ss. 300 and 304.

Grievous hurt causing death owing to a single blow on the head justifies conviction of all the assailants under S. 325 but not under S. 304, where who gave the blow is unknown. 84 Ind. Cas. 861=26 Cr.L.J. 381=6 L.L.J. 317=A.I.R. 1924 Lah. 654.

—Ss. 300 and 302—With lathis—All joined in beating—Who gave the fatal blow—Immaterial—All guilty.

One B an elderly Kachhi was mercilessly beaten by the four accused. There had been litigation between B on the one side and two of the accused, on the other, in which B had been entirely successful. B was taken to the hospital where he died two days afterwards. All the accused had joined in beating B when he was on the ground with lathis and they inflicted such serious injury to him that he died two days afterwards:

**Held**, that they must have known that at the least they were causing injury which was likely to cause death, and if death resulted they are guilty of murder. In such cases it is immaterial by whose lathi the fatal injury is inflicted. 29 All. 282 is no longer good law. 74 Ind. Cas. 858=45 All. 727=21 A.L.J. 623=4 L.R.A. Civ. 205=24 Cr.L.J. 826=A.I.R. 1924 All. 145.

—Ss. 300 and 304.

Where it is not shown that the accused did any act which caused the death of the deceased, he can only be convicted under S. 304 if it is shown that there was an unlawful assembly of five or more persons whose common object was to commit an offence under S. 304 and accused was one of them. 69 Ind. Cas. 380=14 M.L.W. 588=30 M.L.T. 18=A.I.R. 1921 Mad 687.



**—Ss. 299 and 300—Attack by several persons—Common intention to cause death liable for murder.**

Where the evidence showed that four men armed with deadly weapons pursued the deceased and set upon him and killed him:

**Held**, that their common intention was to cause his death or to cause such bodily injury as was likely to cause death and under these circumstances all those who took part in the murderous assault upon him were guilty of murder. 69 Ind. Cas. 449=23 Cr.L.J. 721=A.I.R. 1924 Lah. 415.

**—Ss. 300 and 302—With lathis—Killed on the spot—Injuries on the head—Ring-leader—Penalty of.**

Where a number of men armed with lathis make a concerted attack upon another man and practically kill him on the spot, inflicting injuries on the head, as the result of blows which must have been struck either with the intention to kill, or at any rate with the intention to cause hurt such as the strikers must have known to be imminently likely to result in the death of the person struck, in the case of the ring-leader at least in such an assault, the penalty prescribed by the law as the proper penalty in cases of murder will be inflicted. 71 Ind. Cas. 234=20 A.L.J. 900=24 Cr.L.J. 106=45 All. 130=A.I.R. 1923 All. 88.

**—Ss. 300 and 302—Beating by all—Death caused—No common intention—Not known who gave fatal blow—None guilty of murder.**

Where three accused beat the deceased and it was not proved who gave the fatal blow or that the common intention of the accused was to commit murder:

**Held**, that none of the accused can be convicted of murder. 76 Ind. Cas. 705=1 Rang. 390=2 Bur. L.J. 142=25 Cr.L.J. 241=A.I.R. 1923 Rang. 268.

**—Ss. 300, 302 and 34—Conjoint beating resulting in death—All guilty—When Excep. 4, would apply.**

Where the accused all conjointly beat the deceased and caused his death, under S. 84, Penal Code, they are equally guilty of the offence of murder, Exception 4 to S. 300 would have been applicable to the facts of this case but for the facts that the assailants took undue advantage and acted in a cruel and unusual manner in inflicting serious injuries upon an old man of 69 years. 81 Ind. Cas. 35=4 L.L.J. 276=25 Cr.L.J. 347=A.I.R. 1922 Lah. 260.

**—Ss. 300 and 302—Several persons beating with heavy lathis—Natural consequence of such action presumed—All guilty of murder.**

When one man sets about trouncing another with a heavy lathi, and still more when two or more do so, it is more than merely likely that one blow at least will land on the head of the man attacked, however careful his assailants may be to avoid the head, and that he will die of a fractured skull in consequence.

Every sane person of the age of discretion is presumed to intend the natural and probable consequences of his own act, and that in deciding what are the natural and probable consequences of an act the only safe rule to apply is to regard every actual

consequence as a natural and probable consequence unless and until the contrary is affirmatively shown.

Where A joined B in beating C with heavy stick and in consequence C died of fractured skull:

**Held**, that A must be presumed to have intended together with B to cause C's death and both were guilty of murder. 64 Ind. Cas. 838=23 Cr.L.J. 54=A.I.R. 1921 Nag. 78.

**—Ss. 299 and 300—One of two killed—Intention to kill him presumed.**

Where several persons attack two men A and B, but kill only B, whether their object was to get at A, more than at B, or whether they went at B, mistaking him for A, they shall be taken to have intended to kill B and there can be no question of B's death being accidental. 62 Ind. Cas. 545=22 Cr.L.J. 529=22 Bom. L.R. 1274.

**—Ss. 299 and 300—Lathi blows directed at the head—Knowledge imputed.**

Where three persons attack with lathis, the blows being directed at the head they must be imputed with the knowledge that they were likely to cause death. 60 Ind. Cas. 676=22 Cr.L.J. 276=3 U.P.L.R. (Lah.) 34.

**—Ss. 299 and 300—Common intention is to cause grievous hurt—One member causing death—Several liability.**

Where one member of an unlawful assembly, actuated with the common intention of causing grievous hurt, but actually causing death, is responsible for causing another's death, he is guilty under Ss. 147 and 304 and the rest under S. 304 read with S. 149. 60 Ind. Cas. 679=22 Cr.L.J. 279=7 O.L.J. 671.

**—Ss. 299 and 300—Attack by several persons.**

When in a fight among persons armed with lathis one dies from the injuries received by him, all the others are punishable under S. 304 as it would not be certain whose blow caused the death. 58 Ind. Cas. 942=21 Cr.L.J. 862 (All.).

**—Ss. 299 and 300—Attack by several persons—Unpremeditated attack—Two persons—Death—Offence.**

Two persons on receiving provocation delivered an unpremeditated attack on the deceased. It was not known who struck the fatal blow. **Held**, that both were guilty of an offence under S. 325, I.P.C. 2 P.W.R. 1920 Cr. =2 U.P.L.R. (Lah.) 22=21 Cr.L.J. 3=54 Ind. Cas. 51.

**—Ss. 299, 300 and 302—Attack by several persons—Fight among three persons—Death of one—No common intention—Offence.**

In a fight which ensued over the division of property between three persons, one of them was hit by a lathi and died. It did not appear which of the other two had struck the blow which caused his death. **Held**, that the accused were not acting in concert and none of them could be convicted of murder. 17 A.L.J. 1095.



**—Ss. 299 and 300—Attack by several persons—Murder—Joint attack.**

Where several persons jointly attacked and caused the death of the victim by lathis, all are guilty of murder. 16 A. L. J. 918=20 Cr. L. J. 22=48 Ind. Cas. 502.

**—Ss. 299, 300 and 325—Attack by several persons—Doubt as to who struck fatal blow—Culpable homicide.**

Where in a free fight several persons attack one, and the evidence is doubtful as to which of the assailants struck the blow, which caused the death, the accused could not be guilty of culpable homicide but only of grievous hurt under S. 324, for it was not the common intention of all of them to cause death. 29 All. 282, Foll. 40 All. 103=16 A. L. J. 11=19 Cr. L. J. 150=43 Ind. Cas. 438.

**—Ss. 299, 300 and 325—Attack by several persons—Culpable homicide—Grievous hurt.**

Where death is caused by blows struck to the deceased by several accused persons and it cannot be made certain which blow was struck by any individual accused, the conviction should be under S. 325 and not S. 304. 37 P. R. 1914 (Cr.), Foll. 109 P. L. R. 1916=45 P. W. R. 1916 Cr.=17 Cr. L. J. 451=36 Ind. Cas. 131.

**—Ss. 299, 300 and 149—Knowledge or intention.**

Where one of the accused, who belonged to the gang of dacoits was arrested when he was being pursued by villagers while the other being separated, shot, and killed a pursuer it was held that the accused arrested could not be convicted under S. 302, I. P. C., as he was separated from the real murderer who no longer belonged to the gang. 17 Bom. L. R. 906=16 Cr. L. J. 745=31 Ind. Cas. 345.

**—Ss. 299, 300 and 313—Attack by several persons—Four accused joined in beating a man to death—Two only gave fatal blow—The liability of the other two.**

When four persons were engaged in beating another out of whom two gave him fatal blows while the other two only struck him on the body and it was not shown that they had realised that they were committing murder or how grave the injuries inflicted by their comrades were, **Held**, that the latter were guilty only of simple hurt under S. 323. 41 P. W. R. 1914 Cr.=16 Cr. L. J. 93=220 P. L. R. 1915=26 Ind. Cas. 1005.

**—Ss. 299, 300, 302 and 304—Attack by several persons—Several persons beating one unarmed man with lathis—Murder.**

Where five persons assaulted a man with lathis and beat him to death, all were guilty of murder since they all had knowledge of the consequences though it was not unknown whose blow was fatal. 14 Ind. Cas. 649, not approved. 35 All. 560=11 A. L. J. 926=14 Cr. L. J. 685=21 Ind. Cas. 1005.

**—Ss. 299, 300 and 326—Attack by several persons—Murder—Two accused—Doubtful as to who caused the mortal injury—Common intention.**

Where two accused were charged with murder and it is not clear as to which of them caused the mortal injury, both of them should not be sentenced unless a

common intention to murder is established by the circumstances of the case. 6 Bur. L. T. 68=14 Cr. L. J. 396=20 Ind. Cas. 220.

**—Ss. 299 and 300—Attack by several persons—Liability.**

Per **Lindsay, J. C. (dissenting)**.—When the acts of a combination of persons are blows causing severe bodily injury sufficient in the ordinary course of nature to cause death each of the accused persons taking part in such combination is guilty of murder.

Per **Kannaiyalal, A. J. C.**:—Where persons go with a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose but not for unpremeditated acts beyond the original object and intention.

**Per Rafique, A. J. C.:**—

Where the cumulative effect of some or all injuries inflicted by several persons is death, all are guilty. Where only one deals the fatal blow while others cause minor injuries, the former alone is liable for the fatal blow. Where the fatal blow is not traceable to any particular person while all cause minor injuries, none is responsible for the fatal blow since the common intention of all was not necessarily to commit murder. 16 O. C. 19=14 Cr. L. J. 241=19 Ind. Cas. 497.

**—Ss. 299, 300 and 160—Attack by several persons—Culpable homicide—Two persons fight—Death of one.**

**L** and **M** met and after abuse came to blows and each struck the other down. Others had also joined the fight and **M** died of the injuries received. There was no reliable evidence that **L** alone was the assailant. **Held**, that **L** could not be convicted under S. 304, I. P. C., and no offence had been committed. 11 P. L. R. 1912 Sup.=32 P. W. R. 1912 Cr.=13 Cr. L. J. 718=16 Ind. Cas. 526.

**—Ss. 299 and 300—Attack by several persons—Intention.**

Four persons who attacked a man and caused his death are guilty of an offence under S. 302 if their common intention was to cause death or bodily injury likely to cause death or sufficient in the ordinary course of nature to cause death, and of an offence under S. 304 if their common intention was to make a violent assault, and they knew that it was likely to cause death. 13 Cr. L. J. 159=13 Ind. Cas. 847 (All.)

**—Ss. 299, 300 and 147—Attack by several persons—One member causing death.**

Where one member of an unlawful assembly does an act which causes the death of a person and there is no sufficient ground for holding that the act was done in pursuance of the common object, the member who alone caused the death is guilty of an offence under the S. 304. (1911) 1 M. W. N. 130=9 M. L. T. 362=12 Cr. L. J. 124=9 Ind. Cas. 727.

**—Ss. 299 and 300—Attack by several accused.**

Where there are several persons accused of murder and there is no reliable evidence as to who struck the fatal blow it is not safe to differentiate the guilt of the accused and sentence some of them to the extreme



penalty of the law. 9 M.L.T. 103=12 Cr.L.J. 48=9 Ind. Cas. 288.

—Ss. 299 and 300—Attack by several persons—Murder—A person murdered by two—Doubt as to which of the two committed murder.

When it is shown that one of two persons must have committed murder but it is not clear, which of the two, both must be acquitted. 22 C. 638, Foll. 8 P.W.R. 1909 Cr.=10 Cr.L.J. 321=3 Ind. Cas. 622.

—Ss. 299 and 300—Attack by several persons—Murder—Assault by more than one person—Evidence not showing who inflicted blow—Murder.

Where two or three persons attacked two others and inflicted serious injuries on them which caused their death and the evidence did not show which blow was dealt by which individual it is reasonable to infer that the accused persons in making the brutal and fatal assault must have known that it would result in the death of the persons assaulted and that the accused could therefore be convicted of murder. 7 Cr.L.R. 125 (Mad.)

### 3. Causing death.

—Ss. 299 and 300—Causing death—Meaning of—Murder—Intention to cause the death of a person alive or believed to be alive necessary.

Accused struck his wife on the head with a ploughshare which rendered her senseless. He believed her to be dead and to lay the foundation for a false defence of suicide he proceeded to hang her from a beam by a rope, which resulted in her death by asphyxiation:

Held, that the accused was not guilty of murder. The expression 'causing death' in S. 299 of the Penal Code means putting an end to a human life. A man is not guilty of culpable homicide if his intention was directed to what he supposed to be a lifeless body, 18 C. W. N. 1279, Foll. 42 Mad. 547=37 M.L.J. 17=26 M.L.T. 68=10 L.W. 45=(1919) M.W.N. 340=20 Cr. L. J. 404=51 Ind. Cas. 164.

—Ss. 299, 300 and 325—Causing death, meaning of.

Where the accused assaulted his wife who became unconscious and thinking her to be dead he hung her up to give an appearance of suicide but the medical evidence showed that she died of hanging. Held, that the accused could not be convicted under S. 302, I.P.C., as there was no intention to kill her and as he thought that she was already dead. But he was guilty under S. 325 of the Penal Code. 18 C.W.N. 1279=15 Cr.L.J. 709=26 Ind. Cas. 157.

—Ss. 299 and 300—Causing death, meaning—Murder—Intention to murder some one else—Murder by poison.

The accused prepared sweet containing poison with the intention of giving them to her husband. The husband with some others ate them. One of the guests died in consequence of it. Held, that the accused was guilty of murder, as the intention of causing death does not mean the death of any particular person. 22 M.L.J. 333, Foll. 39 All. 161=15 A.L.J. 13=17 Cr. L. J. 505=36 Ind. Cas. 473.

—Ss. 299 and 300, Illus. (d)—Causing death, meaning of—Intention of the accused.

It is not necessary that the person charged with the offence of murder should intend to cause the death of any particular person. Absence of proof of motive does not affect the man's guilt. (1910) M.W.N. 77=7 M.L.T. 314=11 Cr. L. J. 222=20 M. L. J. 657=6 Ind. Cas. 51.

### 4. Child in mother's womb—S. 299, Expl. (3).

—S. 299, Expl. 3—Child in mother's womb—Newly born child—Proof of life after having wholly or partially emerged from its mother.

Under the English Law the child must be completely emerged to constitute a human being. But under S. 299, Expl. 3, I.P.C., it must be proved not only that the child breathed and was therefore a living child (for that might have been done while it was entirely in the mother's womb) but that it breathed after it had wholly or partially emerged from its mother's womb. 29 P.R. (Cr.) 1915=17 Cr. L. J. 20=46 P.W.R. 1915 Cr.=32 Ind. Cas. 148.

### 5. Death avoidable by proper treatment—S. 299, Explanation (2).

—S. 299, Expl. 2—Applicability—Thrust with knife into abdomen—Death ultimately due to gangrene and paralysis of intestines—Offence.

A thrust with a knife into the abdomen viscera deep, causing the intestines of the victim to emerge, is sufficient in the ordinary course of nature to cause death. The fact that death is ultimately due to the supervention of gangrene and paralysis of the intestines and that the medical evidence was to the effect that, if an operation had been performed within an hour of the causing of the injury, the victim's life might have been saved, cannot reduce the offence from murder to culpable homicide, in view of Expl. 2 to S. 299. I.P. Code: I.L.R. (1948) Nag. 435=1948 N. L. J. 471=49 Cr.L.J. 647 (2)=A.I.R. 1949 Nag. 19.

—S. 299, Expl. (2)—Stabbing in vital part of body—Offence.

Where an accused has stabbed the deceased on a vital part of the body and the deceased has died as a direct result of that injury and the injury is one which in the ordinary course will cause death, the accused is guilty of murder. The mere fact that the deceased might have been saved if expert medical attention had been afforded at once makes no difference as to the nature of the crime. A.I.R. 1940 Mad. 293=50 L.W. 787=1939 M.W.N. 1129=41 Cr. L. J. 491=187 Ind. Cas. 632.

—S. 299, Expl. (2)—Inefficiency of treatment—Effect.

Where an injury is intentionally inflicted the defence that no proper medical treatment was forthcoming does not exonerate the person who caused the injury from guilt of murder if he intended that the injury should be sufficient in the ordinary course of nature to cause death, or knew that it was likely to cause death to that person. It does not exonerate him from guilt of culpable homicide if death ensues as a natural or likely consequence. Such a person is deemed to have caused the death, and his degree of criminal responsibility must depend on the knowledge or intention to be gathered from the proved facts. A.I.R. 1937 Rang. 396=1937 Rang. L.R. 384=38 Cr. L. J. 1097=171 Ind. Cas. 574 (F.B.).



—S. 299, Expl. (2)—Death avoidable by proper treatment—Whether alters nature of crime.

A person may be guilty of murder notwithstanding that death would have been avoided if the injured person had submitted to proper treatment. A person may be guilty of murder when the immediate cause of death is the treatment administered, and the question whether the treatment was proper treatment does not arise, provided that it was administered *bona fide* by a competent physician or surgeon. A.I.R. 1936 Rang. 442=37 Cr. L.J. 1119=14 R. 643=165 Ind. Cas. 245.

—S. 299, Expl. 2—Injuries caused not direct cause of death—Death as a result of gangrene—Offence.

Where the deceased did not actually die from the injuries but died from the gangrene which set in consequence of some dirty substance, such as a bandage on the *da* with which the injuries were caused, coming into contact with one injury, although the injuries were not the direct cause of death, never the less under Expl. 2 to S. 299 the person who caused the injuries must be held to have caused the death. A.I.R. 1936 Rang. 526=38 Cr. L.J. 103=165 Ind. Cas. 911.

—S. 299, Expl. (2)—Deceased dying due to ignorance and unskilful treatment—Offence.

Where the death of the deceased was due to her ignorance and the unskilful treatment which she received in her village, and the injuries on her head were only the remote cause of death.

**Held**, that the accused was not responsible for causing death and that he was not guilty of culpable homicide. A.I.R. 1935 Rang. 418=37 Cr. L.J. 205=159 Ind. Cas. 1032.

—S. 299, Expl. (2).—The idea that the victim of a murderous assault must take such great care of his health and that he does not by any neglect or omission on his part hasten the advent of his death, is not countenanced by any provision of the Penal Code. A.I.R. 1934 Oudh 405=35 Cr. L.J. 1113=11 O.W.N. 851=150 Ind. Cas. 819.

—S. 299, Expl. 2—Inefficient treatment—Effect.

The mere fact that the death of the deceased could have been prevented by proper treatment cannot take away a case from the operation of S. 299. A.I.R. 1932 Oudh 279=9 O.W.N. 655=34 Cr. L.J. 99=140 Ind. Cas. 706.

—S. 299, Expl. (2)—Prompt or better treatment—Might have saved.

The mere fact that more prompt or better treatment would have saved the deceased cannot exonerate the accused from liability for the death. 108 Ind. Cas. 164=10 A.I.Cr. R. 39=29 Cr. L.J. 345 (Lab.)

—S. 299, Expl. (2)—Murder or culpable homicide—Fracture—Gangrene—Grievous hurt.

Where in a scuffle the accused struck three lathi blows which fractured the bones and caused gangrene resulting in death but it was found that the accused did not intend to cause death, the accused is not guilty of murder but of manslaughter. 42 All. 302=21 Cr. L.J. 783=18 A. L.J. 224=58 Ind. Cas. 463.

12—F. Y. D.—11.

## 6. Evidence and proof.

### Synopsis.

- (a) Burden of proof.
- (b) Child witness.
- (c) Circumstantial evidence.
- (d) Conduct of accused.
- (e) Confession and retracted confession.
- (f) Dying declaration.
- (g) Evidence of approver.
- (h) First information report.
- (i) Medical and other expert opinion.
- (j) Murder by poisoning.
- (k) Murder by strangulation.
- (l) Possession or production of property of deceased.
- (m) Proof of death.
- (n) Solitary witness.
- (o) Statement of accused.
- (p) Suicide or murder.
- (q) Miscellaneous.

### 6 (a). Evidence and proof—Burden of proof.

—Ss. 299, 300 and 302—Murder by fire-arm—Ingredients of offence—Burden of proof—Theory of accidental explosion—Special plea and proof by accused—If necessary—Evidence Act, S. 105.

In a trial under S. 302, I. P. Code, for murder by a fire-arm, the prosecution has to show not only that the firing was intentional or voluntary but also that the firing was prompted by any such intention or knowledge as is mentioned in S. 300, I. P. Code. If neither of these ingredients is proved, the offence committed is not murder whatever else it may be. In such a trial the first question is whether the firing was intentional and on this issue the accused is under no obligation to prove that the firing was not intentional but only accidental, the initial onus of proving the intent being always on the prosecution. If considering every relevant fact the theory of accidental explosion remains as likely as that of intentional firing or even reasonably possible the accused must be acquitted on the ground that the prosecution has failed to prove one of the essential ingredients of the offence of murder. In such a case it is wholly incorrect to say that the burden of proof that the firing was accidental is by reason of S. 105 of the Evidence Act or on some general principle on the accused, and that the accused must take a special plea to that effect and prove it in the same manner as the prosecution is required to prove a fact. It is not the law that if the Crown satisfied the Judge that the deceased died at the prisoner's hands then the prisoner has to show that there are circumstances to be found in the evidence produced by the prosecution or by the prisoner which alleviate the crime so that it is only culpable homicide not amounting to murder or which excuse the homicide altogether by showing that it was a pure accident. Pak. L.R. (1948) Lah. 293= A.I.R. 1949 Lah. 85=50 Cr. L.J. 397.

—Ss. 300 and 304.—The onus ought to be thrown on the accused as S. 105, Evidence Act requires, to show that there were extenuating circumstances which reduced the offence to culpable homicide not amounting to murder. A.I.R. 1943 Pat. 397=22 Pat. 338=45 Cr. L.J. 213=210 Ind. Cas. 210.



**—Ss. 300 and 302—Onus of proving mitigating circumstances.**

When the facts are clear, the onus is upon the accused to show the circumstances which would bring the offence within the category of those offences where capital sentence should not be imposed. A.I.R. 1942 Pat. 113=43 Cr. L.J. 90=8 B.R. 129=21 Pat. 153=196 Ind. Cas. 852.

**—Ss. 300 and 302—Burden of proof.**

Accused is not bound to prove how the man was murdered. But where in a village of two hundred houses the murder has taken place just after sun rise, the fact that the accused could not produce any evidence to show that they were innocent can be taken into consideration with other evidence against them. A.I.R. 1942 Oudh 193=1941 A.W.R. C. C. 354=17 Luck. 376=1941 O.W.N. 1246=43 Cr. L.J. 243=197 Ind. Cas. 701.

**—Ss. 299 and 300—Onus.**

The burden lies on the prosecution to establish that the act alleged to constitute murder was really the act of a person other than the deceased. The burden is not cast upon an accused person of proving that no crime has been committed, though it has been established that the accused has special knowledge on the point whether a crime was committed or not. A.I.R. 1940 Mad. 1=1939 M.W.N. 883=50 L.W. 452=41 Cr. L.J. 369=186 Ind. Cas. 704.

**—Ss. 300 and 304—Intention or knowledge — Duty of prosecution.**

In a charge under S. 302, burden is on prosecution to prove intention. Where the intention is not proved, they fail to prove the charge of murder and accused cannot be convicted for murder even in the alternative. If the prosecution can prove knowledge, the proper course is to convict accused for offence under S. 304, Part II and not in the alternative. A.I.R. 1938 Sind 63=31 S.L.R. 480=39 Cr. L.J. 460=174 Ind. Cas. 497 (D.B.).

**—Ss. 300, 302, 304—Burden of proving homicide being culpable.**

Every death by violence is not culpable homicide. Some at least can be justified. The burden is always on the prosecution to prove by evidence that the homicide was culpable. 1937 M.W.N. 1196.

**—Ss. 300 and 302—Burden of proof as to intention or knowledge.**

In British India the law does not regard, that every case of homicide is *prima facie* murder. The burden of proving a certain intent or knowledge—that which in English law is called malice—is thrown on the prosecution by the statutory definition of culpable homicide and murder; and it is not only in cases of murder that this burden of proof is thrown on the prosecution by statute; that burden is imposed in every offence coming within the ambit of the Penal Code. The Maxim *actus non facit reum, nisi mens sit rea* a source of fruitful discussion in criminal Courts in England, has no application in India, as the statutory definitions of the offences in the Code in each case expressly contain a proposition as to the state of mind of the accused. A.I.R. 1937 Nag. 274=39 Cr. L.J. 92=172 Ind. Cas. 204.

**—Ss. 300 and 302 — Affirmative proof of murder by prosecution beyond reasonable doubt —Necessity of.**

In a trial for murder, it is not the bounden duty of the accused to prove how the deceased met with his death. It is for the prosecution to prove affirmatively and beyond all reasonable doubt that accused was responsible for the murder of the deceased. Where the trial Judge has practically rejected the version of the occurrence given by the prosecution witnesses and the Court of Appeal agrees with him, the accused cannot be convicted. A.I.R. 1935 Oudh 7=11 O.W.N. 1219=36 Cr. L.J. 181=152 Ind. Cas. 423.

**—Ss. 300 and 304—Burden of proof.**

Where eight men, none of whom carried lathies, attacked and beat a man to death by breaking his ribs, it is for the prosecution to prove that the common intention was to break the ribs or that breaking of the ribs was such an act as they knew to be likely to be committed. In the absence of such proof, however, only those of them who were proved to have actually sat on the accused's body and to have brought pressure on his ribs can be convicted under S. 304-149. Others can be convicted only under S. 323-149. 118 Ind. Cas. 369=10 L.R.A.Cr. 100=30 Cr. L.J. 903=12 A.I.Cr.R. 80=1929 Cr.C. 163=A.I.R. 1929 All. 575.

**—Ss. 300 and 304—Accused tattooing deceased and allowing snake to bite him and causing death—Burden of proving that accused honestly believed himself able to produce immunity lies on him—If burden is not discharged, offence is only culpable homicide.**

Accused who professed to be able by tattooing to render persons tattooed by him immune from the effect of snake-bite, tattooed a number of villagers and then allowed a poisonous snake, which he was himself handling, to bite one of them. The man who was bitten died at once.

**Held**, that the burden of proving that the accused was justified in believing, and did really believe, that his tattooing gave immunity was on him. If the accused proved that he honestly believed himself to be able to produce immunity, he would be guilty merely of a rash and negligent act not amounting to culpable homicide. But otherwise he would be guilty of culpable homicide not amounting to murder, because he caused death by an act done with the knowledge that it was likely to cause death but had neither the intention nor the knowledge necessary to make his offence murder. 64 Ind. Cas. 843=11 L.B.R. 56=A.I.R. 1921 L. B. 26.

**—Ss. 299, 300 and 307—Evidence—Murder—Guilt—Proof of, on prosecution.**

The prosecution should prove their story and cannot rely on the weakness of the defence case. Where the accused set up a right of private defence and there was some doubt about its truth, the accused was entitled to the benefit of the doubt and to be acquitted. 16 Cr. L.J. 152=14 P.W.R. 1915 Cr.=131 P.L.R. 1915=27 Ind. Cas. 216.

**—Ss. 300 and 302—Insanity—Burden of proof.**

Murder—Burden of proof in case of insanity is on accused—Burden not higher than that which rests upon a plaintiff or defendant in civil proceedings. 1936 M.W.N. 1248=44 M.L.W. 694 (P.C.).



### 6 (b). Evidence and proof—Child witness.

#### —Ss. 299 and 300—Evidence of child.

The evidence of the child is not admissible as evidence of the truth of what it says but as explaining the conduct of other witnesses; even what it said is admissible in evidence. Where, therefore, the mother of a child is murdered and the cries of the child attract the passers-by, the witnesses can speak not only of the nature of the child's cries, but even as to what the child said so far as it explains their conduct. A.I.R. 1938 Sind 97=39 Cr.L.J. 618=32 S.L.R. 709=175 Ind. Cas. 324.

#### —Ss. 299 and 300—Evidence—Murder—Evidence—Testimony of a little girl.

Where the only evidence against the accused who were charged with the murder of a little girl was that of a girl of 10 years old, and the accused were in possession of the jewels of the murdered child and were not able to explain their possession of them, the evidence is sufficient to sustain conviction, 6 M.L.T. 123=11 Cr.L.J. 157=4 Ind. Cas. 1051.

### 6 (c). Evidence and proof—Circumstantial evidence.

- (i) General
- (ii) Accused seen in company of deceased
- (iii) Blood stains
- (iv) Knowledge where corpse is buried

#### 6 (c) (i). Evidence and proof—Circumstantial evidence — General.

—Ss. 299, 300 and 302—Circumstantial evidence, rule as to stated—Fact that accused offers no explanation, if can be used against him—Court, if can invent possible explanations.

The rule as to circumstantial evidence is that it must be consistent, and consistent only with the guilt of the accused and if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. No doubt one of the circumstances, which has to be taken into account is the fact that the accused has offered no explanation, or has offered a particular explanation, but it must be borne in mind that in India the accused cannot go into the witness-box, and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him. It is the clear duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence and the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and if there is he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because it is not offered by the accused. The Court is competent to invent all possible explanations and theories which fit in with the evidence and are consistent with the innocence of the accused when the accused's statement does not explain the evidence against him. A.I.R. 1941 Bom. 139=43 Bom.L.R. 144=42 Cr.L.J. 697=I.L.R. (1941) Bom. 315=195 Ind. Cas. 208.

#### —Ss. 299, 300 and 302—Circumstantial evidence.

The case against two accused rested on circumstantial evidence which was not such as to leave one no

alternative but to hold that they were guilty. There was no evidence to show that both of them killed the deceased or that both had the intention to kill him:

**Held,** that neither could be found guilty of murder. A.I.R. 1941=Cal. 106=I.L.R. (1940) 2 Cal. 258=72 C.L.J. 533=44 C.W.N. 840=42 Cr.L.J. 385=193 Ind. Cas. 302.

—Ss. 299, 300 and 302—Evidence held to be insufficient—First accused found guilty—Accused No. 2 meeting first accused on evening of day of murder and knowing where certain articles belonging to deceased which she carried with her on the evening of murder were to be found—Facts, if sufficient to warrant conviction of accused No. 2 either under S. 300 or S. 201.

Where an accused is found guilty of the offence of murder, the facts that 2nd accused met the first on the evening of the date of murder and knew the place where certain articles belonging to the deceased which she had carried with her on that fateful evening were to be found, lead to grave suspicion against accused No. 2 but are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence. A.I.R. 1941 Mad. 316=52 L.W. 284=1940 M.W.N. 764=I.L.R. (1940) Mad. 1028=42 Cr.L.J. 466=193 Ind. Cas. 814 (D.B.)

—Ss. 299, 300, and 302—Mud in nails of deceased indicating struggle in water during life—Presumption of death by drowning.

Mud in the nails indicates struggle in the water during life and is presumptive evidence in favour of death by drowning. But such a presumption is not absolute and other circumstances may of course negative it. But the presence of mud on the toes and nails, in a country of bare-feet and not invariable cleanliness can scarcely weigh against the fact that no single characteristic of drowning is found. A.I.R. 1941 Mad. 238=52 L.W. 420 (2)=1940 M.W.N. 1045=42 Cr.L.J. 654=195 Ind. Cas. 53.

—Ss. 299 and 300—Circumstantial evidence when sufficient.

Where a charge of murder is based purely on circumstantial evidence, that evidence must point conclusively to the guilt of the accused, and must practically exclude the possibility of the murder having been committed by other persons. It must be such as to show that within all human probability the act must have been done by the accused. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though no explanation of them is forthcoming. (1939) 183 Ind. Cas. 307=1939 O.W.N. 700=40 Cr.L.J. 764=1939 A.W.R. 102=14 Luck. 635.

—Ss. 299, 300 and 302—Circumstantial evidence.

Where the only thing proved against the accused is that he was aware of the place where the corpse was concealed it is quite insufficient to support a charge of murder. A.I.R. 1939 Cal. 539=69 C.L.J. 344=40 Cr.L.J. 792=183 Ind. Cas. 433.

—Ss. 299, 300 and 302—Circumstantial evidence.

Where there is only circumstantial evidence against the accused, in order to convict an accused of murder



the Court must be satisfied that the circumstantial evidence is of such a nature that it would be inconsistent with his innocence:

**Held**, that there was no such evidence in the case. A.I.R. 1938 Pat. 308=19 P.L.T. 268=39 Cr.L.J. 428=4 B.R. 451=17 Pat. 369=174 Ind. Cas. 524.

—Ss. 299, 300 and 302—Absence of explanation of suspicious circumstances—Effect.

The mere absence of explanation cannot prove the crime of murder, but the fact that a criminal does not explain very suspicious circumstances against him is certainly circumstantial evidence which may be taken into consideration against him. A.I.R. 1937 Lah. 127=17 Lah. 547=38 P.L.R. 1018=38 Cr.L.J. 472=167 Ind. Cas. 861.

—Ss. 299, 300 and 302 — Circumstantial evidence—Sufficiency—Question of fact.

In a murder case where an accused has failed to give any explanation of the suspicious circumstances against him, it is better to treat the circumstances as establishing a crime as a point of fact. Evidence of this nature would certainly in England be left to a jury by a Judge. The question in each case is whether circumstantial evidence of this nature satisfies a jury of the guilt of the accused under S. 302. The question is not one of law. A.I.R. 1937 Lah. 127=17 Lah. 547=38 P.L.R. 1018=38 Cr.L.J. 472=167 Ind. Cas. 861.

—Ss. 299, 300 and 302—Circumstantial evidence.

A Police enquiry is always regarded as a harassment, and anxiety to avoid it, is not necessarily an indication of guilt:

**Held**, after considering all the circumstantial evidence including the **post mortem** examination of the deceased on which mainly the guilt of the accused rested, that it was not certain that the accused committed the murder. A.I.R. 1936 Pat. 425=2 B.R. 396=37 Cr.L.J. 559=161 Ind. Cas. 939 (2).

—Ss. 299, 300 and 302—Recovery of dead body from house of accused.

Where the only fact which was proved in a case of murder was that the body of the deceased was recovered from the house of the accused buried in the floor of a room inside the house, and it appeared that the accused was away in jail at the time of the recovery of the corpse and he could not be called upon to explain how the corpse came to be buried in the house:

**Held**, that there was no evidence worth the name to connect the accused with the murder. A.I.R. 1934 Oudh 362=11 O.W.N. 581=35 Cr.L.J. 1042=9 Luck. 636=150 Ind. Cas. 205.

—Ss. 299, 300 and 302 — Illegitimate child—Possession of opium by mother—Death of child due to opium—Inference.

Where the accused who had contracted illicit relations with a man and was delivered of a child was charged with having put the infant to death and it appeared that she was in possession of opium four days before the child's birth and the death of the child was found to be due to opium:

**Held**, that the only reasonable inference was that the accused had caused the death of the child by administering opium to it. A.I.R. 1932 Lah. 297=33 P.L.R. 223=33 Cr.L.J. 448=137 Ind. Cas. 259.

—Ss. 299, 300 and 302—Circumstantial evidence.

Where the only evidence against the accused was that they were on the morning in question at or near the place of occurrence and there was no evidence to show that they conspired to kill the deceased or to cause him any injury:

**Held**, that the evidence was not sufficient to convict them. A.I.R. 1932 Lah. 254=33 Cr.L.J. 375=33 P.L.R. 145=137 Ind. Cas. 65.

—Ss. 299, 300 and 302—Circumstantial evidence.

**Held**, on the facts, that the evidence disclosed grave suspicion of guilt but that it did not raise that high degree of probability on which with due prudence a conviction for murder should be based. [Conviction under S. 201, I. P. C., substituted for that under S. 302, I.P.C.] A.I.R. 1931 Lah. 529=32 P.L.R. 461=32 Cr.L.J. 1032=133 Ind. Cas. 446.

—Ss. 299, 300 and 302 — Murder of child—Accused showing place where jewels were hidden—Conviction for murder—Sufficiency of evidence.

A boy was murdered. The accused took the Police next day to where the jewels of the boy were hidden and at the time of the discovery of the jewels, made a long statement to certain neighbours in the presence of the Sub-Inspector of Police who was also one of the signatories to that statement:

**Held**, (1) that the statement of the accused was one made to the Police Officer within the purview of S. 162, Criminal P. C., and could not be used except in the special manner provided in that section;

(2) that the statement could not be used in any other manner even at the instance of the defence and even if it materially assisted the defence case;

(3) that the accused could not be convicted of murder on the sole ground that he had discovered the jewels to the Police. A.I.R. 1931 Mad. 779=(1931) M.W.N. 715=34 L.W. 388=33 Cr.L.J. 132=62 M.L.J. 71=135 Ind. Cas. 364.

—Ss. 299, 300 and 302 - Circumstantial evidence—Benefit of doubt.

In a criminal case, where a set of circumstantial evidence is capable of two constructions, one in favour of the accused, and one against him, he should be entitled to the benefit of the doubt. In order to convict a person charged with murder, there should be unimpeachable evidence of reliable witnesses bringing home the guilt to the accused beyond reasonable doubt. If the Court finds that the proof adduced at best leads to strong suspicion but falls short of the requisite standard, the Court should give the benefit of the doubt to the accused. A.I.R. 1931 Mad. 689=(1931) M.W.N. 1177=54 M. 931=34 L.W. 128=61 M.L.J. 608=33 Cr.L.J. 51 (2)=134 Ind. Cas. 1143.

—Ss. 299, 300 and 302—Evidence—Circumstantial—Complete and incompatible with innocence—Admitting of no reasonable explanation—Death sentence.



There is no rule of law or practice to prevent a Court from sentencing an accused person to death merely on circumstantial evidence.

The accused person visited the village in which the murdered person lived and was at the shop of the deceased on the night of the murder, and that night both had slept on cots in front of the shop. In the morning the person was found murdered and the accused had disappeared. At the time the accused had come to the village he was wearing shoes and also possessed a tin box of cigarettes. A pair of shoes and a tin box were found at the shop, and the accused, who was discovered when followed along the foot-prints sitting amongst some crops, was bare footed. When the accused was discovered he was in possession of the property of exactly the same description as the stolen property. Blood-stains were also found on the shirt of the accused.

**Held**, that circumstantial evidence was incompatible with the innocence and incapable of explanation upon any reasonable hypothesis except that of his guilt and the accused could be sentenced to death. 1929 Cr.C. 414=A.I.R. 1929 Sind 179.

**—Ss. 299, 300 and 302—Circumstantial evidence—Palpably concocted—Improbable—Not sufficient.**

Where the whole case is one of extreme suspicion against the accused but in the opinion of the Court the separate pieces of circumstantial evidence relating to their movements and which converge on their guilt bear palpable signs of concoction and do not fit in with the conduct of rational persons it would be most unsafe to accept them and convict the accused. 122 Ind. Cas. 587=31 Cr.L.J. 438=1931 Cr.C. 457=A.I.R. 1931 Pat. 169.

**—Ss. 299, 300 and 302—Suspicious circumstances—Alone insufficient.**

B and S. were charged under S. 302, Penal Code, for the murder of R, who, according to the village rumour, was in intrigue with G's wife, M, sister to B. S was the brother of G. A tracker followed the tracks with directions from villagers to the Ahata of S and G. Shoes of R were recovered at the instance of B. The tracker found tracks of B and S, leading to the place where the body was later found buried. Dead body of R was found at the instance of the confession made by S:

**Held**, that the evidence was not sufficient to establish charge under S. 302 but was ample to establish an offence under S. 201, Penal Code. 112 Ind. Cas. 347=9 Lah. 671=29 Cr.L.J. 1019=11 A.I.Cr.R. 284=A.I.R. 1928 Lah. 476.

**—Ss. 299, 300 and 302—Motive present—Body found in the field of accused.**

Where the only evidence against a person accused of murder consists of evidence of motive and his production of the corpse from his field, that evidence will not ordinarily warrant a conviction under S. 302, I. P. C.: A.I.R. 1926 Lah. 88 and A.I.R. 1927 Lah. 541, Foll. 107 Ind. Cas. 482=9 A.I.Cr.R. 520=29 P.L.R. 33=29 Cr.L.J. 252.

**—Ss. 299, 300 and 302—Circumstantial evidence—How estimated.**

The fundamental rule by which the effect of circumstantial evidence is to be estimated is well esta-

blished. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt: A.I.R. 1926 Lah. 88, Foll. 96 Ind. Cas. 849=7 A.I.Cr.R. 68=27 Cr.L.J. 993. (Lah.).

**—Ss. 299, 300 and 302—Circumstantial evidence—Inference of guilt—When justified.**

Where a case depends entirely on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts found against the prisoners must be incompatible with their innocence and incapable of explanation upon any other reasonable hypothesis than that of their guilt.

The following circumstances, as proved against the accused, were held sufficient to prove that he was responsible for the murder of deceased: (1) the deceased used to live at accused's house until he disappeared, (2) accused made no report about the sudden disappearance of the deceased to the police or to anybody else; (3) within a few days after the disappearance of the deceased his dead body was found in a well about half a mile from the house of the accused; (4) shortly after the recovery of the dead body the accused admitted to a friend of his that he had murdered the deceased; (5) and after this confession the accused produced from two places considerable valuable property worth Rs. 4,000 belonging to and in the possession of the deceased until his death. 89 Ind. Cas. 516=26 Cr.L.J. 1380=23 N.L.R. 62=A.I.R. 1926 Nag. 119.

**—Ss. 299, 300 and 302—Circumstantial evidence—Accused found near door-way—Shoes and feet stained with blood—Deceased was paying attention to accused's sister—Evidence inadequate.**

Where there was no eye-witness of the affair and circumstantial evidence was that the victim was seen lying wounded on a charpoy with accused No. 1 standing near him and accused No. 2 standing in the door-way of the Kotha the scene of murder that accused No. 1 was at that time wearing a chadar and a kurta both of which bore marks of blood and he had blood stains also on his feet and calves that his brother accused No. 2's chadar and feet were stained with blood, and that the deceased has been paying attention to their sister and that this conduct on his part was resented by the brothers.

**Held**, that the evidence is wholly inadequate to bring the charge home to accused No. 2 and that he be acquitted. 81 Ind. Cas. 173=5 L.L.J. 40=25 Cr.L.J. 685=A.I.R. 1924 Lah. 62.

**—Ss. 299 and 300—Evidence—Circumstantial evidence.**

Where the only reliable circumstantial evidence against the accused was that he had a motive to commit the crime and that he was seen running near the place of occurrence at or about the time of murder, **Held**, that the evidence merely created a suspicion and was insufficient for a conviction. 1 Pat. L.T. 684=59 Ind. Cas. 858=22 Cr.L.J. 154.

**—Ss. 299 and 300—Evidence—Murder—Circumstantial evidence.**

Where the accused had an unnatural intimacy with the deceased who was murdered by sharp weapons



and it was proved that the deceased was last seen alive in the company of the accused near the scene of offence and the accused pointed out the place where the weapons which could have been used to inflict the blows were found, **Held**, this was sufficient proof of guilt. 98 P.L.R. 1918=20 Cr.L.J. 305=50 Ind.Cas. 481.

**—Ss. 299 and 300—Evidence of—Presumption—Accused pointing out spots where occurrence took place.**

A person able to point out several spots connected with the murder is presumed to be concerned in it. 18 P.R. 1917 Cr.=18 Cr.L.J. 6=36 Ind. Cas. 838.

**—Ss. 299 and 300—Evidence—Accused himself showing the spot.**

Where in a trial for murder (1) the first report did not name the murderer, (2) the only eye-witness who professed to have seen the murder could not identify the accused before the police, (3) and the only evidence against accused consisted in the production of a blood-stained *kurtā* from the house where he and his brothers resided and (4) his pointing out a blood stained knife which was concealed in a bush on the way from the deceased's house to his own, this circumstantial evidence is altogether insufficient to maintain a conviction in the absence of any direct evidence connecting the accused with the murder. 22 P.W.R. 1916 Cr.=17 Cr.L.J. 279=34 Ind. Cas. 999.

**—Ss. 299 and 300—Evidence—Murder—Circumstantial evidence, when sufficient.**

In a murder case, where the evidence points to the accused alone as the guilty person and there is no reasonable doubt about it, a conviction can be based on it, though there is no direct proof and the prosecution case is inferential only. (1914) M.W.N. 718=16 Cr.L.J. 195=27 Ind. Cas. 755.

**—Ss. 299 and 300—Evidence—Circumstantial evidence.**

A conviction for murder cannot be sustained when there is no direct evidence connecting the accused in the commission and where this evidence is purely circumstantial especially when the identification was very unsatisfactory. 40 P.W.R. 1914 Cr.=16 Cr.L.J. 89=221 P.L.R. 1915=26 Ind. Cas. 1001.

**—Ss. 299 and 300—Murder or culpable homicide not amounting to murder—Circumstantial evidence—Presumption.**

Where the sole inmates of a house were a man and his two wives, and the elder wife was habitually ill-treated and half-starved by the husband and was taken to hospital with a serious injury on the head as a result of which she died after three days, and there was no indication whether the injury was accidental or self-inflicted, and the explanation of the husband being unsatisfactory, the presumption was that the injury was caused by the husband. The infliction of such an injury on the head of a woman already reduced by ill-treatment would bring it under S. 304, part 2. 3 P.W.R. 1913 Cr.=14 Cr.L.J. 283=150 P.L.R. 1913=19 Ind. Cas. 715.

**—Ss. 299 and 300—Evidence—Some circumstances favourable.**

An accused cannot be convicted of murder upon the only evidence of the brother of the deceased who

stated that he saw the accused running away after the commission of the offence when other circumstances favourable to the accused existed. (1911) 2 M.W.N. 349=12 Cr.L.J. 551=12 Ind. Cas. 527.

**—Ss. 299 and 300—Evidence—Murder—Conviction on circumstantial evidence—Requirements.**

A conviction for murder on pure circumstantial evidence should be had only if the history of the case taken as a whole points unmistakably to the inference of the commission of the offence by the accused and no other reasonable hypothesis than that of his guilt could possibly be deduced from the facts before the Court. 16 P.W.R. 1911 Cr.=12 Cr.L.J. 412=11 Ind. Cas. 596.

**—Ss. 299 and 300—Murder—Proof of offence—Circumstantial evidence—Conviction of one of two persons when uncertain who fired the fatal shot in the absence of common intention—Penal Code, Ss. 34, 149.**

Where the Sessions Judge in a trial on a charge of gunshot murder against N found that N and another person L were seen immediately after the report of the gun at the scene of occurrence each with a gun in his hand but he did not find which of them fired the fatal shot, his finding being that either N or L fired the shot that killed the deceased and there was no finding in the judgment that N and L had a common intention and acted in concert and that the gun was fired in furtherance of their common intention. **Held**:—That the legal inference from these findings must be that neither N nor L was guilty of the offence of murder. The fact that an accused person was found with a gun in his hand immediately after a gun was fired, and a man was killed on the spot from which the gun was fired, may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. If there are two persons who answer the above description the circumstantial evidence loses its weight very substantially. (1907) 11 C.W.N. 1085=6 Cr.L.J. 304.

See also 13 C.W.N. 680=36 C. 659.

**—Ss. 299 and 300—Evidence, circumstantial—Murder—First information and later prosecution story.**

The inconsistency of the first information with the theory of the prosecution is a very weak feature of a case depending on circumstantial evidence. Little, if any, importance should be attached to an extra judicial confession often found to bolster up the circumstantial evidence on which a case depends. (1905) 9 C.W.N. 474=2 Cr.L.J. 255.

**6 (c) (ii). Evidence and Proof—Circumstantial evidence—Accused seen in company of deceased.**

**—Ss. 299, 300 and 302—Accused seen in company of deceased.**

In a murder case the evidence that the accused was in the company of the deceased and the other accused prior to the murder is certainly not sufficient in law to establish the charge of murder against the accused. A. I. R. 1944 Cal. 249=46 Cr. L. J. 131=216 Ind. Cas. 129.



**—Ss. 299, 300 and 302—Circumstantial evidence  
—Accused seen following deceased.**

The deceased boy was not seen after the morning of 17th October 1942. On the 19th his body was found floating in a well. Except for the evidence that the two accused were seen following the deceased on the morning of 17th October there was nothing to connect the two accused with the murder of boy, except their alleged possession of the ornaments which belonged to the boy and the statements which, according to the prosecution, led to the recovery of those articles. Both in the committing Magistrate's Court and in the Sessions Court the two accused denied all knowledge of the offence and asserted that they had made no confessions at all to the Police;

**Held**, that in the face of the production of the articles the denials by the accused could not be believed, and the Sessions Judge was, therefore, unquestionably right, in accepting the evidence that the articles were recovered in consequence of the statements made by the accused. Even, however, if the statements themselves were ignored, the evidence that the two accused were seen following the deceased that morning taken with the facts that a few days later the articles which the boy had been wearing were found in the possession of the accused in default of any reasonable explanation, would lead inevitably to the conclusion that the accused are guilty of the murder of the boy. A.I.R. 1943 Mad. 69=55 L.W. 552=1942 M.W.N. 584=(1942) 2 M.L.J. 312=44 Cr.L.J. 299=I.L.R. (1943) Mad. 148=204 Ind. Cas. 545.

**—Ss. 299, 300 and 302—Circumstantial evidence  
—Absence of motive.**

The deceased, girl aged six years, and her mother lived at the house of the accused who was the girl's uncle. There was some quarrel between the girl's mother and the wife of the accused as a result of which the mother had been cooking separately. One morning after the mother had left home for her field, the accused took the girl from the house on a false pretext and returned without her. On being questioned he first said that the girl had been run over by a car but later he stated in the presence of the mother and other relatives that he had killed her and put her in a pond. The dead body of the girl was subsequently found in the pond. A number of witnesses spoke to seeing the accused and this little girl on that morning together and, in various places in the vicinity and not far from the pond in which the body was found.

**Held**, that if the evidence were only that the girl was last in the presence of the accused and in his presence under suspicious circumstances and that her body was found with a stone tied to it in the pond, that alone would raise a hostile presumption against the accused which he would necessarily have to explain, but in the circumstances of the case the guilt of the accused had been proved beyond any shadow of doubt and the fact that the motive for the crime was slight was immaterial. A.I.R. 1941 Mad. 120=I.L.R. (1941) Mad. 340=1940 2 M.L.J. 895=1940 M.W.N. 1229=52 L.W. 853=42 Cr.L.J. 770=195 Ind. Cas. 679.

**—Ss. 299 and 300—Circumstantial evidence.**

Where an accused is charged with murder of a child for the sake of its ornaments and the sole fact proved against him is that he was seen in the company of the child not far away from where the corpse was found, sometime before the murder must have taken place, and there was nothing unusual in the fact

that the little boy was with the accused as that was a common occurrence and where it is not possible to say that the accused and the child were seen together within a very short time of the murder, it is unsafe to infer that the accused must have been concerned in the murder. A.I.R. 1938 Mad. 336=47 L.W. 272=1938 M.W.N. 36=40 Cr. L.J. 596=181 Ind. Cas. 849.

**—Ss. 299, 300 and 302—Circumstantial evidence.**

Evidence that accused paid a visit to his aunt, that the aunt sent her little girl with food for her father to the garden and the girl did not return, that the next day the body was found in a well and the surgeon found death by strangulation, that the accused had taken the little girl to look for date fruits and was not seen far from the well very shortly before her death and that the accused sold to a goldsmith the next day a pair of silver anklets of a size suitable for a child and that this goldsmith was found in consequence of a statement of the accused to the Police, though circumstantial, an inference drawn from it that the accused committed the murder is a fair and reasonable one. 1938 M.W.N. 34.

**—Ss. 299, 300 and 302—Circumstantial evidence  
—Accused last seen with deceased.**

Where the accused was the person last seen with the deceased boy when he was alive and was observed walking with the deceased boy with an axe under his arm and was seen at the actual place where the body was discovered and it appeared that he dug up in the presence of trustworthy witnesses ornaments identified as belonging to the deceased;

**Held**, that even excluding a confession which the accused made to a large body of witnesses there was ample evidence to convict the accused under S. 302 but the sentence of death should be remitted. A.I.R. 1934 All. 132=35 Cr. L.J. 448=1934 A.L.J. 143=3 A.W.R. 419=147 Ind. Cas. 630.

**—Ss. 299, 300 and 302—Accused seen with deceased shortly before murder—Inference.**

Where two persons are seen together and shortly afterwards one of them is found to have been murdered, the survivor is not bound to give an explanation as to how the deceased met his death. The fact that the accused denies all knowledge of the crime or of the circumstances connected therewith cannot be treated as any evidence of his guilt. A.I.R. 1932 Lah. 243=33 P.L.R. 23=33 Cr. L.J. 411=137 Ind. Cas. 59.

**—Ss. 299, 300 and 302—Circumstantial evidence.**

Accused seen last with deceased — Attempt to explain how they separated—This circumstance alone is insufficient to convict him. 1931 M.W.N. 723.

**—Ss. 299, 300 and 302—Accused last seen with deceased — Disappearance immediate after murder  
— Defence that he never knew the deceased.**

Where the evidence against the accused is that the deceased was last seen alive in his company and that the accused disappeared immediately after the murder and the accused set up a palpably false defence that he did not know the deceased and was never in her company, these facts and circumstances are sufficient to bring the offence of murder home to the accused. 120 Ind. Cas. 529=31 Cr. L.J. 138=A.I.R. 1930 Lah. 265.



—**Ss. 299, 300 and 302—Accused found with deceased the previous night — Possession of his belongings — No direct evidence — Nature of offence.**

Accused were seen in the company of deceased on a previous night. Next morning accused were found to be in possession of clothes and other articles belonging to deceased:

**Held**, that in absence of direct evidence, circumstances, though raising a strong suspicion against accused are not sufficient to convict them either under S. 302, or under S. 392, but they are guilty either under S. 411 or S. 379. 112 Ind. Cas. 212=10 L. L. J. 525=29 Cr. L. J. 996=A.I.R. 1929 Lah. 61.

—**Ss. 299, 300 and 302—Accused last seen with deceased — Accused showing place where corpse was buried not sufficient.**

The fact that the accused was one of two persons with whom the deceased was last seen alive, and the fact that he pointed out the spot where the dead body was ultimately found, are not sufficient to draw the inference that the accused was one of the actual murderers. No doubt grave suspicion attaches to him in this connexion, but grave suspicion is not sufficient. 103 Ind. Cas. 97=28 Cr. L. J. 641=8 A.I.Cr.R. 254=A.I.R. 1927 Lah. 541.

—**Ss. 299, 300 and 302—Accused and deceased seen together last — Accused unable to explain death.**

The facts that the deceased, and the accused had been seen together at about 8 o'clock in the evening, that the dead body of the deceased had been discovered the next morning and, that no explanation had been given by accused regarding the death of the deceased, are alone insufficient to fix the guilt on the accused. In the absence of other evidence, circumstantial or direct, tending to show that the accused was concerned in this crime, he is entitled to an acquittal. 67 Ind. Cas. 724=23 Cr. L. J. 452=20 A. L. J. 564=A.I.R. 1922 All. 340.

—**Ss. 299, 300 and 302—Accused last seen with murderer—Subsequent disappearance—Complicity.**

Accompanying the murderers with the deceased and returning the next day without the deceased and subsequent disappearance of accused, all these facts were held to be not sufficient to prove accused's complicity in the crime of murder. A.I.R. 1922 Lah. 171.

—**Ss. 299 and 300—Evidence—Child found in a well indicated by accused—Child stripped of ornaments —Accused last seen with the child.**

Where the facts clearly established that the accused was last seen with the child alleged to have been murdered, that he stripped her of most of her ornaments and sold them and that her body was next found in a well but the accused disclaimed all knowledge of the matter though the well was indicated by him, **Held**, that the facts were sufficient to prove that the accused had committed a foul murder. 16 P.W.R. 1915 Cr.=16 Cr. L. J. 167=27 Ind. Cas. 551.

6 (c) (iii). **Evidence and proof—Circumstantial evidence — Blood stains.**

—**Ss. 299, 300 and 302—Evidence of blood stains.**

The blood stains on the hatchet were too disintegrated to determine their origin, the blood stains on the blade were extensive. No explanation was offered of these stains which were proved to be of blood:

**Held**, that the possibility that the stains were of human blood was not excluded. A.I.R. 1944 Lah. 206=45 Cr.L.J. 660=46 P.L.R. 69=213 Ind. Cas. 355.

—**Ss. 299 and 300 — Evidence of blood-stained nails.**

The evidence of blood-stained nails is not only of no value but may be extremely dangerous to innocent persons. Giving such evidence as corroborating an approver or as circumstantial evidence connecting an accused person with homicide may lead to the miscarriage of justice. A.I.R. 1939 Lah. 149=40 Cr.L.J. 576=41 P.L.R. 493=I.L.R. (1939) Lah. 206=181 Ind. Cas. 864.

—**Ss. 300 and 302—Circumstantial evidence.**

Where the only evidence against an accused charged with murder is the evidence of the recovery of the blood-stained shirt and the blood stained sua and the fact that he concealed himself in the reeds at the time of his arrest, such evidence is inconclusive. Where there is nothing on the record as to the extent of the blood-stains on the shirt, it is impossible to judge whether they were caused in committing a murder or were obtained by the accused in the course of his ordinary pursuits. The mere recovery of a blood stained sua is not sufficient to fix the guilt upon the accused. The mere fact that he produced it does not necessarily mean that it was he who used it. His hiding to avoid arrest is by itself a circumstance which creates no more than a suspicion against him. The accused cannot therefore be convicted of murder upon such evidence. A.I.R. 1939 Lah. 194=41 P.L.R. 16 (2)=40 Cr.L.J. 697=182 Ind. Cas. 694.

—**Ss. 299, 300 and 302—Blood-stains on clothes.**

Villagers often have blood-stains on their clothes. The existence of a few small blood-stains on a man's shirt or dhoti is not enough to found a conviction on, in itself, though it is important corroborative evidence when the accused is directly implicated by other evidence or circumstances. A.I.R. 1938 Nag. 52=39 Cr.L.J. 105=172 Ind. Cas. 213.

—**Ss. 299, 300 and 302—Recovery of blood-stained articles from accused's house.**

In a charge for murder, the evidence of the recovery from an accused person's house of a blood-stained chopper and a blood-stained chadar is not enough by itself to justify his conviction. This is circumstantial evidence the value of which is very great when used to corroborate other evidence. It cannot by itself prove the case for the Crown. It is possible to imagine many an occasion where the mere discovery of a blood-stained weapon or blood-stained clothes was due to something other than murder, for instance, concealing a dead body or receiving from the real murderer a blood-stained weapon in order to hide it and so assist the murderer. It is impossible to say that the discovery of a blood-stained article is enough by itself to justify a conviction for murder. A.I.R. 1936 Lah. 335=16 Lah. 995=38 P.L.R. 15=37 Cr.L.J. 503 (2)=161 Ind. Cas. 884.

—**Ss. 299, 300 and 302—Circumstantial evidence—Evidence of alibi weak—Conviction.**



The Court was satisfied that the accused had some motive for attacking the deceased and there was no evidence to show that any one else had any motive for attacking her. The prosecution evidence was very strong against the accused. The recovery of a blood-stained shirt from the person of the accused and of a blood-stained knife from a room in his house strongly corroborated the rest of the prosecution evidence:

**Held**, that in view of the strength of the case against the accused, it was impossible to treat seriously his **alibi** evidence especially when that evidence was given by men belonging to his caste and the person with whom the accused alleged he was at the time in question was not produced. (1936) 164 Ind. Cas. 154 = 1936 O.W.N. 603 = 37 Cr.L.J. 932 (D.B.).

**—Ss. 299, 300 and 302—Spots of human blood on garments.**

Finding of small spots of human blood on the clothes of the inhabitants of the Delta is of very slight probative value as they can always be accounted for otherwise. If a mosquito bites a man through his clothes and it is squashed, as often happens, the victim's clothes may have a patch of blood of any size up to three quarters of an inch in diameter and it may be imagined, that that blood is the blood of the victim which has been sucked into the mosquito's stomach or what corresponds to it, and if that blood is transferred to a garment, from the Imperial Serologist's point of view it is still human blood. Its short stay in the mosquito would not greatly change its normal characteristics. A.I.R. 1936 Rang. 468 (470) = 38 Cr.L.J. 49 = 165 Ind. Cas. 758.

**—Ss. 299, 300 and 302—Circumstantial evidence, sufficiency of.**

The deceased who was believed to be a 'womanizer' was murdered and there being no eye witnesses suspicion fell on the accused with whose wife the deceased was believed to have illicit intimacy. The accused absconded and was found next in another village by a **zaildar** to whom he confessed the crime and his clothes were found to be blood-stained. During the course of the investigation, he produced a blood-stained hatchet from a pond and a pair of shoes from another pond and there were impressions of shoes near the bed of the deceased which tallied with those of those shoes. It was found in evidence that the deceased had illicit intimacy with accused's wife amongst other women but the other facts were not proved:

**Held**, that the evidence was not satisfactory and that the accused was entitled to the benefit of the doubt. A.I.R. 1934 Lah. 10 = 35 Cr.L.J. 615 = 148 Ind. Cas. 164.

**—Ss. 299, 300 and 302—Blood-stains on clothes of accused—Failure to give explanation.**

Although the mere fact that a person has blood on his clothes is not by itself always of much importance yet where he has failed to give any explanation of the blood on his clothes, the circumstance is important, inasmuch as if it had been due to any ordinary circumstances, he would have been able to give such an explanation. The evidence of the clothes will, in such a case, be sufficient corroboration against him. A.I.R. 1933 Nag. 352 = 16 N.L.J. 186 = 35 Cr.L.J. 213 = 146 Ind. Cas. 701.

**—Ss. 299, 300 and 302—Discovery of blood-stained weapons through accused—Injury on his person—Insufficient.**

The mere facts that the accused pointed out a heap of **tury** belonging to some unknown zamindar which was accessible to anybody and from which were recovered a hatchet and a dang which turned out to be blood-stained and that the accused had some injuries on his person were held to be not sufficient to prove him guilty of being concerned in the murder. 10 L.L.J. 58 = A.I.R. 1928 Lah. 335.

**—Ss. 299 and 300—Evidence—Proof of murder.**

The fact that blood-stained garments are found in a house does not sufficiently prove that any particular member of the family in that house is guilty of murder, recently committed in the neighbourhood. 32 P.W.R. 1916 Cr. = 17 Cr.L.J. 226 = 26 P.R. 1916 Cr. = 153 P.L.R. 1916 = 34 Ind. Cas. 642.

**6 (c) (iv). Evidence and proof—Circumstantial evidence—Knowledge where corpse is buried.**

**—Ss. 299, and 300—Pointing out place where corpse was lying.**

The mere fact that the accused conducted the father of the deceased and other persons to the ravine where the corpse was found lying, cannot, alone, while creating a suspicion against the prisoner, bring the guilt home to him. 114 Ind. Cas. 719 = 30 P.L.R. 269 = 30 Cr.L.J. 375 = 1929 Cr.C. 102 = A.I.R. 1929 Lah. 558.

**—Ss. 300 and 302—Knowledge where corpse is buried.**

The mere fact that an accused person appears to have known where the corpse was buried does not prove that he was the murderer: 18 P.R. 1917, Foll. 89 Ind. Cas. 901 = 26 Cr.L.J. 1429 = A.I.R. 1926 Lah. 138.

**—Ss. 300 and 302—Knowledge where body is buried.**

Even if it be held satisfactorily proved that accused did give the information which led to the recovery of the dead body, that fact alone would not be sufficient to connect him with the murder, because a person may very well know where the body of a murdered man has been buried without himself having joined in committing the murder. 75 Ind. Cas. 693 = 6 L.L.J. 54 = 25 Cr.L.J. 5 = A.I.R. 1923 Lah. 315.

**—Ss. 300 and 302—Pointing out body—No explanation of knowledge—If sufficient.**

The mere pointing out of the body of the person murdered would not by itself be sufficient evidence for sustaining a conviction for murder; but if the appellant has never explained how he came by his knowledge of the place where the body lay, it may be sufficient. 68 Ind. Cas. 841 = 4 Lah. L.J. 225 = 23 Cr.L.J. 617 = A.I.R. 1922 Lah. 189.

**6 (d). Evidence and proof—Conduct of accused.**

**—Ss. 299 and 300—Conduct of accused.**

Where a person is alleged to have murdered his wife and there is no direct or medical or other circumstan-



tial evidence justifying a conviction much reliance cannot be safely placed on the conduct of the accused. A.I.R. 1940 Mad. 1=41 Cr.L.J. 369=1939 M.W.N. 883=50 L.W. 452=186 Ind. Cas. 704.

**—Ss. 299 and 300—No counter-story—Evident motive—Subsequent conduct—Proof of having confessed—Sufficient evidence.**

In a case of murder there was no counter-story worth believing on behalf of the accused. The motive of the accused in committing the murder was evident. His conduct subsequent to the crime showed that, although he knew the truth he put forth numerous falsehoods. And further there was in evidence the statement of the accused's uncle that the accused confessed his crime to him:

**Held**, that the evidence was sufficient to prove that the accused was guilty of murder the only proper sentence for which was death. 117 Ind. Cas. 737=6 O.W.N. 309=30 Cr.L.J. 829=1929 Cr.C. 14=A.I.R. 1929 Oudh 272.

**—Ss. 299 and 300—Unnatural conduct.**

Where the person admittedly knew that his wife was murdered shortly after midnight and yet he made no report to the police station, nor made any attempt to find out who killed his wife, his conduct was unnatural and may lead to the conclusion that he himself was the murderer. 116 Ind. Cas. 193=6 O.W.N. 218=30 Cr.L.J. 567=12 A.I.Cr.R. 420=4 Luck. 679=A.I.R. 1929 Oudh 190.

**—Ss. 300 and 302—Evidence of unnatural demeanour of accused.**

Where the evidence on which the accused has been convicted consists mainly of statements made by witnesses, suggesting that his demeanour was some what too calm when attention was drawn to the fact that his hut of grass was burning which had been set on fire and in which the deceased was found lying dead and a gun lying between his legs:

**Held**: that his conviction is not sustainable and must be set aside. 99 Ind. Cas. 324=8 L.L.J. 559=28 Cr.L.J. 116=28 P.L.R. 27=A.I.R. 1927 Lah. 51.

**6 (e). Evidence and proof—Confession and retracted confession.**

**—Ss. 299, 300 and 302—Confession—Offence.**

The accused made a confession that the deceased expired in his presence after a struggle for about ten minutes and then he secretly disposed the corpse along with the other accused:

**Held**, that the confession did not amount to an admission of murder and the offence fell under S. 201, I.P.C. A.I.R. 1941 Mad. 238=52 L.W. 420 (2)=1940 M.W.N. 1045=42 Cr.L.J. 654=195 Ind. Cas. 53.

**—Ss. 299, 300 and 302—Confession—Accused confessing but introducing mitigating circumstances—Conviction for murder.**

Where an accused confesses to having caused the death of a woman and admits having robbed her after death but during that confession he introduces into it circumstances with a view to excuse himself from a conviction for murder and it is clear from the medical evidence and the Court is satisfied that the woman lost

her life not in the least in the manner described by the accused but that by violence to the neck and pushing of the cloth into her mouth by the accused, the violence amounts to murder and the accused can be convicted murder upon his confession. (1940) 187 Ind. Cas. 481=1940 M.W.N. 169=41 Cr.L.J. 461.

**—Ss. 299, 300 and 302—Confession.**

In the trial for an offence under S. 302, a confession must be taken into account as a whole. A.I.R. 1934 Lah. 673=35 P.L.R. 559=36 Cr.L.J. 247=152 Ind. Cas. 1077.

**—Ss. 299, 300 and 302—Confession.**

But it is entirely wrong to base the conviction of the accused upon their own version of the occurrence, and picking holes in that version without having any legal evidence adduced by the Crown to support their conviction on a capital charge of murder under S. 302 of the I.P.C. A.I.R. 1934 Oudh 427=11 O.W.N. 1117=35 Cr.L.J. 1347=151 Ind. Cas. 559.

**—Ss. 299, 300 and 302—Evidence—Confession—Confession to lambardar insufficient to convict—Other facts proving guilt—Conviction.**

A who was charged under S. 302 knew where the bodies of the murdered persons were. He also knew that murder had been committed. The jewellery removed by him from the dead body was subsequently produced and identified. Moreover he confessed his guilt to the lambardar of the village:

**Held**: that it was not safe to rely upon the confession made to the lambardar and therefore he could not be convicted under S. 302. But the evidence was sufficient to convict him under S. 201. 111 Ind. Cas. 449=29 P.L.R. 486=29 Cr.L.J. 865=A.I.R. 1928 Lah. 858.

**—Ss. 299, 300 and 302—Accused pointed out by dying victim—Confession—Struggle proved.**

The pointing by the deceased to the accused as the person inflicting the injury and the confession of the accused that he committed the murder taken along with other facts which prove that there was a struggle between the accused and the deceased is sufficient to convict the accused of murder. 77 Ind. Cas. 993=49 Cal. 600=26 C. W. N. 414=25 Cr. L. J. 529=A. I. R. 1922 Cal. 409.

**—Ss. 299, 300 and 302—Discovery of body—Doubtful if before or after confession—Confession unreliable.**

Per **Kanhaiya Lal, J. C.** and **Lyle, A. J. C.**:—Where there is a reasonable doubt whether the accused gave the information which led to a discovery, it would be unsafe to rely on his confession. If the dead body in a murder case was discovered in consequence of the confession, the corroboration would be material but if the evidence produced about the time when the dead body was discovered is discrepant it is difficult, to say whether the discovery was made before the confession or afterwards. 68 Ind. Cas. 17=9 O.L.J. 190=23 Cr.L.J. 481=A.I.R. 1922 Oudh 202 (F.B.).

**—Ss. 299, 300 and 302—Retracted confession—Necessity of corroboration for having conviction.**

The accused who was 48 years old was charged with the offence of murdering his brother in order to get the



deceased's wife who was 45 years old. The case entirely depended upon the confession of the accused to the villagers and the Magistrate which he subsequently retracted. The accused had stated in his confession that he had murdered the deceased, with **wahola** (a sort of an axe) because he had a liaison with his wife and wanted to marry her and had then cut his body into pieces and thrown the pieces into the river. The accused had pointed out the place where he had killed the deceased and the place where he had cut him into pieces. Some blood was found on the grass and gram crop where the deceased had been killed and some particles of blood and some bones and flesh were discovered where he had been cut into pieces. He then pointed out the place where the **wahola** and a blood-stained shirt of the deceased had been buried. The Sub-Inspector dug them out and took them into possession:

**Held**, that as the confession was retracted, the Court must take it with caution and must look for some sort of corroboration before accepting it and convicting the accused upon it. The corroboration lay in the discovery of the blood at the place where the deceased was said to have been killed by the accused in the discovery of pieces of flesh and bones at the spot where, according to the accused, the deceased was cut into pieces and in the digging out of the **wahola** and the shirt at the instance of the accused which shirt was subsequently found to be stained with human blood. The confession was, therefore, corroborated and the conviction could be based on it.

**Held**, further that to covet the wife of his brother at the age of 48 when the woman was 45 and to kill her husband in order to get her was a very serious breach of one of the ten Commandments of Moses and for this reason, the sentence of death was very well deserved. A.I.R. 1945 Pesh. 1=46 Cr.L.J. 585=219 Ind. Cas. 317.

**—Ss. 299, 300 and 302—Retracted confession with corroboration.**

An accused was charged with a murder of a young woman. Within a short time after the murder, the accused confessed to the murder and said that he had taken the jewels from her corpse and concealed them in the cattle-shed. He went to the cattle shed and produced them. The confession was subsequently retracted but it was sufficiently corroborated by other evidence. The Sessions Judge acquitted the accused on the ground of certain discrepancies in the evidence:

**Held**, that the acquittal of the accused was a clear miscarriage of justice. The evidence proved beyond the possibility of any reasonable doubt that he was guilty of the murder. A.I.R. 1938 Mad. 806=1938 M.W.N. 609=48 L.W. 150=39 Cr.L.J. 1006=178 Ind. Cas. 115.

**—Ss. 299, 300 and 302—Retracted confession.**

In order to base a conviction under S. 302, a retracted confession must be corroborated in material particulars. 1935 M.W.N. 463.

**—Ss. 299, 300 and 302—Retracted confession of accused if sufficient.**

In a murder trial, men's lives and liberties cannot be imperilled upon mere probabilities and upon mere suspicions engendered in the mind of the trial Judge. The decision of a Judicial Tribunal must rest upon

legal evidence based upon legal testimony. Where the confession of an accused person is retracted and it cannot be used in evidence against his co-accused and there is no eye-witness of the occurrence and though some suspicion may attach against one of the accused, yet there is no legal proof of his guilt, the accused, cannot be convicted on the mere finding of blood-stains on his clothes. Where the trial Judge has allowed his imagination to play upon the facts of the case and he has filled up the gaps in the evidence adduced on behalf of the prosecution by making presumptions against the accused, no conviction can be based on mere suspicions. A.I.R. 1935 Oudh 33=36 Cr. L.J. 246=11 O.W.N. 1540=153 Ind. Cas. 52.

**—Ss. 299, 300 and 302—Retracted confession of accused.**

Where the only evidence against the accused is the retracted confession of the accused himself and the mention of his name in the retracted confessions of his co-accused, conviction is not justifiable. A.I.R. 1933 Oudh 404=35 Cr.L.J. 192=146 Ind. Cas. 905=10 O.W.N. 937.

**—Ss. 299, 300 and 302—Confession induced by promise of pardon—Subsequently retracted—Should be excluded—Other fact insufficient—Guilt not established.**

M was convicted by the Sessions Court under Ss. 302 and 201, I.P.C., upon his own uncorroborated confession. M retracted the confession at the first opportunity alleging that the confession was put into his mouth by the police who tortured him in order to induce him to turn an approver. The prosecution never alleged that M was the only person concerned either in the murder or in the burial, but admitted that after the confession efforts were made to induce him to become an approver. The prosecution evidence did not establish the existence of any motive on the part of M, and there was no independent evidence connecting him with the murder in material particulars except that G, the victim, with other co-accused who were acquitted of the charge of being the accomplices of M was seen in M's company shortly before the murder, that the corpse was found upon M's land and that M took the Magistrate to where the corpse was buried. The police, however, had known of the whereabouts of the corpse some days prior to M's confession:

**Held**: that in the circumstances, M's confession was probably due to the promise of pardon and, therefore, should be excluded from the evidence against M, and that if the confession was excluded, the rest of the evidence could not establish M's guilt. 104 Ind. Cas. 247=28 Cr.L.J. 807=A.I.R. 1927 Lah. 682.

**6 (f). Evidence and proof—Dying declaration.**

**—Ss. 300 and 302—Dying declaration—Necessary corroboration.**

In a murder case the only evidence was the oral dying declaration made to the brother of the deceased, and the two written dying declarations, i.e., made to the Sub-Inspector on the very day of the occurrence and made to the Magistrate on the day following the occurrence, in all these dying declarations, the deceased charged the accused as the actual person who fired at her. She added that the son of the accused armed with a gun was with him. In corroboration of the



dying declarations, a freshly fired gun was found in the possession of the accused. It had been freshly broken, and smelt of fresh discharge:

**Held**, that the mere absconding of the son of the accused could not be taken as corroborative evidence of sufficient value so as to convict him of the offence. The evidence, however, was sufficient to convict the accused under S. 302. A.I.R. 1940 Pesh. 49=42 Cr.L.J. 254=192 Ind. Cas. 179.

—Ss. 300 and 302—Dying declaration.

It is unsafe to convict a person on mere dying declaration without sufficient and satisfactory corroboration. 1935 M.W.N. 1089.

—Ss. 300 and 302—Evidence—Dying declaration—Short statement—Answers to leading questions—Other evidence insufficient—Conviction.

Some persons were tried under S. 302 for having murdered one B. The occurrence took place on a moonless night under a thick tree. The so-called eye-witnesses were disbelieved on the point of identification. The only evidence against the accused was the first report and the dying deposition of the deceased. The deceased was not able to make a long statement. The dying declaration was not an unaided effort but consisted of answers to leading questions put by the disbelieved alleged witness. The family of the deceased had deliberately chosen to put the attack back some two hours before it actually occurred:

**Held**, that under the above circumstances it was impossible to uphold the conviction. 1930 Cr.C. 156=4 Luck. 726=6 O.W.N. 1056=A.I.R. 1930 Oudh 60.

—Ss. 299 and 300—Statement to doctor before death—Independent corroboration necessary.

Although the statement made by the deceased to the doctor just before his death is admissible in evidence as dying declaration, still in order to convict the accused of murder there must be independent corroboration of facts and circumstances to prove the offence. 120 Ind. Cas. 474=A.I.R. 1929 Pat. 249.

—Ss. 299 and 300—Evidence—Murder—Dying declaration of deceased.

Where no motive has been shown for the crime and there is no reliable evidence to implicate the accused it is not safe to convict an accused of murder on the dying declarations of the deceased. 5 M.L.T. 217=11 Cr. L. J. 193=4 Ind. Cas. 1127.

**6 (g). Evidence and proof—Evidence of Approver.**

—Ss. 300 and 302—Approver—Corroborative evidence.

The appellant and two other persons were originally committed to the Court of Sessions and the Committing Magistrate charged all three of them under S. 120-B read with S. 302, I.P.C. He also charged the appellant under S. 302, I. P. C. and the other accused under S. 302-34, I. P. C. When the three accused persons were brought before the Court of Session, the Public Prosecutor withdrew the charges under S. 302, and S. 302-34, with the consent of the Court and an order was recorded acquitting the accused on these charges. The charge on which the trial actually took place was under S.120-B-302 and the trial proceeded with

the aid of assessors. The prosecution case mainly rested on the evidence of the approver:

**Held**, that the corroborative evidence was not of any value with respect to the charge actually framed and could not be used to justify a conviction on that charge. The offence as on facts found was one of pure and simple murder and the charge of conspiracy substituted after withdrawing the main charge was misconceived. The practical effect of this alteration in the charge was that the appellant was deprived of his right to be tried by a jury. In view of the evidence upon the record and the nature and quality of the so-called corroborative evidence and of the character of the approver himself, the case was not a fit one for directing the re-trial of the appellant before a jury upon a substantive charge of murder. A.I.R. 1938 Cal. 857=40 Cr. L. J. 166=179 Ind. Cas. 156.

—Ss. 300 and 302—Approver.

Where there is no sufficient corroboration of the approver's story, the accused cannot be convicted. A.I.R. 1922 Lah. 311.

**6 (h). Evidence and proof—First information report.**

—Ss. 299, 300 and 302—First information report by accused—Admissibility.

In a trial for offences under S. 302 or S. 201, a first information by the accused which clearly deeply incriminates him in the crime though intended to exculpate and being in nature of a confessional statement made to the Police, is inadmissible in evidence at the trial either to convict him of murder or of the lesser offence under S. 201. Moreover while accused person can undoubtedly in certain cases be tried for murder and convicted of causing evidence to disappear, there is evidence usually other than the mere statements of the accused to show that they do cause evidence to disappear, though in a trial for an offence under S. 201, the first information can be made the basis of a conviction, but in such a case the accused is not tried for murder and his first information is not a confession. A.I.R. 1939 Sind 130=40 Cr. L. J. 661=182 Ind. Cas. 464.

—Ss. 299, 300 and 302—Evidence—First information—Failure to record—Non-production as witness—Effect.

The failure to record the statement of the first informant and his non-production before the Sessions Judge has the serious consequence of depriving the accused of the right of cross-examination which will make the case of the prosecution suspicious. The recording of the statement of the second informant does not make him the first informant. 71 Ind. Cas. 353=1 Pat. 401=3 P.L.T. 771=1923 P.H.C.C. 26=1 Pat. L.R. Cr. 77=24=Cr. L. J. 129=A.I.R. 1922 Pat. 535.

—Ss. 299, 300 and 302—Delay in report, effect of.

Delay in the report is not sufficient to make the case doubtful when there are three eye witnesses whose statements are not vitiated by material contradictions or improbabilities, when sufficient motive has been established, and the accused absconded immediately after the occurrence to find refuge in a foreign country for no less than three years. A.I.R. 1936 Pesh. 106 (107)=37 Cr. L. J. 619=162 Ind. Cas. 300.



—Ss. 299 and 300—Evidence—First report and subsequent evidence — Discrepancy—Benefit of doubt.

Grave discrepancies under the first report and subsequent evidence threw doubt in the case and give the benefit of doubt. 23 P.W.R. 1914 Cr.=172 P.L.R. 1914 =15 Cr. L.J. 530=24 Ind. Cas. 842.

#### 6 (i). Evidence and proof—Medical and other expert opinion.

—Ss. 300 and 302—Strong evidence as against chemical examiner's negative evidence.

Chemical examiner's negative report regarding absence of trace of blood in the earth, leaves and grass taken from the alleged place of occurrence will not displace strong direct evidence of the place of a certain murder. 83 Ind. Cas. 485=28 C.W.N. 561=26 Cr. L.J. 5=A.I.R. 1924 Cal. 625.

—Ss. 299 and 300 (3)—Evidence—Value of medical opinion—Injury likely to cause death.

A Medical Officer's opinion that the injuries inflicted, were not serious, the opinion being based upon a mis-conception of facts is of no weight, when the evidence shows that the injuries inflicted were one inch deep and they pierced, the pleura which in the ordinary course of events is sufficient to cause death.

16 Cr. L.J. 543=29 Ind. Cas. 671. (Mad).

—Ss. 299 and 300—Homicide or death from epilepsy — Scratches on the neck — Medical opinion.

Where amongst other marks noticed on the body of the deceased, there appeared certain scratches on the front part of the neck running downwards:

**Held**, upon a consideration of medical authorities, that though, in the opinion of the Civil Surgeon's it was probable that the deceased met with his death from throttling, the alternative theory was equally possible, that the scratches were self-inflicted whilst the deceased was labouring under an epileptic or other fit and of which he died. Having regard to this, as also to the nature of the evidence adduced in support of the prosecution the accused who were charged with murder were acquitted. The theory of murder upon which the prosecution proceeded in this case was arrived at by the Sub-Inspector of Police the day following the night of the occurrence. *Per Curiam*: "It is scarcely necessary to say that a theory should succeed and not precede the collection of evidence; otherwise it is a matter of common knowledge that the evidence may be made to fit in with the theory such as the Police Officer in this case propounded. (1909) 13 C.W.N. 622=4 Ind. Cas. 286=10 Cr. L.J. 548.

—Ss. 300 and 302—Expert's evidence as to foot-prints.

Expert's evidence as to foot-prints found near corpse —Before relying on such evidence, judge should form his own opinion as to identity of those foot-prints with those of the accused. A.I.R. 1941 Mad. 88 (90)=1940 M.W.N. 761=52 L.W. 198=42 Cr. L.J. 316=192 Ind. Cas. 704.

#### 6 (j). Evidence and proof—Murder by poisoning.

—Ss. 299, 300 and 302—Arsenic poisoning—Nature of proof necessary.

In a charge of murder by arsenic poisoning it is essential for the prosecution to prove: (a) That the person alleged to have been murdered died of arsenic poisoning; (b) That the accused person administered arsenic to the deceased with intent to murder. The deposition of the Civil Surgeon to the effect that from the history and the *post mortem* appearance of the stomach and intestines, he was of opinion that death was due to an irritant poison of the nature of arsenic, is not sufficient to prove death by arsenic poisoning. The symptoms of arsenic poisoning before death are indistinguishable from the symptoms of some natural diseases, such as cholera and acute dysentery. Both diseases are common in India and both can cause sudden death. It is not possible to be certain by a naked eye *post mortem* examination of the stomach and intestines that death was due to arsenic poisoning. *Post mortem* appearances similar to those observed in undoubted cases of arsenic poisoning are also similar to those produced by certain natural diseases and other irritant poisons. It is just possible too that under certain conditions they might be produced by the action of the digestive gastric juices of the stomach upon the tissues after death.

The rule of law that the evidence of one party should not be received as evidence against another party without the latter having an opportunity of testing it by cross-examination applies with great force to a criminal case where death has been the result. This rule of law should be strictly enforced if any weight is sought to be attached to a report on the chemical examination of suspected material. No person, therefore, ought to be put in peril of capital, or any punishment on a written report not given on oath and untested by cross-examination. To accept such a report—whatever it may contain—as proof of death by arsenic poisoning or of anything is an impossible proposition in law. A.I.R. 1933 All. 837=35 Cr. L.J. 280=1934 A. L. J. 173=56 A. 228=146 Ind. Cas. 1089.

—Ss. 299, 300 and 302—Murder by poisoning—Points to be proved.

In a case of murder by poison, the following points have to be proved: Firstly, did the deceased die of the poison in question; secondly, had the accused got the poison in question in his or her possession; and thirdly, had the accused an opportunity to administer the poison in question to the deceased. If these three points are proved a presumption may under certain circumstances be drawn by the Court that the accused did administer poison to the deceased and did cause the death of the deceased. It is not usual that reliable direct evidence is available to prove that the accused did actually administer poison to the deceased. The evidence of motive which is frequently given in these cases is of subsidiary importance, and the mere fact that the accused had a motive to cause the death of the deceased is not a fact which will dispense with the proof of the second and third points that the accused had the poison in his or her possession, and that the accused had an opportunity to administer the poison.

In such cases it is not enough for the chemical examiner to merely state that poison was detected. His report should be full and complete and take the place of evidence which he would give if he were called to Court as a witness.



Distinguishing symptoms of arsenic poisoning considered. A.I.R. 1933 All. 394=34 Cr. L. J. 754=1933 A. L. J. 1617=144 Ind. Cas. 357.

—Ss. 299, 300 and 302—Circumstantial evidence—**Dhatara poisoning, presumption.**

Where in the trial of a wife for having administered **dhatura** poison to her husband as a result of which he died, the evidence of the only eye-witness could not be relied on, and although she was suspected of having illicit intimacy with one of the deceased's friends, her conduct subsequent to her husband's illness was entirely compatible with her innocence and incompatible with her guilt, and in view of certain impossibilities in the prosecution story, the possibility of suicide could not be excluded.

**Held**, that the evidence against the accused was insufficient to connect her definitely with her husband's death.

**Held also**, that in the case of **dhatura** poisoning, the contention, that in the absence of proof that the deceased was subject to a fatal dose of the poison, death as a result of that poison cannot be presumed, is without force. A.I.R. 1933 Nag. 303=16 N. L. J. 35=34 Cr. L. J. 398=142 Ind. Cas. 714.

—Ss. 299, 300 and 302—Evidence based on scientific enquiry essential—**Arsenic poisoning—Viscera examination—Vomit and night-soil alone insufficient.**

In view of the common diseases of this country whose symptoms are almost indistinguishable from that of arsenic poisoning it is very unsafe to convict a person without such evidence as can be obtained from a proper scientific enquiry. The proper enquiry consists in the careful examination of the viscera of the body and an analysis by a competent analyser showing from the amount of arsenic found in the viscera that at least a lethal dose must have been administered. Mere examination of the vomit or night-soil is totally insufficient and it is extremely dangerous to rely upon sum traces of arsenic found in either of these two things. 1930 Cr. C. 757=1930 A. L. J. 1405=A.I.R. 1930 All. 532.

—Ss. 299, 300 and 302—Nature of the poison not known—**Confession false.**

The Civil Surgeon and the Sub-Assistant Surgeon were unable to say what poison was actually administered and there was no evidence on the record to show what poison had been administered. The appellant's own confession was not true because the deceased did not die of aconite poisoning nor was aconite found in the pill produced by her.

**Held**, the evidence on the record was quite insufficient to establish the charge. 85 Ind. Cas. 817=26 Cr. L. J. 593=A.I.R. 1923 Lah. 325.

—Ss. 299, 300 and 302—**Poisoning of mistress—Ropes stained with blood—Cakes containing arsenic—Poisoning not proved.**

A person was charged of murdering and causing death by poisoning of a woman who was his mistress. The only evidence against him was that in her room were found two pieces of rope stained with human blood and to which were adhering human hair, also Bajra cakes containing arsenic were found. But there

was no evidence to show that she was poisoned. **Held**: there was no evidence that would justify the conclusion that she was poisoned. The first element justifying conviction was absent. No **corpus delicti** was established. 66 Ind. Cas. 422=23 Cr. L. J. 278=A. I. R. 1922 All. 30.

—Ss. 299, 300 and 302—**Poisoning by members of family—Death shortly after food prepared by wife—No explanation as to cause of death—Corpse hidden—Presumption violent.**

A violent presumption that the deceased was poisoned by the members of the family arises, perhaps one of the strongest presumptions known to the law, when a man dies in his own house surrounded by his own family, and poisoned shortly after eating food which must have been prepared for him by his wife, and no explanation is forthcoming from the occupants of the house-hold as to what had happened to him to cause his death, and where, in addition to such violent presumption, the persons accused are proved to have been guilty of persistent lying in an attempt to account for the absence of the deceased, and are also shown to have hidden the corpse to save themselves, the presumption becomes a certainty. 97 Ind. Cas. 44=49 All. 57=27 Cr. L. J. 1068=7 L.R.A. Cr. 156=24 A.L. J. 958=A.I.R. 1926 All. 737.

—Ss. 299, 300 and 302—**Accused displeased with mother—Attempt to take away child frustrated—Child poisoned—Medical evidence complete.**

The accused who was greatly displeased with the wife of his brother, came to get her child from her. He took away the child without her consent. Later on he was over-persuaded by other men to let the child remain. He then proceeded to give the child some sweets. Directly afterwards the child was taken ill and died. The child's viscera was sent to Chemical Examiner who deposed that an extract from viscera produced tingling sensation when rubbed on the tongue and killed frog on injection. He gave as his opinion that death was due to aconite poisoning. The Civil Surgeon was of opinion from the condition of the mucous membrane of the stomach and the points of haemorrhage that death was due possibly to irritant poisoning. There were other symptoms which pointed to aconite poisoning.

**Held**: that child died under circumstances which would be compatible with little else than aconite poisoning and that the child was poisoned by the accused was a good conclusion. 119 Ind. Cas. 870=6 O.W.N. 681=30 Cr. L. J. 1118=1929 Cr. C. 604=A.I.R. 1929 Oudh 516.

—Ss. 299 and 300—**Evidence—Murder—Poisoning.**

Guilt must be established beyond doubt and that it should not be probable only. When proof that the accused had arsenic or gave anything to eat to the deceased is not given, the conviction for murder is bad. 17 Cr. L. J. 102=32 Ind. Cas. 838 (All.).

**6 (k). Evidence and proof—Murder by strangulation.**

—Ss. 299 and 300—**Ligature strangulation—Presumption.**

There is no presumption in law that a ligature strangulation may or must be presumed to be homicidal



and not suicidal. Even taking it as a presumption of fact such a presumption cannot be safely made, and a finding that a particular strangulation was homicidal cannot possibly be made to rest on this so-called presumption. A.I.R. 1940 Mad. 1=50 L.W. 452=1939 M.W.N. 883=41 Cr.L.J. 369=186 Ind. Cas. 704.

**—Ss. 299 and 300—Murder by throttling—Absence of injuries to bones or tissues of neck—Inference.**

If the object which is employed to compress the wind-pipe is broad and pliable, there need be no injury to the bony structures of the neck. Pressure by the sole of the foot or by the palm of the hand placed across the neck of an unresisting victim would cause death by asphyxia without necessarily causing injury to the bones or tissues of the neck. The absence of such injury does not therefore indicate that the approver is not telling the truth, when he says that the deceased was throttled. A.I.R. 1939 Mad. 737=1939 M.W.N. 611=(1939) 2 M.L.J. 202=40 Cr.L.J. 913=50 L.W. 920=184 Ind. Cas. 302.

**—Ss. 299 and 300—Evidence—Strangulation or apoplexy.**

A theory as to the cause of death should not precede but succeed the collection of evidence which may be made to fit in with the theory. Where there are scratches on the throat such as would be produced by the nails of the hands one should be cautious in coming to a conclusion as to the cause of death, as the effects of apoplexy, etc., might be mistaken for those of manual strangulation. 13 C.W.N. 622=10 Cr.L.J. 548=4 Ind. Cas. 286.

**6 (1). Evidence and proof—Possession or production of property of deceased.**

**—Ss. 300 and 302 (Gwalior Penal Code, S. 292)—Evidence of murder—Property of deceased found in possession of accused—Accused not explaining such possession—Inference.**

Evidence to connect the accused with the murder is necessary before they can be convicted of it. Merely on the recovery of stolen property of the deceased found in possession of the accused soon after the murder and in the absence of any evidence that the common intention of the accused was to commit murder in furtherance of the common intention to commit robbery, the Court would not be justified in drawing the inference that the accused are guilty of murder.

Merely because the accused are unable or unwilling to explain the possession of the stolen property and when the possession of the stolen property of which the explanation is not true, is the only circumstance appearing in the evidence against the accused they cannot be convicted of murder unless the Court is satisfied that the possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. 51 Cr.L.J. 1265=4 A.I.Cr.D. 624=A.I.R. 1950 M.B. 76.

**—Ss. 299, 300 and 302—Proof of offence—Possession of property belonging to murdered person—Evidence Act, S. 114.**

Under S. 114 of the Evidence Act, the Court is entitled, if it appears reasonable in all the circumstances of the case, to draw an inference that an accused person committed a murder or took part in its commission, from the facts that he is found in possession of property,

proved to have been in the possession of the murdered person at the time of the murder or is able to point out the place where such property is concealed and admits having concealed it there and that he fails to give any explanation of his possession of the property which can be reasonably accepted. 56 M. 231 and 1930 C. 379 (2), Foll. I.L.R. (1949) Nag. 200=A.I.R. 1949 Nag. 277=50 Cr.L.J. 713=1949 N.L.J. 216.

**—Ss. 300 and 302—Production of ornaments of deceased.**

The mere fact that the accused produced, shortly after the murder, ornaments which were on the murdered woman is not enough to justify an inference that the accused must have committed the murder. Evidence to connect the accused with the murder must be there. A.I.R. 1943 Bom. 458=45 Bom. L.R. 884=45 Cr.L.J. 221=I.L.R. (1944) Bom. 25=210 Ind. Cas. 362.

**—Ss. 299, 300 and 302—Recovery of deceased's property.**

The fact that the accused were found in possession of murdered man's watch shortly after the murder affords strong corroboration of his participation in the crime. A.I.R. 1942 Lah. 271=44 P.L.R. 448=44 Cr.L.J. 77=203 Ind. Cas. 488.

**—Ss. 299 and 300—Accused's recent possession of property of murdered person.**

Where the charge is specific, that the murder was caused by throttling and it is not proved and there is no evidence to show that the deceased was murdered at all, the presumption of guilt cannot be drawn from the recent possession by the accused of jewellery taken from the murdered person. A.I.R. 1940 Mad. 12=1939 M.W.N. 873=50 L.W. 435=41 Cr.L.J. 242=185 Ind. Cas. 829.

**—Ss. 300 and 302—Recovery of property of deceased.**

Accused in possession of articles belonging to the deceased at the time of murder—If no explanation is given inference of participation in murder may be drawn. 1935 M.W.N. 954.

**—Ss. 300 and 302—Possession of goods recently stolen—Stolen articles were jewels worn by deceased on the day previous—Presumption.**

The possession of stolen goods recently after the loss of them may be indicative not merely of the offence of larceny or of receiving with guilty knowledge but of any other more aggravated crime which has been connected with the theft; this particular fact of presumption forms also a material element of evidence in case of murder.

The presumption is particularly applicable where there is satisfactory proof in case of a murder of a woman that the stolen articles were habitually worn by the deceased and that she was actually seen wearing it on the evening before the murder. 34 C.W.N. 256=A.I.R. 1930 Cal. 379.

**—Ss. 299, 300 and 302—Property recovered from place pointed out by accused.**

The mere recovery of property belonging to the deceased from a place pointed out by a person accused of the murder cannot be regarded as a proof that



the accused was a murderer: A.I.R. 1924 Lah. 109, Foll. 96 Ind. Cas. 849=7 A.I.Cr.R. 68=27 Cr. L.J. 993 (Lah.).

**—Ss. 299, 300 and 302—Production of property stolen from deceased.**

Where the only evidence against an accused person is that he produced certain property which is identified as having been stolen from a person proved to have been murdered and there is no admissible evidence against him to connect him more directly with the murder it is unsafe to convict him of the offence of murder. 13 Mad. 426 and 21 M.L.J. 1071, Dist.; (1887) A.W.N. 130, Foll. 89 Ind. Cas. 516=26 Cr.L.J. 1380=23 N.L.R. 62=A.I.R. 1926 Nag. 119.

**—Ss. 299, 300 and 411—Evidence—Murder—Stolen property of murdered man found with accused—Evidence.**

When the only evidence against an accused person is a bundle of cloth which is identified as having been stolen from a murdered man, and there is no other admissible evidence on record against him, to connect him with murder, he can be convicted only under S. 411, I.P.C. and not under S. 300. 220 P.L.R. 1913=23 P.W.R. 1913 Cr. =14 Cr. L.J. 275=19 Ind. Cas. 707.

**—Ss. 299 and 300—Evidence—Accused in possession of deceased's jewels—Effect.**

In a murder case the possession of the deceased's jewels by the accused is not evidence unless it is shown that the deceased had them on his person at the time of the murder and the accused cannot explain his possession. (1913) M.W.N. 145=14 Cr.L.J. 49=18 Ind. Cas. 337.

**6 (m). Evidence and proof—Proof of death.**

**—Ss. 300 and 302—Corpus delicti absent—Evidence of prosecution witnesses as to murder of deceased in their presence—The absence of corpus delicti not of consequence.**

The prosecution case was that accused 1 and 2 were on inimical terms with the deceased G and therefore on a night they lay in wait with a number of people on the way when G was returning with P. Ws. 1 and 4 in a jutka driven by P. W. 3. They stabbed him and removed him to a place some distance away and that he died. P. Ws. 1 and 4 who resisted were also beaten. P. Ws. 1, 3 and 4 reported to the Muniagar of the village after the lapse of four hours nearly. On the question whether when the body of the deceased could not be traced the accused could be convicted of murder:

**Held,** it is not obligatory for proving the death of an individual that his dead body should be recovered. As there is no justification for not accepting the evidence of P. Ws. 1, 3 and 4, the absence of **corpus delicti** could not be a matter of consequence so as to prevent the accused being found guilty of murder. (1880) I.L.R. 3 All. 383, followed. 63 L.W. 315=51 Cr. L.J. 1068=A.I.R. 1950 Mad. 452=4 A.I. Cr.D. 384=1950 M.W.N. 260=(1950) 1 M.L.J. 428.

**—Ss. 300 and 302—Death, proof of—Identification of corpse—Discovery of blood-stained weapons.**

In murder cases, it is essential for the prosecution to establish that the person with whose murder the accused is charged, is dead. It is unnecessary that the corpse should be identified, but there must be evidence to bring conviction to the mind of the Court that the alleged victim is dead.

The discovery of blood-stained weapons does not by itself prove that the person at whose instance these articles were discovered, is necessarily connected with the murder of a particular person. The discovery must definitely be shown to be connected with the murder of the person who is alleged to have been murdered. A.I.R. 1935 Lah. 805=37 Cr. L.J. 250=38 P.L.R. 138=160 Ind. Cas. 187.

**—Ss. 300 and 302—Corpse of murdered person not found—Caution.**

The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict an accused person of murder, but when the body of the person said to have been murdered is not forthcoming, the strongest possible evidence as to the fact of the murder should be insisted on before the accused is convicted. A.I.R. 1934 Sind 139=28 S.L.R. 387=36 Cr. L.J. 83=152 Ind. Cas. 376.

**—Ss. 300 and 302—Death doubtful—No conviction for murder—Death established, body not found.**

When a Court is not convinced that a man is dead it is impossible to convict any one of the murder, but if it is convinced that the man is dead, sentence of death may be upheld though the body has not been found: 93 Ind. Cas. 252=1 Luck. 327=13 O. L.J. 484=3 O.W.N. 204=27 Cr. L.J. 460=A.I.R. 1926 Oudh 234.

**—Ss. 300 and 302—Evidence—Duty of prosecution—Actual death must be proved.**

Where a person was beaten into unconsciousness by being brutally attacked with lathis and was dragged up to the bank of rivulet leaving traces of blood along the way and was never heard of again, **held,** that there was a reasonable possibility of the person being alive, and therefore the accused can only be convicted of an attempt to murder. Prosecution must prove the actual death of the alleged murdered person. 81 Ind. Cas. 436=22 A.L.J. 340=5 L.R.A.Cr. 59=25 Cr.L.J. 900=A.I.R. 1924 All. 662.

**6 (n). Evidence and proof—Solitary witness.**

**—Ss. 299 and 300—Ill-feeling between accused and deceased—Solitary evidence of servant, whether sufficient.**

On a certain cloudy evening, a **zemindar** was returning from certain village to his own village, with a servant who had lantern with him. In the course of the journey the **zemindar** was attacked by certain unknown persons and killed. The servant who was also attacked from behind lost his head and fled dropping the lantern without making any attempt to render any first aid to his master or to discover what had happened to him, as he was more anxious to save his own skin than to do anything else. As there was ill-feeling between the accused and the deceased, they were suspected of the murder and were tried. There was evidence of the servant alone and the jury and the Judge relying upon his evidence and his recognition of the accused convicted the accused;



**Held**, that it was doubtful whether the servant could recognize the assailants in the circumstances and it was unsafe to convict any one upon the evidence of the servant. The motive assigned to murder was inadequate and the ill-feeling between the accused and the deceased explained how they were implicated on mere suspicion. A.I.R. 1938 Cal. 220=65 C.L.J. 423=39 Cr. L.J. 541 (2)=175 Ind. Cas. 193.

**—Ss. 299, 300 and 302—Testimony of solitary witness, if sufficient.**

A charge of murder cannot succeed on the unsatisfactory nature of the defence, unless the prosecution has positively proved its case to the Court's reasonable satisfaction. In such a case the evidence of one person is nonetheless sufficient, if that evidence establishes the appellant's guilt beyond any reasonable doubt. A.I.R. 1937 Rang. 8=38 Cr. L.J. 299=166 Ind. Cas. 840.

**—Ss. 299, 300 and 302—Evidence of solitary witness—Benefit of doubt.**

In a murder case where all evidence except the statement of one witness has to be rejected the accused should not be convicted on the solitary statement of this witness but should be given the benefit of doubt. A.I.R. 1936 Lah. 778=38 P.L.R. 274=37 Cr. L.J. 1029=164 Ind. Cas. 1056.

**—Ss. 299, 300 and 302—Evidence of solitary witness—Conviction.**

It is unsafe to base a conviction in a murder case on the evidence of the only witness who is not believed by the Sessions Judge on several points, when no motive for the commission of the offence is made out. A.I.R. 1934 Oudh 373=11 O.W.N. 969=35 Cr. L.J. 1265=151 Ind. Cas. 274.

**6 (o). Evidence and proof—Statement of accused.**

**—Ss. 300, 302, 201—Statement by accused to Police, relied on by prosecution to convict them under S. 201, if can be used to prove case of murder—Duty of prosecution.**

If the prosecution wishes to rely on the statements made by the accused to the Police to convict them of an offence under S. 201, then they can only do so by showing by other evidence the falsity of their statements. These statements themselves can certainly not be used as substantive evidence in proof of the truth of the prosecution case of murder and conspiracy to murder in whole or in part. They cannot be relied on as both true and false. A.I.R. 1939 Sind 130=40 Cr. L.J. 661=182 Ind. Cas. 464.

**—Ss. 300 and 302—Case under Ss. 302 and 201, entirely depending on statement of accused—Part of statement false—Court, if can accept evidence that rest was made by accused.**

Where a case under Ss. 302 and 201, depends entirely upon the statement made by the accused and the discoveries made in pursuance of these statements and if the Court treats half of the statement of the accused as false, it cannot accept the evidence that the other half of the alleged statement of the accused was made by him.

Where the statement made by the accused is, "I have murdered the woman and buried the dead body," etc., the words "murdered the woman" are not

admissible only because the rest of the sentence makes quite good sense and is sufficient to identify the body and to lead to its discovery. The words "murdered the woman" are not sufficient to identify the woman with one murdered, and this evidence is not sufficient for convicting the accused under S. 302. The accused, however, can be convicted under S. 201. (1938) 177 Ind. Cas. 909=1938 M.W.N. 866=48 L.W. 332=39 Cr. L.J. 977.

**—Ss. 299 and 300—Admission of accused the only basis of conviction—His statement should be accepted entire.**

When the only account of what happened on the night of murder is given by the accused himself and it is his admission contained in that statement that forms the basis of his conviction, the statement should be accepted in its entirety and if it establishes any mitigating circumstance the accused should be given the benefit of it. 121 Ind. Cas. 178=31 P.L.R. 35=31 Cr. L.J. 226=A.I.R. 1930 Lah. 269.

**—Ss. 299 and 300 — Admission of guilt to villagers—Subject to scrutiny.**

Although the evidence of admission of guilt to villagers is sufficient to justify the conviction, still the evidence that such an admission was made must be closely scrutinized like all other evidence which is used to prove a case of murder. 117 Ind. Cas. 737=6 O.W.N. 309=30 Cr. L.J. 829=1929 Cr. C. 14=A.I.R. 1929 Oudh 272.

**6 (p). Evidence and proof—Suicide or murder.**

**—Ss. 299 and 300—Suicidal or homicidal wound.**

**Held**, that the fact that the body of the deceased was found lying flat with its face downwards, having several throat wounds by razor, only one of them being severe, indicated that the wound was suicidal and not homicidal. A.I.R. 1937 Pat. 652=18 P.L.T. 683=4 B.R. 113=39 Cr.L.J. 66=172 Ind. Cas. 171.

**—Ss. 299 and 300—Pointing either to murder or suicide—No conviction.**

A person was accused of having murdered his daughter. There was evidence to show that one day he went out along with the daughter and returned alone. The accused had made a statement before the 'Juge d' instruction that his daughter was tired of life and that he assisted her to commit suicide. The accused could lead the police to the place on the river where his daughter was drowned. Although the deceased's hands were tied, there were no signs to show any struggle between her and her father. All other adverse evidence was of interested nature. During the investigation by the 'Juge d' instruction another motive also was disclosed that the daughter, who was a widow, was intriguing with a man which possibly might have been the real motive that led her to death.

**Held**, that the accused could not be convicted of murder. 121 Ind. Cas. 157=52 Mad. 529=29 M.L.W. 645=1929 M.W.N. 383=2 M.Cr.C. 150=31 Cr.L.J. 223=A.I.R. 1929 Mad. 487=56 M.L.J. 628.

**—Ss. 299, 300 and 302—Evidence—Suicide and murder—Double knotted ligature round the neck.**

Double knotted ligature round the neck of the deceased was held to be a clear indication of the



fact that his death had been caused by strangulation by some person other than himself. 89 Ind. Cas. 516=23 N. L. R. 62=26 Cr. L. J. 1380=A. I. R. 1926 Nag. 119.

#### 6 (q). Evidence and proof—Miscellaneous.

##### —Ss. 299, 300 and 302—Mere suspicion.

A was charged for the murder of B. Strychnine in sufficient quantity was found in the post mortem in B's stomach. People in their village suspected that A was carrying on an intrigue with B's wife;

Held, that evidence only showed that possibly A had some hand in the poisoning of B but it was only a suspicion and suspicion could not take the place of positive evidence. Case against A was, therefore, not proved. A.I.R. 1946 Lah. 48=47 Cr. L. J. 232=221 Ind. Cas. 638.

##### —Ss. 299, 300 and 302—Conviction on mere suspicion.

Suspicion, however strong, furnishes no legal grounds for a conviction on a charge of wilful murder. In the absence of eye-witnesses, a person should not be convicted on mere suspicion, however strong it be. A.I.R. 1933 Oudh 148=34 Cr. L. J. 498 (2)=8 Luck. 301=143 Ind. Cas. 55=10 O.W.N. 7.

##### —Ss. 300 and 302—Probabilities and suspicions—Insufficient to found conviction.

Probabilities and suspicions are not sufficient grounds in law upon which to found a conviction of an accused in a criminal trial specially in a murder trial where the maximum punishment is death. 7 O.W.N. 933=128 Ind. Cas. 211=A.I.R. 1930 Oudh 460.

##### —Ss. 299, 300 and 302—Evidence of resolution to kill—Inference.

It is seldom that direct evidence of a resolution to kill is forthcoming. The decision as to resolution more often rests on legitimate inferences from the proved circumstances and the conduct of the accused. A.I.R. 1945 P.C. 42=1944 A.L.J. 466=46 Cr. L. J. 394=11 B.R. 258=217 Ind. Cas. 381=60 M.L.W. 118=1946 M.W.N. 1 (P.C.).

##### —Ss. 299, 300 and 302—Evidence of arrest.

Evidence of arrest should not only mention the date but also the place of arrest. An arrest made soon after the occurrence in the accused's own village may put one complexion, while an arrest made long after in a distant place may have a different significance. A.I.R. 1944 Mad. 483=(1944) 2 M.L.J. 101=57 L.W. 443=1944 M.W.N. 497=46 Cr. L. J. 337=I.L.R. (1945) Mad. 231=217 Ind. Cas. 302.

##### —Ss. 299, 300 and 302—Evidence of relations of deceased.

Where in a case of murder, it is found that the deceased and his party were on inimical terms with the party of the accused, it is a rule of prudence that the evidence of the relations of the deceased should be taken with caution. A.I.R. 1942 Pesh. 29=43 Cr. L. J. 498=189 Ind. Cas. 878.

##### —Ss. 299, 300 and 302—Prosecution witnesses, relatives of deceased—Effect.

In a case of murder the fact that the prosecution witnesses are relatives of the murdered man is no valid reason for discarding their evidence. What would be of importance is that the witnesses had enmity with the accused. The interests of the relatives is undoubtedly to see the true criminal prosecuted; they have no interest in accusing any one falsely unless they have enmity. A.I.R. 1936 Lah. 233=37 Cr. L. J. 751=38 P.L.R. 695=163 Ind. Cas. 143.

##### —Ss. 299 and 300—Inimical witness.

It is altogether unsafe in a murder case to place reliance on the evidence of a witness when the Court knows that enmity exists between him and accused. A.I.R. 1940 All. 46=1939 A.L.J. 966=41 Cr. L. J. 258=1939 A.W.R. 768=186 Ind. Cas. 192.

##### —Ss. 299, 300 and 302—Absence of marks of injury on person of accused.

In the case of fight between two parties, the fact that no marks of injury were found on the person of the accused and the other members of his party, indicates that the accused were the aggressors. A. I. R. 1942 Pesh. 29 (2)=43 Cr. L. J. 498=199 Ind. Cas. 878.

##### —Ss. 299, 300 and 302—Accused charged with causing death of her new born infant by drowning—Essentials to be proved by prosecution.

Where the charge against the accused is that she intentionally caused the death of her new-born infant by drowning it in the Corporation syphon, the prosecution must not only prove that she was recently delivered of a child but also that the body of the child found in the cesspool was the body of her child. The accused cannot be convicted merely on the evidence that she was seen in an advanced state of pregnancy and that her appearance and the state of the room that she occupied on the date of the alleged offence indicated that she had been delivered of a child, and that the dead body of the child was found in the syphon. A.I.R. 1941 Mad. 1=1940 M.W.N. 1105=52 L.W. 710=42 Cr. L. J. 677=195 Ind. Cas. 129.

##### —Ss. 299, 300 and 302—Test of live birth of child.

The fact that the lungs on suction floated in water is not an infallible test of live birth. A child may breathe while its head is in the vagina, either during a presentation of the head or of the breech. A.I.R. 1940 Mad. 294=1939 M.W.N. 1130=50 L.W. 791=41 Cr. L. J. 579=188 Ind. Cas. 332.

##### —Ss. 299 and 300—Absence of evidence.

Per Young C. J.—Where, there is no evidence upon which the Court can rely, it is not possible to come to a conclusion even that the murder was probably committed by anyone. A. I. R. 1940 Lah. 457=42 P.L.R. 570=42 Cr. L. J. 53=I.L.R. (1941) Lah. 259=190 Ind. Cas. 668.

##### —Ss. 299 and 300—Implication of innocent party—Effect on other accused.

Where the falsehood is merely an embroidery to a story, that would not be enough to discredit the whole of the witness's evidence. But if the falsehood is on a major point in the case, or if one of the essential circumstances of the story told is clearly unfounded, this is enough to discredit the witness altogether. Hence, the implication of a man in a murder in which he



could not possibly have taken part in, in the absence of convincing circumstantial evidence against the other murderers, a reason for acquitting them all. A.I.R. 1940 Lah. 457 = I.L.R. (1941) Lah. 259 = 42 P.L.R. 570 = 42 Cr.L.J. 53 = 190 Ind. Cas. 668.

—**Ss. 299 and 300—Discrepant evidence—Accused found to have several wounds—Duty of prosecution in explaining such wounds.**

It is surely a discrepancy of great gravity when a witness, called to say that a fatal blow was struck and the deceased fell in consequence of it is obliged to admit that on an earlier occasion he told the Police that the deceased fell when he ran into the yokepin of a cart.

When a man charged with murder in the course of a *melee* is found to have number of wounds, the prosecution ought to be able to do more than merely call a witness to say that the deceased swung a *da* in all directions, and then ask the Court to infer that that explains the accused's wounds. A.I.R. 1940 Rang. 55 = 41 Cr.L.J. 373 = 186 Ind. Cas. 719.

—**Ss. 299 and 300—Witness testifying on oath—Inference.**

If a witness goes into the witness box and testifies on oath, the jury, unless there is something else to operate on their minds, may draw an inference not as a matter of law, but rather as a matter of fact that he is *prima facie* likely to be speaking the truth, particularly in capital cases. A.I.R. 1939 Cal. 682 = I.L.R. (1939) 1 Cal. 187 = 43 C.W.N. 133 = 41 Cr.L.J. 59 = 184 Ind. Cas. 614.

—**Ss. 299, 300 and 302—Inquest report.**

The statements in the inquest reports are not evidence in a case. 177 Ind. Cas. 808 = 1938 M.W.N. 868 = (1938) 2 M.L.J. 618 = 48 L.W. 615 = 39 Cr.L.J. 947.

—**Ss. 300 and 302—Inquest report filed—Sub-Inspector not cross-examined—Retrial.**

Where inquest reports have been filed, it is incumbent upon the Sub-Inspector who reduced the statements in inquest report to writing, immediately after the discovery of the dead bodies, to explain the difference between them and the evidence given by him. He should be cross-examined with regard to this difference. Where he is not so cross-examined, and since the statements in the inquest reports cannot be used to discredit the evidence of the Sub-Inspector, unless they are put to him under the provision of S. 145, Evidence Act, it is necessary to order a re-trial. (1938) 177 Ind. Cas. 808 = 1938 M.W.N. 868 = (1938) 2 M.L.J. 618 = 48 L.W. 615 = 39 Cr.L.J. 947.

—**Ss. 299 and 300—Evidence.**

It can never be maintained that where the evidence for the prosecution points affirmatively no further than manslaughter, the law would enlarge the proof and transform the case into one presumptively of murder. A.I.R. 1936 P.C. 242 = 1936 M.W.N. 889 = 1936 A.W.R. 741 = 44 L.W. 253 = 1936 A.L.J. 869 = 37 Cr.L.J. 914 = 40 C.W.N. 1164 = 38 Bom. L.R. 1101 = 163 Ind. Cas. 681 (P.C.).

—**Ss. 299, 300 and 302—Unreliable evidence—Conviction.**

Where the evidence given in the Court is obviously not reliable and the medical evidence shows that there

is only one long cut on the deceased's body and it cannot be possibly determined who caused it, a conviction for murder is not sustainable, though a wicked crime has thereby to go unpunished. (1936) 165 Ind. Cas. 889 = 38 Cr.L.J. 89.

—**Ss. 299, 300 and 302.**

Person giving threats of death some months before murder.

**Held**, that such fact is not sufficient to prove that the person was connected with death. A.I.R. 1936 Lah. 400 = 38 P.L.R. 949 = 37 Cr.L.J. 597 = 17 Lah. 518 = 162 Ind. Cas. 511.

—**Ss. 299, 300 and 302—Alibi.**

Evidence strong against accused — Accused found to have motive — Recovery of blood-stained garments and knife:

**Held**, that the *alibi* evidence was not to be treated seriously and that on the evidence he could be convicted under S. 302. (1936) 164 Ind. Cas. 154 = 1936 O.W.N. 603 = 37 Cr.L.J. 932 (D.B.).

—**Ss. 299, 300 and 302.**

**Held**, provided that enough points of similarity and dissimilarity in two fired cartridges are taken the chances of two different bolts making identically the same marks are so remote as to be to all intents and purposes non-existent.

**Held**, further on facts that the accused was guilty of murder. A.I.R. 1936 Pesh. 152 = 37 Cr.L.J. 889 = 164 Ind. Cas. 145.

—**Ss. 299, 300 and 302—Mode of examining witnesses.**

In a capital case it is important that the more important of the witnesses should be examined in such way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events, the facts which the witnesses saw or the acts which they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. It is only by this means that a clear and consistent account of the whole thing may be presented before the Judge and jury. A.I.R. 1935 Cal. 184 = 39 C.W.N. 368 = 36 Cr.L.J. 808 = 62 Cal. 572 = 155 Ind. Cas. 687 (F.B.).

—**Ss. 299, 300 and 302—Witness resiling from previous statement—Value of evidence.**

It is quite unsafe, especially in a murder case, to rely upon the evidence of witnesses who have resiled from their previous statements. But this principle does not apply where it is not only the evidence of a witness who has resiled from his statement which proves the case against the accused but there is an eye-witness and other witnesses to prove the case. A.I.R. 1934 Oudh 507 = 11 O.W.N. 1269 = 36 Cr.L.J. 86 = 152 Ind. Cas. 331.

—**Ss. 299, 300 and 302.**

Where the deceased was about 80 years old, suffering from rheumatism; the first information report by *chaukidar* mentioned that the deceased must have fallen on a log of wood and died a natural death; the medical evidence could not definitely say whether



the death was due to violence or natural; the prosecution evidence was vague and unreliable; all circumstances pointed to a natural death;

**Held**, that no charge under S. 302 had been made out against the accused. A.I.R. 1934 Oudh 286=35 Cr.L.J. 992=11 O.W.N. 722=149 Ind. Cas. 473.

—Ss. 299, 300 and 302—Evidence required.

A brutal murder committed in daylight in a village is bound to go unpunished where satisfactory evidence is not forthcoming as to who were the guilty parties. A.I.R. 1934 Oudh 13=11 O.W.N. 77=35 Cr.L.J. 681(2)=148 Ind. Cas. 259.

—Ss. 299, 300 and 302—Events to be considered.

The events preceding and leading on to the assault on the deceased have to be considered in approaching the evidence led by the prosecution to prove the guilt of the accused. A.I.R. 1934 Rang. 44=35 Cr.L.J. 855=148 Ind. Cas. 1069.

—Ss. 299, 300 and 302 — Duty of prosecution—Available evidence.

Though it is the duty of the prosecution to place before the Court, especially in a case of murder, all the available evidence which is likely to throw any light upon the crime and the withholding of such evidence is likely to be treated by the Court as a flaw in the evidence for the Crown, each case depends upon its own facts and circumstances. A.I.R. 1932 Lah. 500=33 Cr.L.J. 497(2)=33 P.L.R. 580=137 Ind.Cas. 691.

—Ss. 299, 300 and 302—Custom of implicating relatives of suspected murderers.

Where in a trial of four brothers for murder although the Magistrate found the evidence of all the professing eye-witnesses to be untrustworthy, he acquitted two of them and passed the sentence of death upon the other two:

**Held**, that having in view the prevailing custom of maliciously implicating as many of the suspected murderer's close relations as possible without regard to truth, it would be unsafe to confirm the conviction of two of the accused upon evidence which as a whole had failed to convince the trial Court. A.I.R. 1932 Lah. 424=33 P.L.R. 475=33 Cr.L.J. 744=139 Ind.Cas. 128.

—Ss. 299, 300 and 302 — Time of post mortem examination, importance of.

In a murder case, it is most essential that the time of the post mortem should be recorded, as in many cases, it assists the Court in determining whether the death took place at the time alleged or not. A.I.R. 1931 Oudh 119=8 O.W.N. 107=32 Cr.L.J. 697=6 Luck. 475=131 Ind. Cas. 439.

—Ss. 299, 300 and 302 — Defence — Duty of counsel.

In a case of murder, the Advocate for the defence should be very careful in advising the accused person to dispense with his defence witnesses especially if those witnesses were present at the time of the occurrence. A.I.R. 1931 Rang. 163=32 Cr.L.J. 1067=133 Ind. Cas. 488.

—Ss. 299, 300 and 302 — Prosecution witnesses untruthful—Residue uncorroborated—Conviction bad.

Where the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it is dangerous to convict the accused on the residue without corroboration; 42 Cal. 784, Foll. 7 O.W.N. 939=A.I.R. 1930 Oudh 460.

—Ss. 299, 300 and 302—Lathi blow on the head—Abettor gagged the mouth as desired—No common intention proved—Abettor not liable for murder.

P attacked H with a lathi and hit him on his head. P then asked B to press H's mouth with a cloth. B did as she was asked. In the post mortem H's skull was found to be shattered into 14 pieces. Upon medical examination it was found that death was due to injuries on the head caused by P. The blows were not struck in furtherance of common intention on the part of P and B. There was no evidence that death had been caused by strangulation:

**Held**, that B was not guilty of murder. 120 Ind. Cas. 268=31 Cr.L.J. 37=1930 Cr. C. 61=A.I.R. 1930 All. 45.

—Ss. 299, 300 and 302—Prosecution evidence uncorroborated in material particulars—Real murderer concealed—Evidence insufficient.

The fact of murder admitted of no doubt. The main evidence for the prosecution and the sole evidence connecting the accused with the murder was that of two brothers whose evidence was uncorroborated in material particulars and unreliable. The villagers were well aware of the identity of the murderers, but whether it was because the real murderers were public favourites or the deceased was unpopular no evidence was forthcoming:

**Held**, that the accused could not be convicted, 1929 Cr.C. 287=A.I.R. 1929 Pat. 527.

—Ss. 299, 300 and 302 — Evidence—Unreliable witness.

Conviction for murder on the strength of the statement of a witness who was found to be unreliable, cannot be supported. 100 Ind. Cas. 359=7 A.I.Cr.R. 430=28 Cr.L.J. 279=A.I.R. 1927 Mad. 1112.

—S. 300—Evidence.

When the prosecution witnesses are not impartial and the story put forward by them is palpably false and does not explain injuries caused to the accused, the High Court should set aside the convictions of the accused under S. 304(2). 95 Ind. Cas. 597=8 L.L.J. 183=27 P.L.R. 22=27 Cr.L.J. 821.

—Ss. 299, 300 and 302—Evidence—Robbery and murder—Evidence sufficient for robbery—Not sufficient for murder.

In a case of murder the following facts were found: The accused found the deceased playing with three other companions, gave him a melon and took him away on the promise of giving him more. The accused and deceased were afterwards seen together near the canal by one witness and after that deceased was never seen alive again. The medical man who conducted the post-mortem examination was unable to give any opinion as to the cause of death because putrefaction was too far advanced. Melon seeds were found in the deceased's stomach at the post mortem examination. The accused's shoes



were found near the canal bridge hidden in some reeds. Deceased when taken away by the accused was wearing 3 ornaments and these were not on his dead body. The appellant subsequently had knowledge of the place in which these ornaments were concealed and himself dug them up during the police investigation.

**Held**, that assuming these findings to be correct they do not exclude every reasonable hypothesis other than that the deceased's death was caused by the accused. If the accused can be held to have robbed the deceased it does not follow necessarily that he afterwards killed him. 77 Ind. Cas. 433=4 Lah. 373 =6 L.L.J. 59=25 Cr.L.J. 385=A.I.R. 1924 Lah. 109.

**—Ss. 299, 300 and 302—Evidence—Value of—Evidence of eye witness failing to inform.**

When a person sees a murder committed and gives no information thereof, his evidence is little better than that of an accomplice. 76 Ind. Cas. 824=5 L.L.J. 322=25 Cr.L.J. 264=A.I.R. 1923 Lah. 391.

**—Ss. 299, 300 and 302—Going with a weapon on the day of murder.**

The mere fact that the appellant left the house with *toka* in his hand after the deceased had left it on the night of the murder is not a very material point. Many *zamindars* carry *tokas* which are used for their ordinary work as agriculturists and there is nothing significant in the fact that the appellant had a *toka* in his hand when he left the house. 77 Ind. Cas. 602=25 Cr.L.J. 426=A.I.R. 1923 Lah. 539.

**—Ss. 299, 300 and 302—Cause of death uncertain—No proof of body being pointed out—Accused seen with deceased the day previous with bulls sold by deceased—Presumption.**

When the cause of death was uncertain and it was not proved that the body of the deceased was pointed out by the appellant:

**Held**, accepting it as proved that the body was discovered on the 9th some three miles from the fair ground, but from this fact and the facts that the appellant was the last person seen with the deceased on the 8th and that he was later on that day in possession of a bullock which the deceased had offered to him for sale do not justify the presumption that the death of the deceased was caused by the appellant in the absence of any evidence of the cause of death. Still less could it be presumed that the death was caused by the appellant with such intention or knowledge as to render him guilty of an offence under Section 302, Indian Penal Code. 75 Ind. Cas. 762=25 Cr.L.J. 58=A.I.R. 1923 Lah. 429.

**—Ss. 299, 300 and 302—Evidence—Not sufficient—Very young girl charged—Infant's throat cut—Body not found in her house—Motive insufficient—Jewels not effectively concealed—Evidence not sufficient.**

A girl, aged 10 or 11 years was convicted of murder of an infant by cutting her throat with a knife and was sentenced to transportation for life by the Sessions Judge. The evidence against her was purely circumstantial;

**Held**, that the Sessions Judge committed a grave error concerning the most important link in the chain of circumstantial evidence viz., the place where the body was discovered, because as a fact it was not found in the girl's house but in a disused cattle shed to which anybody had access; that no importance to the so-called motive should have been attached as the liking for sweets is almost universal among children; that the evidence of her denial of the whereabouts of the infant loses all importance as the dead body was not found in her house and that the knife and the jewels were so slightly concealed that they could have been found out by any one without her aid; and that under these circumstances conviction of the girl for murder was not sustainable. 5 L.L.J. 78=A.I.R. 1921 Lah. 361.

**—Ss. 299 300 and 302—Assessors finding some guilty and others not guilty—Evidence the same against all—Unsatisfactory—Conviction of some.**

Where the accused were seven in number and the assessors were of opinion that some of them were not guilty while others were held to be guilty although the evidence against them was merely the same and it appeared that the evidence was most unsatisfactory and that the truth had been kept back. **Held**, that under those circumstances it was not proper to convict some of the accused under S. 302, I. P. C.

**Per Addison, J**—In the Punjab persons who are on the point of death do sometimes implicate their enemies without cause. 30 Punj. L.R. 536.

**—Ss. 299, 300 and 302—Decomposed body—Identified by clothes, height and age—Confession not recorded but deposed to.**

Where the body though decomposed was identified by the help of clothes, height and age of the deceased and the accused made confessions before witnesses and the Tahsildar before whom she was produced for remand and who though had not recorded the confession under S. 164, Cr. P. C. deposed to it, **held**: that the appellant was guilty of the offence under S. 302, that there was no reason to doubt the testimony of the disinterested witnesses and the unanimous verdict of the assessors. 81 Ind. Cas. 271=25 Cr.L.J. 783=A.I.R. 1923 Lah. 40.

**—Ss. 299 and 300—Evidence—Corroboration of—Testimony of Investigating Officer.**

Observations by Investigating Officer made on the spot require the same sort of corroboration by independent witness that is required in connection with the first inspection of the corpse and the preparation of the inquest report on the same point. 15 A.L.J. 340=18 Cr.L.J. 1028=42 Ind. Cas. 772.

**—Ss. 299, 300, 304 and 326—Evidence—Charge—Intention—Essentials**

Where the charge to the jury omitted to ask the jury to consider the intention of the accused, the charge is defective. The accused's frame of mind, the nature of weapon, number and nature of wounds, examination of the eye-witnesses, as to duration of the action are considerations in deciding the questions of intention. 8 L.B.R. 125=17 Cr.L.J. 154=33 Ind. Cas. 634.



—Ss. 299, 300 and 201 — Evidence — Causing evidence of murder to disappear—Principal and accessory after fact—Principal if can be convicted under S. 201.

A principal could not be convicted as an accessory after fact. When it is impossible to say definitely, though strongly suspected, that an accused was guilty of murder, mere suspicion does not bar a conviction under S. 201. But if it be accepted as a proved fact that the accused disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder, they cannot be convicted of the minor offence of causing evidence of the murder to disappear, though by order of a Judge or by a misconception of the position by the Public Prosecutor, the charge of murder is subsequently withdrawn. *Per Chapman, J.*—It is unsatisfactory that one Court charges the accused as principal and the other as accessory after the fact. 20 C.W.N. 166=17 Cr.L.J. 4=23 C.L.J. 333=32 Ind. Cas. 132.

—S. 302—Explosive Substances Act, (1908), Ss. 3, 5 and 8.

*White, C. J. and Abdur Rahim, J.*—A person in possession of bomb material ten days before a fatal explosion took place and who could not explain its possession, is guilty under S. 8 of the Exp. Sub. Act and not under S. 302, I.P.C., nor under S. 3 of the Expl. Sub. Act. (*Benson J.*)—He is guilty under S. 302, I.P.C. and under Ss. 3 and 5 of the Exp. Sub. Act. (1910) M.W.N. 77=7 M.L.T. 314=11 Cr.L.J. 222=20 M.L.J. 657=6 Ind. Cas. 51.

—Ss. 299, and 300—Murder—Proof—Practice.

Where one is charged with the murder of another, three facts obviously have to be established—first of all that the person alleged to be murdered is dead; secondly, that he died by the means alleged on the part of the prosecution; and thirdly, that the accused intentionally took that part in causing his death which is attributed to him by the prosecution. (1905) 7 Bom. L.R. 985=3 Cr.L.J. 85.

—Ss. 299 and 300—Plea of insanity—Melancholic homicidal mania.

*Held*, on the evidence in the case, that the prisoner was suffering from a fit of melancholic homicidal mania at the time of the act and incapable of knowing the nature of the act. (1905) 10 C.W.N. 725=3 Cr.L.J. 469.

—Ss. 299, 300, 411—Murder—Receiving stolen property—Proof of murder.

The accused *Y.* being charged with the murder of a boy and with having committed an offence under S. 411, in respect of certain ornaments which the boy was wearing at the time of his death, admitted that the boy was at his house immediately before his death, and declared he had fallen from the roof and his respiration had stopped. He also admitted that he had subsequently thrown the body in a tank where it was afterwards found. It was further proved that the accused had produced the ornaments from a hole near the tank. But there was no evidence to prove that the accused had anything to do with the death of the boy, and the medical evidence was to the effect that the boy might have been either

intentionally or accidentally strangled. *Held*, that there was not sufficient legal evidence that the accused had killed the boy, and the accused could only be found guilty of an offence under S. 411. (1903) 8 C.W.N. 22.

—Ss. 299 and 300—Gunpowder—Burn by—Explosion of—Death by—Marks of.

A burn from gunpowder may be recognized not only by the scorch but by small particles of gunpowder being buried in the skin. 4 Bom.L.R. 679.

## 7. Exceptions to S. 300.

- (a) Burden of proof
- (b) Duty of Court
- (c) Facts may fall within more than one Exception.

### 7 (a). Exceptions to S. 300—Burden of proof.

—S. 300—Person driving spear in abdomen and killing another—Offence—Burden of proof—Exceptions—Presumption.

Where a man intentionally kills another, or intentionally inflicts bodily injury sufficient in the ordinary course of nature to cause death, (by driving spear in his abdomen) his act is murder, unless the accused can bring the case within one of the exceptions specified in S. 300. Under S. 105, Evidence Act, not only is the burden of proving the existence of circumstances bringing the case within an exception upon the accused persons, but the Court shall presume the absence of such circumstances. A.I.R. 1914 Pat. 92=22 Pat. 607=10 B.R. 388=45 Cr.L.J. 409=211 Ind. Cas. 532.

—S. 300—Onus.

Where an accused admits that he took part in the killing, the onus is strongly upon him to show that his case comes under one of the exceptions under S. 300. A.I.R. 1940 Lah. 157=42 P.L.R. 1=41 Cr.L.J. 576=188 Ind. Cas. 326.

—S. 300.

Plea that act of accused falls within exception to S. 300—Burden of proof is upon accused under Evidence Act, S. 105. A.I.R. 1933 Oudh 148=10 O.W.N. 7=8 Luck. 301=34 Cr.L.J. 408 (2)=143 Ind. Cas. 55.

—Ss. 300, 302—Evidence Act, S. 105—Burden of proof.

The burden of proving that the act of an accused charged with murder comes within the purview of any of the exceptions to S. 300, I.P.C., is upon the accused under S. 105, Evidence Act and when he has failed to discharge that burden, he is on his own showing guilty of an offence under S. 202. A.I.R. 1933 Oudh 148=10 O.W.N. 7=8 Luck. 301=34 Cr.L.J. 498 (2)=143 Ind. Cas. 55.

—S. 300—Onus.

In a charge for murder, it is for the accused to prove the fact essential for the purpose of bringing his case within any of the exceptions to S. 300, I.P.C. A.I.R. 1933 Rang. 142=34 Cr.L.J. 783=144 Ind. Cas. 420.



**—Ss. 300—Murder—Plea of case falling under proviso—Onus.**

When accused brutally beat a defenceless man against whom they had a grudge, but without an intention to kill, and gave him such a blow which caused his death, they are guilty of murder unless they show that they are protected by one of the provisos to S. 300, I.P.C. 17 A.L.J. 985=20 Cr.L.J. 767=53 Ind. Cas. 495.

**—Ss. 300 and 302—Burden of proof—Exceptions.**

When the accused gave such a blow with a lathi to the deceased on the head which caused the death of the deceased by fracture of the skull it was for him to show that it was removed from the category of murder by one of the exceptions to the section. 17 A.L.J. 866=20 Cr.L.J. 608=52 Ind. Cas. 224.

**7 (b). Exceptions to S. 300—Duty of Court.****—S. 300—Benefit of exceptions.**

If upon the evidence it appears that the accused is entitled to the benefit of any one of the exceptions of the Code, neither the ignorance of the accused nor the falsity of his evidence nor any mistake or omission of the lower Courts or advocates should deprive him of the benefit of it. A.I.R. 1941 Sind 117=42 Cr.L.J. 786=195 Ind. Cas. 833.

**—S. 300—Duty of Court.**

Where the Court finds on the prosecution evidence itself that the accused is entitled to the benefit of one of the exceptions to S. 300, it should give the accused that benefit though he may not have relied on the exception. A.I.R. 1936 Nag. 119=37 Cr.L.J. 1035=I.L.R. (1936) Nag. 85=164 Ind. Cas. 928.

**—S. 300—Benefit of exception, not pleaded—Court must give if made out.**

Where the Court finds on the prosecution evidence itself that the accused is entitled to the benefit of one of the exceptions to S. 300, it should give the accused that benefit though accused may not have relied on the exception; thus where accused by chance caught his wife in the very act of having intercourse with her paramour and killed her on the spot:

**Held**, that the accused should be convicted under S. 304 and not S. 302, though he did not plead the exception to S. 300. 81 Ind. Cas. 901=25 Cr. L.J. 1077=A.I.R. 1925 Nag. 37.

**—S. 300—Culpable homicide not proved to amount to murder—Necessity of considering exceptions.**

The question as to whether the case is within one of the Exceptions to S. 300 does not arise for determination unless and until the prosecution has established a case of murder. If the prosecution has proved that culpable homicide (under S. 299) has been committed by the accused but has failed to prove that such culpable homicide amounted to murder (under S. 300), it is improper, and indeed useless, to consider whether any of the excluding factors are present. A.I.R. 1939 Rang. 225=40 Cr. L.J. 725=183 Ind. Cas. 145.

**7 (c). Exceptions to S. 300—Facts may fall within more than one Exception.****—Ss. 299 and 300—Overlapping.**

The facts of a case may be such that it may fall within more than one exception to S. 300. 106 Ind. Cas. 343=1927 M.W.N. 796=29 Cr. L.J. 7=9 A.I.Cr.R. 263=1 M.Cr.C. 178=A.I.R. 1928 Mad. 136.

**8. Grave and sudden provocation—S. 300, Exception (1)**

- (a) Duration.
- (b) Proof and onus.
- (c) Test of sufficiency.
- (d) What amounts to.
- (e) What does not amount to.

**8 (a). Grave and sudden provocation—S. 300, Exception (1)—Duration.****—S. 300, Excep. 1—Person getting provocation—When can be said to have cooled down and consequently deprived of benefit of exception.**

It is not possible to lay down a hard and fast rule as to when a person who has received provocation should be said to have had time to cool down and thus to be deprived of the benefit of Excep. 1 to S. 300, I. P. C.; much depends on the individual characteristics of the accused and that element cannot be ignored in the determination of this matter. Information received from a reliable person and believed to be credible as to the existence of a provoking act, which is being done in the immediate neighbourhood and the existence of which is instantaneously verified, can within the meaning of that exception be said to be provocation given by the person committing that act as much as if the person provoked had seen it in the first place with his own eyes.

Accused No. 1, who was the father of accused No. 2 saw the deceased who had contracted a liaison with his daughter-in-law, entering his house in his absence from a short distance from his house. Thereupon he informed his son who was about 100 paces from the house and both father and son came to the house and seeing the daughter-in-law and the deceased in a compromising position killed them both:

**Held**, that when the accused No. 1 was at a short distance from his house, he must have been provoked to such a degree as to lose his senses there and then and if he further informed his son of what he had seen and came to his house accompanied by his son, he had no time to cool down so to say and thus return to his normal condition. The whole thing formed a series of one transaction and the provocation continued until such time as the deed was done. The accused No. 1, therefore, was entitled to the benefit of Excep. 1. Similarly, when the son was seen going to meet his wife, he too would have at once lost the power of control and if afterwards he travelled a distance of 100 paces only, it could not be reasonably urged that the act that he then did smacked of deliberation or that he sought the provocation himself. He too, therefore, was entitled to the benefit of Excep. 1 to S. 300. A.I.R. 1943 Lah. 123=45 P.L.R. 162=I.L.R. (1944) Lah. 72=44 Cr. L.J. 595=207 Ind. Cas. 388.

**—S. 300, Excep. (1)—Act need not immediately follow provocation—Provocation may be continuing.**

The rule contained in S. 300, Excep. (1) does not contemplate that in order to entitle an accused to



earn the mitigation provided for, the act must immediately follow the provocation. The appellant continued to be under the influence of provocation until he had killed the deceased and the case fell clearly within S. 300, Excep. (1), I. P. C. 68 Ind. Cas. 403=23 Cr. L. J. 563=2 L. L. J. 406.

—Ss. 300, Excep. (1) 302, 304—Grave and sudden provocation—Provocation continuing to influence feelings—Murder—Culpable homicide not amounting to murder.

Where the accused found a man entering his house at night at the invitation of his wife with whom that man had criminal intimacy and being enraged, caught hold of him and took him outside the house to some distance and there assaulted him so severely that he subsequently died of the injuries received:

**Held**, that the circumstances under which the deceased was found in the house of the accused on the night of the crime were sufficient to cause grave and sudden provocation to the accused and his relations and that the provocation was of a nature that would continue to influence the feelings of the accused for a considerable period after the deceased was caught in the house in the company of the wife of the accused. (1901) 5 C.W.N. 708=28 C. 571.

**8 (b). Grave and sudden provocation—S. 300, Exception (1)—Proof and onus.**

—S. 300, Excep. (1)—Grave and sudden provocation—Duty to plead and prove.

Grave and sudden provocation to be an effective defence must be expressly pleaded and then supported by cogent evidence. 142 Ind. Cas. 741=15 N.L.J. 129=34 Cr. L. J. 404.

—S. 300, Excep. (1)—Provocation must be proved, not presumed.

Absence of premeditation is not in every case a sufficient ground for imposing the lesser penalty for murder.

A tendency to assume that because the murdered person was the murderer's wife, he must have received provocation from her and to supply by conjecture the absence of evidence on the point is to be deprecated as being not only illogical but also unjust to the woman. 63 Ind. Cas. 149=22 Cr. L. J. 613=13 M.L.W. 612=A.I.R. 1921 Mad. 303.

—S. 300, Excep. (1)—Provocation—Proof of—Loss of self-control—Adequate provocation for such loss—Both must be proved.

Before a person can claim the benefit of Exception (1) to Section 300 of the Penal Code, he must prove (i) that he was deprived of the power of self-control, and (ii) that the provocation was so grave and sudden as to reasonably justify such loss of self-control. In other words, it ought to be distinctly shown not only that the act was done under the influence of some feeling which took away from the person doing it all control over his action but that that feeling had an adequate cause. In the absence of such proof, the atrocity of the offence will not be mitigated and the offender will not be able to escape the legal consequences of his act.

A person who flies into a passion without just cause and goes about slaughtering people may be insane but

if he is sane he cannot defend his action on the ground of provocation. 63 Ind. Cas. 610=22 Cr. L. J. 674.

—S. 300, Excep. (1)—Burden of proof.

Burden of proof of grave and sudden provocation is on defence. Burden does not lie on prosecution to prove want of it. I.L.R. (1937) Lah. 726=39 P.L.R. 313.

—S. 300, Excep. (1)—Burden of proof.

The burden of proving that the provocation was grave lies on the accused. A.I.R. 1936 Sind. 31=37 Cr. L. J. 483=161 Ind. Cas. 414.

—S. 300, Excep. (1)—Provocation—Burden of proof.

The onus of proving grave and sudden provocation such as would reduce the offence of murder into one of culpable homicide not amounting to murder, is on the accused. 93 Ind. Cas. 230=6 Lah. 171=26 P.L.R. 304=27 Cr. L. J. 438=A.I.R. 1925 Lah. 399.

**8 (c). Grave and sudden provocation—S. 300, Excep. (1)—Test of sufficiency.**

—S. 300, Excep. 1—"Grave and sudden provocation."

The test of "grave and sudden provocation" within the meaning of exception 1 to S. 300, I. P. Code, is whether the provocation given was in the circumstances of the case likely to cause a normal reasonable man to lose control of himself to the extent of inflicting the injury or injuries that he did inflict. 4 A.I.Cr.D. 5.

—S. 300, Excep. (1)—Necessity of proving loss of self-control.

Under S. 300, Excep. 1 of I. P. C. it is not sufficient to establish merely grave and sudden provocation but it must also be shown that the accused was deprived of the power of self-control. 42 P.L.R. 88.

—S. 300, Excep. (1)—Requisite provocation.

Grave and sudden provocation must be such as will upset not merely a hot tempered or hypersensitive person but a person of ordinary sense and calmness. 41 P.L.R. 758=I.L.R. (1939) Lah. 345.

—S. 300, Excep. (1)—Provocation, what is.

In deciding whether the provocation was grave and sudden it is not open to an accused person to show that he was a person of particular excitability or of a particular mental instability or of a particularly volatile temperament. The Court should take into account the habits, manners and feelings of the class or community to which the accused belonged and not the peculiar idiosyncracies of the offending individual. And in determining whether the provocation was so grave and sudden as to deprive the offender of the power of self-control the Court will consider whether that provocation would be so grave and sudden as to deprive the ordinary man of the class or community to which the offender belonged of the power of self-control. While it is the offender whom the Court regards when considering the question whether he was deprived of the power of self-control by grave and sudden provocation it decides whether this was so by the test of the "reasonable man," the ordinary normal man, of the community to which the offender belongs.



Hence, where the accused, a Baluchi, alleged that the deceased, his wife, showed him a *booja*, that is to say, made a gesture of contempt, and urged that among the Baluchis who are excitable people, a *booja*, shown to them so enrages them as to deprive them of self-control, he must show that showing a *booja* is to Baluchis so grave and sudden a provocation as would deprive the ordinary normal Baluchi of the power of self-control. A.I.R. 1939 Sind 182 = I.L.R. (1939) Kar. 199 = 40 Cr. L.J. 778 = 183 Ind. Cas. 389.

—S. 300, Excep. (1)—Test.

The test to see whether the accused acted under grave and sudden provocation is whether the provocation given was in the circumstances of the case likely to cause a normal reasonable man to lose control of himself to the extent or inflicting the injury or injuries that he did inflict. A.I.R. 1934 Lah. 600 = 35 P.L.R. 388 = 36 Cr. L.J. 306 = 153 Ind. Cas. 204.

—S. 300, Excep. (1)—Provocation—Question of fact—Mental condition when provoked must be considered.

Whether provocation is grave and sudden, such as to deprive the accused of the power of self-control, is a question of fact to be determined upon the peculiar circumstances of each case. In deciding the question the Court must take into account the condition of the mind in which the offender was at the time of provocation: 3 P.R. 1913 Cr., Foll. 108 Ind. Cas. 902 = 10 A.I.Cr.R. 124 = 29 Cr. L.J. 454 (Lah.).

—S. 300, Excep. (1)—Provocation—Test of sufficiency—Feelings aroused in a reasonable man.

There must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, so as to lead the jury to ascribe the act to the influence of that passion. 33 C.W.N. 1023 = 123 Ind. Cas. 649 = A.I.R. 1930 Cal. 199.

—S. 300, Excep. (1)—Provocation—Must be such as will upset person of ordinary calmness.

The provocation contemplated by S. 300, Excep. 1 must be such as will upset, not merely a hot-tempered or hyper-sensitive person, but one of ordinary sense and calmness. 96 Ind. Cas. 209 = 7 Lah. 488 = 27 Cr. L.J. 897 = 27 P.L.R. 805 = A.I.R. 1926 Lah. 598.

—S. 300, Excep. (1)—Provocation voluntarily provoked.

In order that a culpable homicide may not amount to murder by virtue of Exception (1) to S. 300, it is necessary that the provocation must be both grave and sudden. Where, however, the provocation is sought or voluntarily provoked, it may be grave but it cannot be sudden. A.I.R. 1945 Sind 42 = I.L.R. (1944) Kar. 444 = 219 Ind. Cas. 419 = 46 Cr. L.J. 614.

—S. 300, Excep. (1)—Requisite provocation.

One of the provisos to Excep. 1 to S. 300, is that the provocation is not sought. Where the accused knew that his sister was suspected of an intimacy with another person and he left his house after picking up an axe, and going to the house of his sister, broke into it in spite of protests and then proceeded first to murder her lover and then to murder his sister.

Held, that even assuming that the provocation was grave, it could not be said that it was sudden and con-

sequently, Excep. 1 to S. 300 did not apply. A.I.R. 1937 Lah. 562 = I.L.R. (1937) Lah. 206 = 38 Cr. L.J. 637 = 40 P.L.R. 44 = 168 Ind. Cas. 923.

—S. 300, Excep. (1)—Provocation given by offender.

Once the provocation is given by the offender himself he cannot subsequently urge that the opposite party had acted in a provocative manner. A.I.R. 1935 Pesh. 155 = 37 Cr. L.J. 87 = 159 Ind. Cas. 284.

—S. 300, Excep. (1)—Provocation not given by victim within hearing or sight of offender.

The grave and sudden provocation within the meaning of Excep. 1 to S. 300 need not come from the victim within the hearing or sight of the offender. The only questions which would arise under Excep. 1 are whether the provocation caused by the victim was grave enough or sudden enough to deprive the offender of self-control. A.I.R. 1932 Sind 168 = 26 S.L.R. 266 = 33 Cr. L.J. 870 = 139 Ind. Cas. 772.

—S. 300, Excep. (1)—Provocation by act done in obedience to law.

The provocation that will bring a case within Excep. 1 to S. 300 must, according to the proviso, not be provocation given by anything done in obedience to the law or by a public servant in the lawful exercise of his powers. An arrest or attempted arrest by a private person, if not strictly justifiable by law, is thus not outside the provocation mentioned in Excep. 1. A.I.R. 1933 Pat. 508 = 14 P.L.T. 464 = 35 Cr. L.J. 725 = 148 Ind. Cas. 574.

—S. 300, Excep. (1)—Provocation not from victim.

Where S the brother-in-law of the accused went to a *pwe* under the influence of drink and not only abused the people there in general but challenged them to fight and then the deceased went to S and struck him on the cheek whereupon the accused appeared and caught hold of the deceased and stabbed him on the stomach as a result of which he died:

Held, that the provocation came not from the deceased but from the accused's brother-in-law and proviso (1), to S. 300 did not apply. A.I.R. 1936 Rang. 115 = 37 Cr. L.J. 467 = 161 Ind. Cas. 578.

8 (d). Grave and sudden provocation—S. 300, Excep. (1)—What amounts to.

—S. 300, Excep. 1—Grave and sudden provocation—What amounts to.

Where a person in a public place strikes another on the face with a shoe and the latter in the heat of the moment pulls out a knife and stabs the former, and causes his death the case would be covered by the 1st Exception to S. 300, I. P. Code, as there was grave and sudden provocation. 1949 A.W.R. 458 = A.I.R. 1950 A. 91 = 51 Cr. L.J. 385.

—Ss. 300, Excep. (1), 302 and 304—Grave and sudden provocation—Circumstances—Test.

There can never be any direct evidence as to what was the psychological effect upon the mind of a person in certain circumstances. The state of the mind of a person has to be gathered from proved



facts. Where the proved facts are that the accused had devoted himself for years to the deceased and her general welfare, and in return for his devotion and service, she did not only unjustly suspect him of infidelity and asked him to get out after starving him for a number of days and finally hurled one of the most intolerable implications upon him, the circumstances are sufficient to deprive a man, in the position of the accused, the power of self-control. 229 Ind. Cas. 102=48 Cr. L. J. 229=1047 A.Cr.C. 59=1947 A.W.R.(C.C.) 39=1947 O.W.N. 85=1947 O.A.(C.C.) 39=A.I.R. 1947 Oudh 148.

—S. 300, Excep. 1—Grave and sudden provocation—Severe blow on the head—Loss of self-control.

A severe blow on the head with a stick very frequently causes loss of self-control and is of such a nature as to deprive the person beaten temporarily of the power of self-control. If such a person in the heat of his passion stabs his assailant who dies later on it would be a clear case of culpable homicide not amounting to murder. 1946 A.M.L.J. 9.

—S. 300, Excep. (1)—Foul abuse.

Foul abuse may amount to sudden and grave provocation and when death is caused, under such provocation the offence is one of culpable homicide not amounting to murder. 42 P.L.R. 45.

—Ss. 300, 302 and 304—Unchastity of wife—Offence.

If a person sees his wife in the arms of another and in the anger of the moment kills either his wife or her paramour, he is not guilty of murder. The provocation would be both grave and sudden and would reduce the crime to culpable homicide and not amounting to murder under S. 304. But a man who thinks over what he has seen for some hours might still act under grave provocation, but such could not be described as sudden.

[Conviction under S. 302 was set aside and the accused was convicted under S. 304 and sentenced to five years rigorous imprisonment.] A.I.R. 1940 Pat. 541=6 B.R. 503=41 Cr. L. J. 472=187 Ind. Cas. 586.

—S. 300, Exception 1, S. 304—Accused killing another man found in his wife's bed in attempt to commit adultery with her — Accused held entitled to benefit of Excep. (1).

Where an accused seeing another in the act of sleeping with former's wife with the intention of committing adultery, kills him instantaneously, he is entitled to the benefit of Excep. 1 to S. 300, the provocation in such a case being extremely grave. He can be convicted only under S. 304, part I.

The essence of Excep. 1 to S. 300 is that the accused is deprived of the power of self-control. Obviously, if a person is deprived of self-control, the mere amount of beating which he gives to the person who deprives him of that control is not a proper criterion to take into account in awarding a sentence. The more self-control is lost—and, therefore, the more Excep. 1 applies to the case—the more likely are numerous injuries to be inflicted.

(The sentence was reduced from three years to three months). A.I.R. 1939 Lah. 471=I.L.R. (1939) Lah. 278=41 P.L.R. 761=41 Cr. L. J. 15=184 Ind. Cas. 432.

—S. 300, Excep. (1).

At about 10 o' clock at night the accused saw a man going out of the *chaubara* where his wife was, at the time. He pursued him but the latter ran away. He enquired from his wife who he was and she, instead of replying to the question, abused him whereupon he picked the *chhura* which was lying close by, and killed her:

Held, that the accused acted under grave and sudden provocation and his offence was not murder but fell under S. 304, Part I. A.I.R. 1939 Lah. 436=40 Cr.L.J. 868=42 P.L.R. 42=184 Ind. Cas. 186.

—S. 300, Excep. (1)—Adultery with wife of accused—Excep. 1, if applies.

The accused and the deceased were sleeping one night on the same *charpai*. The deceased then got up and entered a room and closed the door. Through the hole in the door the accused saw the deceased committing adultery with the accused's wife. The accused waited till the deceased came out, lay down and began dozing and then stabbed him to death with a knife:

Held, that under the circumstances, there was both grave and sudden provocation and excep. 1 to S. 300, applied to the case. A.I.R. 1938 All. 532=1938 A.L.J. 689=1938 A.W.R. 473=39 Cr. L. J. 956 (2)=I.L.R. (1938) All. 789=177 Ind. Cas. 821.

—S. 300, Excep. (1) — Adultery by wife — Sentence.

In a case where a husband finds his wife actually committing adultery and kills her or her lover at once, that of course would be grave and sudden provocation, but where the husband has time for deliberation, Excep. 1 to S. 300, I.P.C., cannot apply.

(But held, however, that though the offence technically fell under S. 302, the provocation was great and that the case should be referred to the Local Government to consider the reduction of the sentence substantially. A.I.R. 1937 Lah. 692=39 P.L.R. 479=38 Cr.L.J. 1057=171 Ind. Cas. 314.

—S. 300, Excep. (1)—Adultery by wife.

Wife of the accused repeatedly finding fault with him, though he was devoted to her, did not allow him to live in the same house with her. The husband was obliged to stay at his brother's place. After about some months the accused found his wife eight months advanced in pregnancy. On an enquiry by him whether she cohabited with a certain person, she replied in the affirmative. Immediately, the accused stabbed her:

Held, that it was hardly possible to imagine graver provocation being received. The accused was not guilty of the offence of murder but of culpable homicide merely. A.I.R. 1937 Rang. 466=39 Cr. L. J. 137=172 Ind. Cas. 395.

—S. 300, Excep. (1)—Accused seeing his wife with her paramour but not in act of intercourse—Accused killing wife—Offence—Sentence.

Where the accused found his wife who was six months advanced in pregnancy and her paramour together in his house but not in the act of sexual intercourse and killed her on provocation:



**Held**, that taking into account the nature and temper of these people of the class of the accused, when their honour, or perhaps the possession of their women was concerned, the case fell within excep. 1 to S. 300, I.P.C.

**Held**, however, that this was not a case where the provocation was so extreme as to call for a lighter sentence.

[Conviction from one under S. 302 altered to one under S. 304, Part I, and the sentence of transportation for life was reduced to 10 years' rigorous imprisonment] A.I.R. 1937 Sind 212=38 Cr.L.J. 968=31 S.L.R. 460=170 Ind. Cas. 827.

**—S. 300, Excep. (1)—Grave and sudden provocation—Criteria.**

On the question of grave and sudden provocation, the Court has to determine what amounts in any particular case to grave and sudden provocation, and although the circumstances have to be viewed carefully so as not to extend provocation beyond the limits which the safety of the public requires; at the same time grave and sudden provocation can be created by words. No words are more grave than a public taunting by a man whom one has suspected before of being the paramour of one's wife and boasts of the fact and expresses his intention to take her to live with him in the house of her sister to whom he is already married. A.I.R. 1936 Rang. 472=38 Cr.L.J. 144 (1)=166 Ind. Cas. 192.

**—S. 300, Excep. (1) — Continuing grave and sudden provocation.**

The deceased had for several years been carrying on an intrigue with wife of the accused and had been in the habit of having sexual intercourse with that woman. He had also been in the habit of singing a song tantamount to a declaration of his intrigue with the wife of the accused and of a most provocative nature. The accused was convicted under S. 304 (1), I. P. C. :

**Held**, that the relations between the accused, the deceased and the accused's wife were such as to constitute a continuing grave provocation and the song he used to sing was of a nature to give sudden and grave provocation every time it was sung by the deceased in the presence of the accused. The mere fact that the accused had managed to control himself on previous occasions when provoked, was no reason for refusing to give him the benefit of Excep. (1) to S. 300, I. P. C. A.I.R. 1935 Pesh. 78=36 Cr.L.J. 939=156 Ind. Cas. 427.

**—Ss. 300 and 304—Offence.**

Accused seeing his wife on criminal intimacy with a stranger—Murder—Conviction must be under S. 304 and not under S. 302. 1934 M.W.N. 688.

**—S. 300, Excep. (1)—Grave and sudden provocation—Meeting wife with paramour.**

The accused, a Pathan, on returning to his house did not see his wife and he went out and saw her engaged in love making with another man in the fields. He killed the man with an axe and after returning to his wife he cut her throat with a kitchen knife :

**Held**, on the facts, that the accused had acted under grave and sudden provocation within S. 304 (1), and

that the mere fact that when killing his wife he substituted a knife for the axe, which he was carrying, was scarcely sufficient to prove deliberation. A. I. R. 1933 Pesh. 38=34 Cr. L. J. 804=144 Ind. Cas. 160.

**—S. 300 Excep. (1)—Sudden quarrel and provocation.**

Deceased wife found with paramour—Husband trying to seize paramour struck with knife by paramour who ran away—Wife preventing husband from seizing him—Husband consequently striking wife with knife—Husband held guilty not of murder but under S. 304. 11 L.L.J. 485=1930 Cr. C. 180=A.I.R. 1930 Lah. 172.

**—S. 300, Exception (1)—Wife having immoral connection—Husband's protest resulting in abuses from her—Husband in agency loses self-control and deals fatal blow—Guilty under S. 304, para. 2 only.**

A woman was leading a notoriously immoral life which was the common scandal of the village. She had a young lover who was known to the accused, her husband. On the night previous to the murder she had a mysterious and significant disappearance from the bed side of her husband and subsequent protest by the husband resulted only in vulgar abuse by her. The husband started beating her with a shoe, lost his control, picked up a rough stick which happened to be lying close by and struck a fatal blow to the erring wife which resulted in her death. After murder police had no difficulty in finding him out and producing him before the Court :

**Held**, that the whole unfortunate affair should be looked at as one prolonged agony on the part of the husband which must have been preying upon his mind and eventually led to the fatal assault, bringing the case within the purview of Exception. 1, S. 300. 119 Ind. Cas. 323=30 P.L.R. 652=80 Cr.L.J. 1044=1929 Cr.C. 637=A.I.R. 1929 Lah. 861.

**—Ss 300 and 304—Finding wife with paramour—Sudden and grave provocation.**

Where S on entering his house found his wife sitting with her paramour on a charpoy and suspected them of having committed sexual intercourse and injured the paramour and killed his wife.

**Held**, that S committed the act under a grave and sudden provocation and is guilty under S. 304 (1) and not under S. 302. 115 Ind. Cas. 476=10 L.L.J. 508=30 Cr.L.J. 481=12 A.I.Cr.R. 294.

**—S. 300 Exception (1)—Husband reproving wife for immoral conduct—Unrepentant wife beaten—In the struggle fingers of the accused bitten—Grave and sudden provocation.**

The deceased (the wife of the accused) led an immoral life and on the accused's upbraiding the deceased, his wife, with her misconduct, instead of being repentant said that she would again do such acts upon his head. Thereupon he became enraged and struck her with a stick. She struggled with him and got hold of his fingers and bit them. He then lost control of himself and took out a knife and stabbed her with several injuries which resulted in her death :

**Held**, that the immediate provocation was sufficient to bring the offence within Exception 1 to S. 300 and to reduce it from murder to culpable homicide.



88 Ind. Cas. 844=26 Cr.L.J. 1228=6 L.R.A. Cr. 157 =A.I.R. 1925 All. 676.

—S. 300, Exception (1)—Finding wife with lover at midnight—Chased the lover and killed him—Returning home killed wife—Provocation grave and sudden.

Where the accused came unexpectedly at dead of night, as he entertained a suspicion about his wife, and found his wife and her lover, but the lover got away and the accused ran after him as he was entering his house and killed him with a knife which he had with him and immediately after returned to his own house and killed his wife:

Held, there was grave and sudden provocation and hence only culpable homicide not amounting to murder was committed. 85 Ind. Cas. 374=6 L.L.J. 437=26 Cr.L.J. 534=26 P.L.R. 260=A.I.R. 1925 Lah. 114.

—S. 300, Exception (1)—Husband inducing her to lead moral life—Insolent defiance—Provocation sufficient.

When a husband was inducing his wife who had gone astray to lead a moral life in future, but she insolently replied that if he so attempted she would leave him:

Held, that such a shameless answer is sufficient to give fresh provocation with a suddenness unexpected by the husband. 84 Ind. Cas. 482=26 Cr.L.J. 3=A.I.R. 1925 Oudh 288.

—Ss. 300, 302 and 304—Husband preventing wife running away—Wife giving foul abuse—Striking three blows with a chopper on hand—Provocation sufficient.

It was found that the wife of a young Hindu was in the habit of running away though she was not ill-treated. When the husband caught her running away and asked her to come back she gave him foul abuse, and thereupon he gave her three blows with a chopper which was accidentally in his hand; held that the circumstances of an Indian household where the wife is expected to obey and respect her husband should also be considered in weighing the nature and amount of the provocation, and that the facts of the case disclosed an offence only under S. 304 and not 302, I.P.C. 74 Ind. Cas. 712=9 O.L.J. 597=24 Cr.L.J. 808=A.I.R. 1923 Oudh. 112.

—S. 300, Excep. (1)—Finding wife in flagrante delicto—Grave and sudden provocation.

Where a person finds his wife in flagrante delicto with another man he is deprived of the power of self-control by grave and sudden provocation and if he kills wife acting under that impulse he comes within S. 300, I.P.C., Exception I. 71 Ind. Cas. 993=24 Cr.L.J. 273.

—S. 300, Excep. (1)—Actual adultery may not have been seen—Finding wife with paramour—Sufficient provocation.

Whether the accused saw his wife or the deceased actually committing adultery or whether he simply found them together in the Kholā there cannot be the least doubt that grave and sudden provocation must have been caused. 8 P.R. 1890 and 8 P.R. 1899 (Cr.) Foll. The rule contained in S. 300, Excep. (1) does not contemplate that in order to entitle an accused to earn

the mitigation provided for, the act must immediately follow the provocation. The appellant continued to be under the influence of provocation until he had killed the deceased and the case fell clearly within S. 300, Exception (1). I.P.C. 68 Ind. Cas. 403=23 Cr.L.J. 563=2 L.L.J. 406.

—Ss. 300, Excep. (1), and 304 — Provocation—Culpable homicide—Provocation, grave and sudden—Adultery.

Where a person finding his wife on a cot with a stranger with whom she had previously had intrigues murdered her, there is grave and sudden provocation to bring the case within the exception to S. 300, I.P.C. 2 O.L.J. 463=16 Cr.L.J. 625=30 Ind. Cas. 449.

—S. 300, Excep. (1) — Provocation — Effect—Grave and sudden—Husband seeing paramour of his wife leaving his house.

Where an accused returned home unexpectedly and seeing the paramour of his wife coming out of his house remonstrated with his wife, and was annoyed by her reception of his remonstrances, and killed her with a hoe which was lying near him; Held, that the act was covered by the first exception to S. 300. 3 P.R. 1913 Cr.=209 P.L.R. 1913=14 Cr.L.J. 208=19 Ind. Cas. 208.

—S. 300, Exception (1)—Criterion.

The question of provocation is a psychological question and one cannot apply considerations of social morality to such a question.

Where a man sees a woman in the arms of another and loses control over himself, the circumstances that she was his mistress and not wife does not make any real difference for the purposes of S. 304. A.I.R. 1937 Mad. 25 (1)=1931 M.W.N. 1137=35 L.W. 141=33 Cr.L.J. 273=136 Ind. Cas. 314. (1).

But see A.I.R. 1937 Oudh 457 under Note 8 (c).

—S. 300, Excep. (1) — Accused beating his sister for immorality and insolence—Death caused—Offence.

The deceased who was the accused's younger sister had left her husband and was living under his care. She was suspected to be of an immoral character. On the night of the murder at about 3 A. M., she had gone out to meet a stranger in the wāra at the back of the house, for a clandestine purpose. When the appellant asked the deceased why she did not give up her evil ways, she refused to listen to him and gave an insolent reply. The accused then gave her two or three blows with a hatchet and she died on the spot:

Held, that the provocation received by the accused was in the circumstances almost as "grave and sudden" as it would have been had the appellant seen the deceased in the act of sexual intercourse with a stranger and it was further aggravated by the insolent reply given by the deceased and the case fell within the purview of S. 304, Part. 1, I.P.C. A.I.R. 1933 Lah. 869=35 Cr.L.J. 74=34 P.L.R. 935=146 Ind. Cas. 357.

—S. 300, Excep. (1) — Provocation — Indecent overtures.

If a man comes home and finds a person actually misbehaving with his relation, his blood can hardly be



expected to have cooled in the course of 15 or 20 seconds, and it is grave and sudden provocation within Exception 1 to S. 300. 94 Ind. Cas. 140=27 Cr.L. J. 572=A.I.R. 1926 Lah. 485.

—S. 300, Excep. (1)—Laiso with sister of accused—Provocation sudden and grave.

Where the victim was found in the house about midnight and was fully aware of the fact that the accused did not like his visits to his mother's house and it appeared that he had contracted laison with the sister of the accused and was seen by the accused, when he had put his arms round her.

**Held**, that accused must have lost his power of self-control when he saw a stranger in the house at midnight taking liberties with his sister, that the culprit had received grave and the sudden provocation, and that he was guilty of culpable homicide not amounting to murder. 81 Ind. Cas. 173=5 L.L. J. 40=25 Cr.L. J. 685=A.I.R. 1924 Lah. 62.

—Ss. 300 and 302—A bania finding daughter-in-law with a fakir—Provocation sufficient.

Where a Banian in a rage, on finding his daughter-in-law with a fakir, backed her to death, the provocation was sufficient to remove the act from the category of murder, but the punishment must be deterrent. 61 Ind. Cas. 165=22 Cr.L. J. 341=3 U.P.L.R. (All.) 41=L.R. 2 A. (Cr.) 88.

—S. 300, Excep. (1)—Sudden quarrel—Loss of self-control.

A sudden quarrel arose between the accused and the deceased during which the deceased expressed his intention of attacking and kicking the accused and actually advanced towards him. A sudden fight ensued in which the accused used a clasp knife and inflicted a serious wound in the chest of the deceased which ultimately caused his death.

**Held**, that the accused suffered sudden and grave provocation, and in the course of struggle, lost his power of self-control and did not inflict the injury with the intention of causing such bodily injury as was likely to cause death. In the circumstances, therefore, the proper conviction was one under S. 304 and not under S. 302. A.I.R. 1938 Rang. 15=39 Cr.L. J. 300=173 Ind. Cas. 299.

—S. 300, Excep. (1)—Death caused by single blow in sudden fight.

Where the accused struck the deceased only one blow with a stick and the other injury was due to the deceased's head striking against something hard when he fell and all this was due to a sudden provocation by the deceased using filthy language, the offence is not murder as it cannot be proved that the accused acted with the intention or knowledge described in S. 300, I. P. C. (1938) 40 P.L.R. 159.

—S. 300, Excep. (1)—Grave and sudden provocation.

The accused having heard the cries of a woman who was being beaten by her husband on the road came to her rescue and rescued her from the husband. Subsequently, the accused and the woman lived together with mutual consent but they were not married. The woman was major. While they were together passing along the roadside one day they

met the brother of the woman who seeing her, caught her hand and dragged her away from the accused. The accused fired at the brother who died on the spot and ran away with the woman. He was prosecuted under S. 302, for murder.

**Held**, that the accused was being forcibly deprived of the company of a woman of mature years who was voluntarily living with him and he saw that woman being subjected to violence. In these circumstances, he acted under grave and sudden provocation and that provocation was sufficient in the ordinary course of human nature to deprive him of his self-control so that his action did not amount to murder by virtue of Excep. 1 to S. 300. Accused, however, must be accredited with the intention of causing the deceased's death and hence, since he carried his intention into execution, he was guilty of culpable homicide not amounting to murder punishable under the first part of S. 304, I. P. C. A.I.R. 1937 Pesh. 86=39 Cr.L. J. 339=173 Ind. Cas. 698.

—S. 300, Excep. (1)—Grave and sudden provocation proved.

Accused had been gravely and suddenly provoked when ploughing his field and had been forced into a fight; he had then retired and been followed; he had not had time to recover from the effects of the provocation, when again being taunted, he killed another person.

**Held**, that in these circumstances Excep. (1) to S. 300 should be applied, thus reducing the offence to one of culpable homicide not amounting to murder. A.I.R. 1937 Pesh. 33=38 Cr.L. J. 568=168 Ind. Cas. 394.

—S. 300, Excep. (1) — Provocation, what amounts to.

Where it appeared that the deceased was a noted bad character in the village and behaved in an outrageous manner by striking the accused with a stick and by striking him with a stick, the deceased gave grave and sudden provocation to the accused such as would suffice to make any person of ordinary temper lose his self control and in that moment accused used the weapon which he had at hand in retaliation on the deceased and stabbed him.

**Held**, that under the circumstances the accused was entitled to the benefit of Excep. 1 to S. 300 and hence was not guilty of the offence of murder. A.I.R. 1936 Rang. 49=37 Cr.L. J. 411=161 Ind. Cas. 5.

—S. 300, Excep. (1)—Grave and sudden provocation—Deceased striking accused's child for no cause—Accused losing self-control and striking with da—Death as a result of gangrene offence.

The deceased who was accused's brother-in-law struck his child aged only one year merely because it resented its toy being taken away. On this the accused lost self-control and struck the deceased with a da. The deceased died as the result of gangrene setting in one of the wounds caused.

**Held**, that the act of the deceased was such as would rouse much resentment in the mind of any father as to amount to grave and sudden provocation and the offence was that of culpable homicide not amounting to murder punishable under the first



clause of S. 304. A.I.R. 1936 Rang. 526=38 Cr.L.J. 103=165 Ind. Cas. 911.

**—S. 300, Excep. (1)—What amounts to.**

Where the deceased who had no particular right to interfere between the accused and his wife, interfered while the accused was taking away his wife by hand without handling her roughly, and threatened to attack the accused, and in all probability, hit him with a cane;

**Held**, that such interference amounted to grave and sudden provocation and the accused's action in dealing with the deceased was covered by Excep. I and IV to S. 300, especially when the parties were to some extent drunk. A.I.R. 1936 Rang. 216=37 Cr.L.J. 569=162 Ind. Cas. 277.

**—S. 300, Excep. (1)—Grave and sudden provocation, what amounts to.**

What amounts to grave and sudden provocation may vary according to the circumstances of each case and according to the general standard of self-control amongst the people of the class involved.

The accused had been treated with the gravest contumely by the deceased and it appeared that the assault would never have taken place had not the deceased who was drunk, suddenly without any cause whatsoever burst out in filthy abuse and insulting accusation;

**Held**, that to receive such a grievous insult all in a moment at the mouth of a drunken man whose previous offence had been condoned would amount to very grave provocation even to a man of the most philosophic temperament, especially where the accused is an ordinary youthful rustic in whom unusual powers of self-control could not be expected. A.I.R. 1936 Rang. 40=37 Cr.L.J. 410=160 Ind. Cas. 1077.

**—S. 300, Excep. (1)—Accused acting without premeditation and on grave and sudden provocation—Accused beating complainant's party—Actual person causing fatal injury not known—Death—Offence.**

Where without premeditation but on grave and sudden provocation, the accused, more than five in number, attacked the complainant's party and beat them and as a result of the injuries received, one of the latter died, and while it was not known who of the accused party caused the fatal injuries, it was found that though they were not acting in self defence, they did not take undue advantage or act in a cruel or unusual manner;

**Held**, that all the accused were responsible for the injuries inflicted but the offence committed was not murder but culpable homicide not amounting to murder and were punishable under Ss. 304-149. A.I.R. 1935 All. 717=1935 A.L.J. 385=36 Cr.L.J. 773=1935 A.W.R. 210=155 Ind. Cas. 560.

**—S. 300, Excep. (1) — Provocation, what amounts to.**

The accused and his father who were ploughing a field since morning stopped ploughing and while they were resting, the father noticed that the bullocks were straying towards the neighbouring fields and called and asked the accused, his son, to prevent

them from damaging the neighbouring field. The son refused, whereupon the father threw a clod of earth at the son who thereupon lost his temper and assaulted the father with a stick. In consequence of this the father died. It appeared that the father knew full well that the accused's intelligence was not of a normal kind;

**Held**, that in the circumstances the provocation was grave and sudden so as to bring Excep. 1 to S. 300, I. P. C., into play and that conviction under S. 304 was proper. A.I.R. 1935 Pat. 506=2 B.R. 157=37 Cr.L.J. 221=160 Ind. Cas. 18.

**—S. 300, Excep. (1)—Deceased catching hold of accused's tuft.**

In an altercation the deceased returned the abuse and caught hold of accused's tuft of hair, and gave him a blow with his fist on the back. The deceased and accused then closed with each other and accused caught hold of deceased's tuft also and stabbed the deceased to death by a knife;

**Held**, that the offence came under S. 300, Excep. 1 as there was grave and sudden provocation. A.I.R. 1934 Mad. 722=40 L.W. 777=67 M.L.J. 674=1934 M.W.N. 1358=36 Cr.L.J. 790=155 Ind. Cas. 408.

**—S. 300, Excep. (1).**

Where the husband and wife were not on very good terms and on one occasion, the husband asked for pan and the wife refused pan and threw dirty rice water in his face whereupon the husband beat her with stone and killed her;

**Held**, that the refusal of his wife to give him pan was liable to make him angry but the throwing of dirty water in the face was an act which would cause a husband to lose control of himself and would be a grave and sudden provocation and therefore the offence was not one of murder but of culpable homicide not amounting to murder. 117 Ind. Cas. 164=30 Cr.L.J. 720=A.I.R. 1929 Pat. 201.

**—S. 300, Excep. (1) — Provocation—Abuse—Sudden and Grave.**

Accused, who was abused by the deceased, abused the deceased in return and defied the deceased and told him to come on. The deceased caught hold of the accused by the tuft and gave him two blows with his fist. There was a struggle and the deceased held accused firm by the tuft and went on beating him. The accused then gave the deceased a blow on the left side with a "baku" (a dagger) which he had in his hand. The blow proved fatal;

**Held**: That the first exception to S. 300, I. P. C., applied and that the offence was culpable homicide not amounting to murder.

**Jackson, J.**—The offence was one of murder. 106 Ind. Cas. 343=1927 M.W.N. 796=29 Cr.L.J. 7=9 A.I.Cr.R. 263=1 M.Cr.C. 178=A.I.R. 1928 Mad. 136.

**—S. 300, Excep. (1)—Girl married to accused taken away on the day of ceremony—Accused abused—Hurt with pen-knife—1st exception applies.**

The accused had been married to a girl and the ceremony of *tabdil parchat* was to take place on the



day of the occurrence. On that day accused found the deceased taking the girl away from the village where the ceremony was to take place and when he remonstrated with her she told him that the girl would not be married to him that day and abused him. The accused thereupon attacked both the girl and the deceased with pen-knife and inflicted one injury on each in the abdomen. The girl however survived. **Held**, that the accused acted without premeditation, used only a pen-knife and gave each woman only one injury and therefore there is a very strong presumption that he neither intended to cause death nor such bodily injury as he knew to be likely to cause death and the provocation given to him by the deceased was sufficiently grave and sudden to bring him within the first exception in Section 300. **Held** further that when the accused wounded the woman in the abdomen with pen-knife he certainly intended to cause them grievous hurt. 73 Ind. Cas. 695=24 Cr.L.J. 663=A.I.R. 1924 Lah. 234.

—S. 300, Excep. (1) — Sudden provocation — Offence is one under S. 304.

On the night of the crime in question the accused, together with Vir Bhan, his first cousin, Mt. Tulsi Bai, the wife of Vir Bhan, Lachman Das, son of Vir Bhan and the murdered man, were sleeping together on separate charpoys in a Court-yard. The accused woke up in the course of the night to see Mt. Tulsi Bai and Jassu Ram lying together on the same charpay. He thereupon reproached Jassu Ram for his conduct who retorted with an indecent gesture. The accused enraged at what he had witnessed, and inflamed at the insult, struck Jassu Ram a blow on the neck with a hatchet which was lying near hand and killed him. Mt. Tulasi Bai suggested to the accused to put the blame on some unknown person. The accused, however, instead of falling in with this suggestion decided to admit the crime, and he made his statement before the Committing Magistrate within two days of the murder and before he was legally represented:

**Held**, that the theory of premeditation cannot be accepted.

**Held**, further that the murder was the result of sudden and grave provocation. A.I.R. 1923 Lah. 312.

—S. 300, Excep. (1)—Provocation, effect of.

A, came to B, in a challenging manner when they had a fight in which A beat B, as well as B's father. B, then gave a blow to A when A died. **Held**, that B, was guilty of culpable homicide not amounting to murder as there was a grave provocation enough to deprive the accused of self-control. (1911) 1 M.W.N. 275=9 M.L.T. 480=12 Cr.L.J. 235=10 Ind. Cas. 262.

8 (e). Grave and sudden provocation—S. 300, Exception (1)—What does not amount to.

—S. 300, Excep. 1—Grave and sudden provocation—What does not amount to.

Whether or not there is grave and sudden provocation in a particular case is essentially a question of fact and no universal rule can be laid down. The test is whether the accused was subjected to such provocation as to cause a reasonable man to do what he did, and whether the provocation was such that it influenced him to do the act which he did. Mere

verbal provocation, however, even if it be by threats or gestures or by the use of abusive and insulting language, cannot induce a reasonable man to commit an act of violence; and mere threat which may induce a desire for revenge cannot constitute provocation within the meaning of Exception 1 to S. 300, I.P. Code. I.L.R. (1950) Cut. 293=16 Cut. L.T. 102=A.I.R. 1950 Orissa 261.

—S. 300, Excep. 1—Grave provocation—Abusive or vulgar language.

The use of mere abusive or vulgar language cannot be regarded as a grave provocation. 225 Ind. Cas. 567=47 Cr.L.J. 747=48 P.L.R. 26=A.I.R. 1946 Lah. 278.

—S. 300, Excep. (1)—Vulgar abuse—Nature of provocation.

Mere vulgar abuse is not such a grave and sudden provocation as is contemplated by Excep. 1 to S. 300. But provocation though not grave and sudden may be a sufficient reason for not imposing the capital sentence.

Vulgar abuse may amount to provocation even though the party abused is a mere *kamin*. A.I.R. 1932 Lah. 369=33 Cr.L.J. 338=33 P.L.R. 382=136 Ind. Cas. 715.

—S. 300, Excep. (1) — Provocation — Abuse — Accused called 'pig' — Accustomed to abusive language—Provocation not grave but sudden.

R a Bharai by caste and an agriculturist by occupation was accused of murdering his wife in a quarrel by means of an axe. He pleaded grave and sudden provocation and in support of the plea produced a witness who had heard the deceased calling the accused "a pig, son of pig":

**Held**, that such abuse could not constitute grave provocation specially in the case of a low caste man of the class of the accused accustomed to the use of abusive language. But the accused could be said to have acted without premeditation under some provocation which though not grave was sudden and deserved lesser sentence than sentence of death. A.I.R. 1930 Lah. 344.

—S. 300, Excep. (1).

Even when there is no evidence as to previous existence of any serious enmity and the affair arose out of a petty quarrel of the moment, this is hardly an extenuating circumstance in favour of accused using a weapon like a *chhavi* on so slight a provocation which shows a callous disregard of human life for which he must suffer the consequences. 85 Ind. Cas. 822=26 Cr.L.J. 598=A.I.R. 1923 Lah. 326.

—S. 300, Excep. (1)—Provocation must be grave and sudden to reduce the offence of murder to that of culpable homicide.

In order to remove a culpable homicide from the category of murder, the provocation must not only be grave but also sudden, and must have by its gravity and suddenness deprived the accused of the power of self-control. Where a provocation ripens into resentment and malice, and the person aggrieved deliberately determines to take the lives of the persons who offended him, breaks into their houses in the night time, surprises them in their sleep and attacks them with a deadly weapon with intent to kill them and



does cause the death of two of them and inflicts grievous injuries to the third, he is clearly guilty of murder and of an attempt to murder. 83 Ind. Cas. 712=26 Cr.L.J. 152=A.I.R. 1923 Lah. 493.

**—S. 300, Excep. (1)—Provocation — Grave and sudden provocation.**

Mere abusing a man's relatives can never cause sudden and grave provocation so as to cause injuries with a knife. 58 Ind. Cas. 158=21 Cr.L.J. 734 (All.).

**—S. 300, Excep. (1)—Provocation sufficient to mitigate offence.**

A who had filed a criminal complaint against B had got into a lorry at the motor-stand to proceed to the Court. B also came to the motor-stand and got into another lorry. On seeing A in the other lorry B got out of his lorry and entered the other occupied by A probably to give A a bit of his mind. An altercation probably ensued in the course of which B took out his kirpan and stabbed A as a result of which he died. None of the eye-witnesses was able to explain how the attack by B on A started;

Held, that the offence came within S. 302 and that the mere sight of an enemy travelling in another lorry was not grave and sudden provocation sufficient to reduce the offence of culpable homicide from S. 302 to S. 304, I.P.C. A.I.R. 1942 Lah. 301=44 P.L.R. 457=44 Cr.L.J. 117=203 Ind. Cas. 605.

**—S. 300, Excep. 1—Sudden and grave provocation, what is—Held that act of deceased did not fall under Excep. 1 to S. 300.**

The question of what is grave and sudden provocation is a question of fact and one must consider the fact of each case and apply the provisions of S. 300 to these facts. The facts in one case are not always of assistance in another case.

After the accused refused to accompany the deceased and the four others, all of whom were unarmed, to the panchayat, he dragged him by his hand and pulled him away from the steps of his house where he was then seated. The accused thereupon took out his knife and inflicted the injuries upon the deceased which shortly afterwards proved to be fatal.

Held, per Gentle, J., and Patanjali Sastri, J. contra—That although pulling by the hand was exercising some force and was done in order to make the accused go to some place against his will and may be provocative yet, as it was done by an unarmed man the act did not fall within first exception to S. 300. A.I.R. 1941 Mad. 251=1940 M.W.N. 811=42 Cr.L.J. 668=195 Ind. Cas. 64.

**—S. 300, Excep. 1—Accused attacking deceased and two others—Deceased while doing his utmost to prevent accused from continuing attacks stabbed by accused to death—Some violence used by deceased in attempting to take knife from accused—Such act of violence held did not amount to sudden and grave provocation within Excep. 1 to S. 300—Sentence of death held proper.**

The deceased having seen the attacks made by the accused on two others and sustained an earlier attack upon himself, did his utmost to prevent the accused from continuing the attacks upon himself or upon any other persons, but was stabbed by the accused and

died as a result. The deceased in trying to take the knife from the accused threw or flung the accused against a wall and thus had no doubt used some violence;

Held, that the offence committed was murder, that any violence used by the deceased in wrestling with the accused and throwing him against the wall could not amount to sudden and grave provocation within the exception to S. 300, I.P.C., so as to reduce the offence committed, from murder to culpable homicide. The sentence of death was proper in the circumstances. A.I.R. 1941 Mad. 251=1940 M.W.N. 811=42 Cr.L.J. 668=195 Ind. Cas. 64.

**—Ss. 300, and 304—Slapping on back.**

Merely being slapped on the back by a person may be a sudden provocation but is not a grave provocation sufficient to deprive the person slapped, of his power of self-control especially when the person slapping has no weapon in his hand while slapping. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

**—S. 300, Excep. (1)—Requisite provocation—Absence of provocation—Sentence.**

The accused and the deceased belonged to two different religious sects. The deceased exhibited a poster containing some matter against the leader of the accused's sect. The accused who had the knowledge of this poster attacked the deceased two days later and stabbed him in the chest which resulted in his death;

Held, that there was no sudden and grave provocation as accused had knowledge of the poster two days before and that he was guilty of murder. There was premeditation to commit murder, and in the circumstances, the sentence of death was proper. A.I.R. 1938 Lah. 355=40 P.L.R. 119=39 Cr.L.J. 695=176 Ind. Cas. 89.

**—S. 300, Excep. (1)—Accused not betrothed to girl but having intrigue with her—Sanction by custom—Accused seeing her in act of sexual intercourse with deceased—Accused killing deceased—Offence.**

The mere fact that a person's desires are thwarted does not in law justify his killing the person who is thwarting him. The provocation which is mentioned in Excep. 1 to S. 300, is something which is recognized as provocation in law and not merely something which arouses the uncontrollable anger of a particular individual. A man in love with a woman who has repulsed his suit might be so angry as to lose control of himself at the sight of her engaged in sexual intercourse with another but, if he killed one or both of them, he could certainly not plead grave provocation in mitigation of his offence. In the case of a wife the position is entirely different. The law recognizes that a husband is entitled to expect fidelity from her. It is even possible that the provocation might be held to be grave in the case of a man who finds in the arms of another lover a mistress whom he maintains and from whom therefore, he might reasonably expect faithfulness. But this is not so even in the case of a girl betrothed to the assailant much less in case of a person who was not even betrothed to the girl but having between them only an intrigue sanctioned by the custom of the community in which they lived but in no way entailing the obligation of marriage unless and until the girl would become pregnant by the man,



Where, therefore, such a person kills another who is discovered in the act of sexual intercourse with the girl, the offence is murder. A.I.R. 1939 Pat. 443=18 Pat. 101=20 P.L.T. 802=5 B.R. 955=40 Cr.L.J. 786=183 Ind. Cas. 499.

—S. 300, Exception 1—Misconduct of mistress.

The accused and the deceased were both carrying on an intrigue with a certain widow. On the night in question, the deceased visited her, and shortly afterwards the accused arrived. While he was still outside her room the deceased went out of the room. The two men had some words, and then started struggling with each other. In the end the accused dealt the deceased two blows on the head with his *lathi* and the deceased expired while he was being carried to the hospital. There was a fracture of the skull, death being ascribed to shock and intra-cranial haemorrhage resulting from fracture. The accused was sentenced under S. 302:

**Held**, that although the accused was doubtless provoked by finding his rival at his mistress's house, that provocation could not be described as grave and sudden so as to entitle him to the benefit of Exception 1 to S. 300 and that it must be held that the accused in the present case must have known that by striking the deceased three times on the head with a *lathi* he was at least likely to cause his death. A.I.R. 1937 Oudh 457=38 Cr.L.J. 938=1937 O.W.N. 917=170 Ind. Cas. 341.

But see A.I.R. 1935 Mad. 25 (1) under Note 8 (d).

—S. 300, Excep. 1—Husband witnessing adultery of wife—Man-slaughter—Rule restricted to man and wife.

If a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of man-slaughter only and not of murder. But that rule has no application where the relationship between the parties is not that of husband and wife. 124 Ind. Cas. 818=A.I.R. 1930 Cal. 199.

—S. 300, Excep. (1)—Provocation not grave and sudden—Offence.

Where the provocation was not in the nature of immediate and grave provocation, but was the culmination of a long period of swaggering and insult which finally made the accused lose his temper, the offence is murder and does not fall within the exception which may reduce the offence to one of culpable homicide. A.I.R. 1937 Rang. 4=38 Cr.L.J. 366=166 Ind. Cas. 994.

—S. 300, Excep. (1)—Drunkenness—Effect of.

**Held**, that among persons of class of the accused a slight beating of a wife, such as the deceased gave to his wife is an ordinary event which would not be likely to rouse severe resentment, but no doubt the accused did resent seeing his aunt being beaten by the deceased and in his drunken condition his passions were probably easily aroused and he resented this occurrence more than he would have done if he had been sober. Although the provocation was not of a kind such as to reduce the offence of the appellant to culpable homicide not amounting to murder, yet there was provocation which ought to be taken into account in deciding whether sentence of death should be passed, and in assessing this provocation, the Court was entitled to take into account the drunken condition of the accused at the time and the effect of this drunkenness upon his

sensibilities. A.I.R. 1936 Rang. 325=37 Cr.L.J. 902=164 Ind. Cas. 206.

—S. 300, Excep. (1)—Provocation grave but not sudden.

The accused of 18 years administering rebuke to the deceased on seeing him lying with his brother's wife—Accused slapped by the deceased leaving the house and when returning home after some time meeting the deceased—Deceased beating accused with a stick, whereupon accused stabbing the deceased with the knife—**Held**, that the provocation was grave but not sudden so as to attract Excep. 1 to S. 300. 1935 M.W.N. 1198.

—S. 300, Excep. (1)—Grave and sudden provocation, what amounts to.

Mere invitation to the accused to accompany the deceased to the fields does not necessarily mean that the deceased meant to invite him for unnatural intercourse and if the accused deduced from it a suggestion to that effect, and used his dagger on the deceased with fatal results, it cannot be said that he had received grave and sudden provocation in the matter, as such, his case is not covered by Excep. 1 of S. 300, I.P.C. A.I.R. 1935 Pesh. 59=35 Cr.L.J. 914=156 Ind. Cas. 6.

—S. 300, Excep. (1)—Accused knowing of his sister's going to deceased for illicit connection—Accused going to the spot with the intention of killing—Provocation, not sudden.

The accused knew that his sister had gone to see the deceased with whom she had illicit connection and deliberately went there to kill the deceased if he found him with his sister:

**Held**, that the provocation was no doubt grave but not sudden. The accused expected to find at the spot before he left his house what he afterwards found there. There was, therefore, no suddenness about the discovery of his sister in the company of deceased and the accused cannot be said to have been deprived of the power of self-control. On the other hand, he sought the provocation by deliberately going to the scene of the meeting. A.I.R. 1934 Lah. 103=35 Cr. L.J. 1378=151 Ind. Cas. 751.

—S. 300, Excep. (1)—Deceased carrying on intrigue with girl—Accused lying in wait and killing—Offence.

Where the accused were lying in wait armed with spears, expecting the deceased to come that side to prosecute his intrigue with the girl who was betrothed to one of them, and intended to murder him, if he did come, it could not be said that the provocation was sudden or that it deprived the accused of their power of self-control and thus impelled them to commit the offence. The accused were guilty under S. 302, Penal Code. A.I.R. 1934 Lah. 239=35 Cr.L.J. 1476=151 Ind. Cas. 1012.

—S. 300, Excep. (1)—Mother of accused running away with her paramour—Paramour killed—Provocation not 'grave and sudden.'

Where the accused's mother eloped with her paramour on several occasions and had prior to the incident under trial, run away with her daughter aged 16 or 17 years, and the paramour on being suspected to be at the bottom of the whole affair, was murdered by the accused:



**Held**, that although the accused must have been having pangs of shame and humiliation for many years owing to the disgraceful behaviour of his mother and the wickedness of the deceased, and his passions must have been roused to a white heat when his sister had also been taken away by the mother, yet, having regard to the provisions of Excep. 1 to S. 300, the provocation to the accused could not be said to have been 'grave and sudden'. A.I.R. 1932 Lah. 438=33 P.L.R. 511=34 Cr.L.J. 94=141 Ind. Cas. 40.

**—S. 300, Excep. (1)—Suspicion—No extenuation of wife-murder.**

Mere suspicion of a wife's conduct is no extenuation of deliberate wife-murder and so in spite of such suspicion death is the only proper sentence. 116 Ind. Cas. 142=1929 M.W.N. 269=30 M.L.W. 229=2 M.Cr.C. 157=30 Cr. L. J. 630=13 A.I.Cr.R. 65=A.I.R. 1929 Mad. 495.

**—S. 300, Excep. (1)—Wife refusing to give up paramour—Quarrel ensued—Accused lost temper and killed wife—Not grave and sudden provocation.**

Where the husband asked the wife to sever her connexion with her paramour but she declined to give up her lover, thereupon there was a quarrel between the husband and the wife in the course of which he lost his temper and killed his wife;

**Held**, that the accused did not receive any grave and sudden provocation, which would bring his case within the ambit of Excep. 1 to S. 300, but that the wife's persistent immorality coupled with her refusal to sever her connexion with the lover provoked the husband and prompted the assault which resulted in her death and that the extreme penalty of the law should not be exacted. 108 Ind. Cas. 166=29 Cr.L.J. 347=10 A.I. Cr.R. 36=A.I.R. 1928 Lah. 544.

**—S. 300, Excep. (1)—Provocation — Domestic difference.**

Where the accused caused death of his wife, being annoyed with her because she opposed him in some domestic matter and there was no grave and sudden provocation.

**Held**: that the offence committed was murder. 100 Ind. Cas. 226=7 A.I.Cr.R. 371=28 Cr.L.J. 258=A.I.R. 1927 Lah. 729.

**—S. 300, Excep. (1)—Finding wife with lover—Grave but not such as to deprive self-control.**

Accused's wife left the house after giving her husband his midday meal. She went to a grove and there she met her lover. The accused finished his meal, took up a banka and went in search of his wife. He found her sitting with the lover and killed her with the banka;

**Held**, that the provocation was grave but not so grave and sudden as to deprive the accused of his self control, and that Excep. 1 of S. 300 does not apply. 91 Ind. Cas. 241=27 Cr.L.J. 65=A.I.R. 1926 Oudh 272.

**—Ss. 300 and 302—Accused finding wife reproaching co-wife about the immoral conduct of her daughter—Killed in quick succession his two wives and daughter—Provocation not sufficient.**

On the morning of the day in question the appellant returned to his house from his field and found his one wife reproaching his second wife that her daughter was a loose woman and had contracted an intimacy with a Mochi. On hearing this conversation between the two women the prisoner who was holding an axe in his hand attacked and killed in quick succession his two wives and daughter;

**Held**, that the facts did not constitute any grave and sudden provocation such as is contemplated by law, and therefore the appellant had been rightly convicted of murder. 81 Ind. Cas. 826=5 Lah. 67=25 Cr.L.J. 1050=A.I.R. 1924 Lah. 450.

**—S. 300, Excep. (1)—Provocation—Petty quarrel—Loss of temper.**

Where, as a result of a petty quarrel the accused lost his temper and struck his grandfather on the head with a lathi causing extensive fracture of the skull of which the man died within a few hours;

**Held**, that the offence of murder was committed. 90 Ind. Cas. 159=26 Cr.L.J. 1503=A.I.R. 1926 Oudh 27.

**—S. 300, Excep. (1)—Attack with fork on provocation—Going and fetching a Chhavi to strike again—Not sudden.**

Where it appears from the evidence on some of the witnesses for the prosecution that the accused got enraged when the deceased abused him and that after attacking the victim with a fork, the accused went and fetched a Chhavi in order to strike the deceased again;

**Held**, it is not possible to hold that the provocation that he received can be regarded as sudden within the meaning of the first exception to Section 300, Indian Penal Code, and that the abuse uttered by the deceased does not amount to grave provocation so as to reduce the offence to one of culpable homicide. 76 Ind. Cas. 970=25 Cr.L.J. 298=A.I.R. 1923 Lah. 408.

**—S. 300, Excep. (1)—Over diverting course of channel—Not grave and sudden provocation.**

Where the deceased remonstrated with the accused's father for diverting the course of the old water channel which led to a quarrel, and then the accused came to support his father and assaulted the deceased;

**Held**, there was no grave and sudden provocation. 6 L.L.J. 424=A.I.R. 1924 Lah. 742.

**—Ss. 300, 302—Accusation repeated on challenge—Not sufficient provocation.**

The provocation caused by the repetition by the deceased of an accusation which the accused knew she had already made and which she again made on a challenge by him to do so, cannot be called sudden provocation. 73 Ind. Cas. 266=24 Cr.L.J. 570=8 N.L.J. 56=A.I.R. 1923 Nag. 251.

**—S. 300, Excep. (1)—Wife—Woman of loose character—Long known to husband—Access often denied to him—Act not done under provocation.**

Where the accused killed his wife who had long been known to him to be a woman of loose character and who had again and again denied access to him,



the act cannot be said to have been done under grave and sudden provocation. The Court, however, reduced the sentence of death to one of transportation for life. 65 Ind. Cas. 572=23 Cr.L.J. 140=4 U.P.L.R. (Lah.) 49=1 P.W.R. 1922 (Cr.).

—S. 300, Excep. (1)—Provocation — Suspicion and unchastity—Grave provocation.

Merely suspicion of unchastity of the sister does not amount to grave provocation. 15 Cr.L.J. 501=7 S.L.R. 118=24 Ind. Cas. 589.

9. Intention.

- (a) Ascertainment of
- (b) Distinction between intention and knowledge
- (c) Drunkenness
- (d) Poisoning
- (e) Proof and onus
- (f) Requisite intention
- (g) Sufficient
- (h) Not sufficient.

9 (a). Intention—Ascertainment of.

—Ss. 299 and 300—Ascertainment of intention to cause death.

To beat a person after he has fallen down does not necessarily prove the intention of causing his death. Certain factors will have to be considered, such as for instance the number of blows, the nature of blows and the parts of the body on which these blows have been inflicted. It may also be of importance to know what the condition of the injured person was when he fell down. If there could be no doubt about the serious condition, for instance, if blood was flowing from his head or body and he was apparently unconscious, the striking of further blows even on his body, though such blows might not ordinarily be dangerous, would indicate an intention on the part of the assailants to cause him more injury than would be caused by an ordinary beating. 1944 O.W.N. 342=1944 A.W.R.C.C. 225.

—Ss. 299 and 300—Ascertainment of intention.

The law looks as regards intention to the natural results of a man's act and not to the condition of his mind. From a legal point of view a person intends whatever he gives others reasonable grounds for supposing that he does intend. ('32) 9 O.W.N. 350=137 Ind. Cas. 817=33 Cr.L.J. 537.

—Ss. 300 and 302—Inference from acts.

There is no reason why in a murder case as in other cases, a man's intention should not be inferred from his acts. A.I.R. 1941 Sind 117=42 Cr. L. J. 786=195 Ind. Cas. 833.

—Ss. 299 and 300—Inference from injuries.

Knowledge of the effects of a blow or intention to cause those effects can be presumed from the nature of the injuries actually inflicted when those injuries are to a vital part of the body, such as the head, heart liver or abdomen. The reason is simply that a vital part of the body is a part, serious injury to which is known to be sufficient in the ordinary course of nature

to cause death. The same reasoning may apply to cases where the blow is so severe that a limb is severed. But knowledge cannot always be so presumed. A.I.R. 1940 Rang. 259=1940 Rang. L.R. 441=42 Cr.L.J. 124=191 Ind. Cas. 306 (F.B.).

—Ss. 299 and 300—Question of fact.

Questions of knowledge, intention, and the like are always essentially questions of fact falling to be decided solely upon the particular facts and circumstances of each individual case. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

—Ss. 300 and 302—Question of fact.

A question of intention is a question of fact. A state of a man's mind is as much a question of fact as the state of his digestion. A.I.R. 1938 Sind 63=31 S.L.R. 480=39 Cr.L.J. 460=174 Ind. Cas. 497.

—Ss. 299 and 300—Inference.

A person is considered to intend the probable consequence of act, and a person who hits another on the head with such force as to cause a complicated fracture, must be considered to have intended to cause such bodily injury as would, in the ordinary course of nature, cause death. A.I.R. 1937 Mad. 792=46 L.W. 486=1937-2 M.L.J. 490=1937 M.W.N. 1124=39 Cr.L.J. 139=172 Ind. Cas. 382.

—Ss. 299 and 300—Determination of intention.

The intention of the man who kills another is a matter of fact which has got to be determined in order to decide whether the offence is murder or merely culpable homicide. A.I.R. 1936 Rang. 421=37 Cr.L.J. 1050=14 R. 716=164 Ind. Cas. 884 (F.B.).

—Ss. 299, 300 and 302—Intention—Inference of.

When an unarmed person is assaulted by two persons armed with formidable weapons and death is caused, the inference in the absence of anything to rebut it, is that the intention must be to commit murder. ('36) 38 P.L.R. 265.

—Ss. 300 and 302—Inference.

The ordinary rule in criminal cases is, and must be, that intention is to be inferred from a person's acts. A.I.R. 1934 Bom. 156=36 Bom.L.R. 210=35 Cr.L.J. 829=148 Ind. Cas. 1004.

—S. 300—Intention—Striking on head with sharp edge of axe.

A person who strikes another on the head with the sharp edge of an axe with sufficient force to break it, must be held to have acted with the intention described in S. 300, secondly and thirdly, and if the victim succumbs to the injury, the offence committed is that of murder. A.I.R. 1932 Lah. 5=32 P.L.R. 810=33 Cr.L.J. 184=135 Ind. Cas. 670.

—Ss. 299 and 300—Intention—Presumption of.

The accused must be assumed to have intended the natural consequences of their act and the burden lies heavily on them to prove that they had some other intention. A.I.R. 1930 Lah. 491=11 Lah. 460=126 Ind. Cas. 573=31 P.L.R. 797.



## —Ss. 299 and 300—Intention—Nature of the act.

S. 300, I.P.C., says nothing about deliberation or previous preparation. It speaks only of intention and knowledge. If the act by which death is caused is done with the intention of causing death, the offence is murder unless it falls within the exceptions. The intention must be gathered from the nature of the physical act committed; that is to say, that whoever strikes a fatal blow must be taken to have intended the injury which he actually inflicted. 91 Ind. Cas. 238=27 Cr.L.J. 62=2 O.W.N. 862=A.I.R. 1926 Oudh 148.

## —Ss. 299 and 300—Murderer's intention and wish.

A person who inflicts injury on another which ends fatally and which the former knew was likely to cause death, is guilty of culpable homicide amounting to murder though he had no wish or motive to cause death. In such a case the law will presume an intention to cause death and the burden is on the accused to show that he had no such intention. (1913) M.W.N. 556=14 Cr.L.J. 115=18 Ind. Cas. 675.

## 9 (b). Intention—Distinction between intention and knowledge.

## —Ss. 299 and 300—Distinction between intention and knowledge.

'Intention' is one thing and 'knowledge' a different thing. In order to possess and to form an intention there must be a capacity for reason. And when by some extraneous force the capacity for reason has been ousted, the capacity to form an intention must have been unseated too. But knowledge stands upon a different footing. Some degree of knowledge must be attributed to every sane person. Obviously, the degree of knowledge which any particular person can be assumed to possess must vary. A.I.R. 1940 All. 486=1940 A.L.J. 563=42 Cr.L.J. 146=1940 A.W.R. 488=I.L.R. (1940) All. 647=191 Ind. Cas. 328.

## 9 (c). Intention—Drunkenness.

## —Ss. 300, 302 and 304—Drunkenness, effect of.

The accused and his companion C were drunk. C accosted and pulled at the sari of H's concubine who had a child in her arms and was awaiting H a little distance from the liquor shop, where H and his companions F and S had gone to drink after the accused and C had left it. H's concubine cried out. Thereupon the accused stabbed her with a knife inflicting injuries both on her and the child. Hearing the outcry F, S. and H came out to protest whereupon the accused stabbed in quick succession, first H, then F and then S. H had a stab wound for inches deep vertically downward from the right clavicle entering and puncturing the right lung. This wound was the cause of death and the medical opinion was that such wound was sufficient in the ordinary course of nature to cause death.

Held, that each one of the injuries was inflicted with the intention of causing bodily injury, be the assailant drunk or sober. Had the accused been sober the nature of the injury, a penetrating wound directed at the chest and in the direction of the lungs and heart might well have led to the inference that the intention of the accused was to cause death itself, and that would have led to the conclusion that the act amounted to murder within para. 1 of S. 300; but in the case of

a drunken man it was doubtful whether in a deliberate intent of causing death was formulated in his mind. Consequently, the accused was entitled to the benefit of doubt so far as S. 300, para. 1 was concerned. A.I.R. 1942 Pat. 420=43 Cr.L.J. 883=21 Pat. 250=23 P.L.T. 725=9 B.R. 36=202 Ind. Cas. 637.

—Ss. 300 and 302.—The drink taken by the accused had apparently induced a spirit of bravado in him and made him violent. He was drawing lines on the ground and challenging people to cross them on pain of being attacked with a kirpan. He did actually attack the deceased when he crossed the lines and inflicted seven injuries with his kirpan out of which three were on the head or on face. Four of the injuries were grievous.

Held, that any sober person who inflicted such injuries must be presumed to have the intention to cause death or such bodily injuries as would result in death in the ordinary course of nature. The same intention would, therefore, have to be attributed to the accused unless he could prove that he was incapable of forming the requisite intention.

Held, also that this conduct of the accused might look foolish, but it did not show that he was incapable of forming the criminal intention necessary for the offence of murder, viz., the intention of causing death or such bodily injury as was sufficient in the ordinary course of nature to cause death. The fact that the accused was shouting that he would kill or die showed that the accused fully understood the nature and consequence of his act. Therefore, the accused was guilty of murder under S. 302, Penal Code. A.I.R. 1941 Lah. 454=I.L.R. (1943) Lah. 39=43=Cr.L.J. 332=43 P.L.R. 698=198 Ind. Cas. 252.

## —Ss. 300 and 302—Drunkenness, effect of.

Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged, but the evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent. Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Held, on facts, that there was no doubt that the accused was not so drunk as to be bereft of his powers of reason or of forming an intent. His actions although anti social were logical, and that two rupees worth of country liquor, which was not illicitly distilled liquor but Government liquor divided among five persons would not be sufficient to induce intoxication which would deprive the accused of all powers of ratiocination. Consequently, he could not escape the imputation of having intended the natural consequences of his acts. A.I.R. 1937 Nag. 386=39 Cr.L.J. 72=I.L.R. (1938) Nag. 305=172 Ind. Cas. 167.

## —Ss. 300 and 302—Accused challenging deceased to fight—First blow struck by deceased—Both drunk—Fatal injuries inflicted by accused—Offence.

Where the accused challenged the deceased to fight with him and on the latter's refusal asked the deceased



to assault him whereupon he gave accused a blow and immediately, the accused drew his knife and inflicted wounds which had a fatal result:

**Held**, that the fact that so many fatal injuries were inflicted tells strongly in favour of an intention to cause death and the accused was guilty of murder. A.I.R. 1934 Rang. 10=35 Cr.L.J. 1065=149 Ind. Cas. 1176.

—Ss. 300 and 302—**Drunken brawl**—Accused assaulted retaliated with stab at the throat—Ran about, saying he had killed deceased—Knowledge and intention.

In the course of drunken brawl accused was struck by the deceased and knocked down, whereupon the accused struck the deceased with a knife in the throat, which resulted in killing the deceased. After committing the crime the accused ran about saying that he had killed the deceased, and was going to be hanged. Of the two, the deceased was the bigger man.

**Held**, that the accused had knowledge and intention which would make him liable under S. 302 and was guilty of murder, but the case was one in which extreme penalty was not called for. 121 Ind. Cas. 452=8 Pat. 911=31 Cr.L.J. 243=A.I.R. 1930 Pat. 168.

—Ss. 299 and 300—**Intention—Drunkenness**—Not amounting to incapacity to intend—No particular individual intended—Firing at general mass of people—Cl. 4 applies.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act. And even if he did not intend to fire at any particular individual at the time but merely fired at the general mass of villagers and killed some of them his act would still come within the category of murder as defined in Cl. 4, S. 300 of the Penal Code. 116 Ind. Cas. 707=30 P.L.R. 357=30 Cr.L.J. 662=1929 Cr. C. 188=13 A.I.R. Cr. 75=A.I.R. 1929 Lah. 637.

—Ss. 299 and 300—**Intoxication and Intention.**

Where a person who was drunk struck another on the head with a wooden billet which dazed him and immediately struck a third person who died at once thereby, the accused must be deemed to have intended to cause an injury which he knew would be likely to cause death but it is not one to impute to him an intention of causing injury which in the ordinary course of nature would cause death. Per **Twomey, J.**—Intention in culpable homicide is a presumption of law. A person is taken to have intended the natural consequences of his act though he is drunk. 4 Bur. L. T. 253=12 Cr.L.J. 524=12 Ind. Cas. 292.

#### 9 (d). Intention—Poisoning.

—Ss. 300 and 302—**Administering fatal dose of dhatura.**

**Dhatura** is a common poison, frequently used to cause death, and the effects of **dhatura**, plants of which are often to be found in villages, are well-known to the villagers. It may be that **dhatura** is sometimes administered in fairly large doses with the intention of

stupefying the victim, but there is no doubt that if a person consciously administers **dhatura** and administers a fatal dose, that person is guilty of murder for the intention to cause bodily injury is clear, and knowledge of the results of the poison can safely be imputed. A.I.R. 1938 Nag. 318=39 Cr.L.J. 405=I.L.R. (1940) Nag. 125=174 Ind. Cas. 886.

—Ss. 300 and 302—**Woman administering fatal dose of dhatura to husband to get rid of him—Presumption.**

If one deliberately administers a common poison, the effects of which are well-known, it is no defence to say that one failed to grade the exact dose correctly so as to cause some injury short of death. The question whether a person knows what he is administering and knows what its effects will be, is of course a question of fact in the particular case. Where it is proved that one person had administered poison to another causing his death by mixing it with his food, the question is whether his explanation raises a reasonable doubt as to his guilt. A.I.R. 1938 Nag. 318=39 Cr.L.J. 405=I.L.R. (1940) Nag. 125=174 Ind. Cas. 386.

—Ss. 300 and 302—**Intention to stupefy by Dhatura—Intention to cause death—Knowledge of likelihood.**

Where the intention of the accused was certainly primarily only to stupefy his victims by **Dhatura** and to come back when the poison had begun to take effect and rob them, and the poisoning was fatal:

**Held**, that there is no ground for holding that he intended to bring about their death, but he must have had knowledge that he was likely to cause death and the conviction under S. 302, was correct. 98 Ind. Cas. 712=7 L.R.A.Cr. 188=27 Cr.L.J. 1400=A.I.R. 1927 All. 104.

—Ss. 300 and 302—**Intention—Necessity of—Love potion—Causing death—Intention to cause death absent—Administered at the instance of paramour inimical to husband—Liability.**

Where the intention to cause death cannot be clearly found without any other possible explanation of the act of the person giving poison a conviction for murder cannot stand. Unless it is shown clearly and without possible doubt that the intention was to cause death where a substance is administered as a love potion, the accused cannot be convicted of murder. The mere administering of a love potion or drug which a person thinks might be beneficial is not in itself an offence but when it is supposed to have effect upon persons with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any enquiry as to what it really is her act falls within S. 304-A. 77 Ind. Cas. 801=1924 P.H.C.C. 13=25 Cr.L.J. 449=A.I.R. 1924 Pat. 635.

—Ss. 299 and 300—**Murder—Dhatura poison—Intention.**

In a case of murder by **Dhatura** poison it is to be determined with what object it is administered. Its use may be merely in order to facilitate the commission of robbery. It does not *per se* and necessarily import contemplation of the victim's death as a means towards or as incidental to the main end of that offence. The point has to be decided with regard to the circumstances of each particular case and the best indication of the intention of the offender can be gathered from the



amount of Dhatura which he administers; if a very large quantity of Dhatura is administered, the offender shall be presumed to intend to cause death of the victim for the successful termination of his crime. 3 P.W.R. 1920 Cr.=4 P.L.R. 1920=21 Cr.L.J. 319=2 U.P.L.R. (Lah.) 21=55 Ind. Cas. 479.

—Ss. 299 and 300—Intention—Murder by poison.

On a charge of murder by poison, it was proved that the poison was administered by the accused as a drug which would bring the deceased under her control and that she did not know it was poison. The circumstances were not inconsistent with the innocence of the accused who must be acquitted. 18 C.L.J. 590=14 Cr.L.J. 586=21 Ind. Cas. 378.

—Ss. 299 and 300—Intention—Poisoning.

Daughter gave birth to a child and her mother only attended her. The infant while in their custody, died of sulphate of copper poisoning soon after its birth. Both of them must be presumed to have administered the poison and they are guilty of murder even in the absence of clear motive for committing the crime. The fact of their taking no step towards saving the infant's life is evidence of intention and negatives the defence of accidental poisoning. Such a circumstance is sufficient to corroborate their confession of guilt retracted by them at the time of trial. 43 P.W.R. 1910 Cr.=11 Cr.L.J. 717=17 P.L.R. 1911=8 Ind. Cas. 815.

9 (e). Intention—Proof and onus.

—Ss. 299 and 300—Intention to commit offence must be proved and cannot be assumed.

Whether an accused person intended to commit the murder is a matter which has to be proved in the case and cannot be assumed. The inference of intention or otherwise has to be drawn after consideration of the circumstances which preceded, attended and followed the crime. A.I.R. 1946 Nag. 321=I.L.R. 1946 Nag. 946=1946 N.L.J. 656=226 Ind. Cas. 377=47 Cr.L.J. 918.

—Ss. 299 and 300—Onus—Criterion.

In murder cases as in other cases, a man's intentions are to be judged by his acts in relation to the surrounding circumstances, but the provisions of the law of culpable homicide in India are merciful. The burden of proof in these cases as in other cases is on the prosecution and the distinction between knowledge and intention in S. 299 and again S. 304 allows the Judge when he thinks the prosecution have proved not intention but only knowledge to convict of the lesser offence. The intention of the accused should be judged at the time of striking the blow, which is the material time, but not at the time they left the house which is not the material time. A.I.R. 1939=Sind 57=32 S.L.R. 18=40 Cr.L.J. 375 (2)=180 Ind. Cas. 418.

9 (f). Intention—Requisite intention.

—Ss. 299, 300 and 302—Murder—Intention requisite.

In order to constitute an offence of murder not only must bodily injury be intended to be inflicted, but it must be intended that such bodily injury should be sufficient in the ordinary course of nature to cause death. A.I.R. 1941 Rang. 319=43 Cr.L.J. 266=197 Ind. Cas. 786.

—Ss. 300 and 302—Requisite intention.

An injury sufficient in the ordinary course of nature to cause death is not by itself sufficient to support a conviction of murder unless the accused intended that the injury should be sufficient in the ordinary course of nature to cause death. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

9 (g). Intention—Sufficient.

—Ss. 299, 300 and 302—Intention or knowledge of offender—Number of injuries—If material consideration.

The most relevant point in a case in which a person is charged with an offence punishable under S. 302 of the Penal Code is whether or not he had any such intention or knowledge as is mentioned in S. 300, and though the number of injuries is one of the circumstances which the Court may take into account for coming to a finding about the intention or knowledge of the offender, it is not the only circumstance that is to be considered. The mere fact that only one blow, fatal by itself, is given, cannot take the case out of the provisions of S. 300, if the requisite ingredients of that section are proved. Pak. L.R. (1950) Lah. 349=51 Cr.L.J. 1368=A.I.R. 1950 Lah. 169.

—Ss. 299 and 300 (1)—Intention—Hitting another with axe on head, neck and back.

A man is presumed to know the natural result of his act when a man hits another person with an axe on his head, neck and back, he will be presumed to have intended to cause his death. The act would amount to murder when the person so hit dies and the case would fall under Cl. (1) of S. 300. I. P. Code. A.I.R. 1950 Ajmer 75.

—Ss. 299, 300 and 302—Intention to cause injury resulting in natural course in death—Inference from facts.

When a single blow is struck by a person on the head of another in the heat of a quarrel, without giving any thought to the result, it might be possible to argue that there was neither intention to kill nor knowledge that death was likely to result in the mind of the striker. But in a case where two young men pursue a much older man for a considerable distance and then getting in front of him they each give him one blow on his head with sufficient force to crack his skull extensively, an intention to do something serious is clearly evinced by such conduct, and even though it is possible there was no intention to kill him outright, there is no escape from the conclusion, having regard to the repeated blows, that there was an intention to break the head and the result of such injury in the natural course is death. In such circumstances the offence falls under S. 302, I. P. Code. 49 P.L.R. 305=A.I.R. 1948 Lah. 74=49 Cr.L.J. 106.

—Ss. 299, 300 and 302—Intention to kill present—Series of acts—One transaction.

If the intention is to kill and the killing results, the accused succeed in doing that which they intended to do and if the acts follow closely upon one another and are intimately connected with one another, then the offence of murder has been committed. The series of acts would be one transaction. The mere fact that the earlier assault on the deceased did not result in her



death but that she was killed by the passing train, on the railway lines, where on her unconscious body was kept thinking her to be dead, would make no difference. A.I.R. 1945 Pat. 470=24 Pat. 131.

—Ss. 299, 300, 302.

Where the other injuries on the deceased clearly show the determination of the accused to cause the death of the deceased, the fact that the spleen which had ruptured by the blows given by the accused, was enlarged, makes no difference. The accused can be convicted under S. 302. A.I.R. 1942 Oudh 193=1941 O.W.N. 1246=43 Cr. L. J. 243=17 Luck. 376=1941 A.W.R. 354=197 Ind. Cas. 701.

—Ss. 300, 302, 34—Intention to cause death—Series of acts of violence—Mere fact that Court cannot determine at what precise point deceased expired, if material.

Where the intention to cause death has been present, it will make little or no difference that the Court cannot determine at what precise point in the course of a series of acts of violence the victim of the crime expired. A.I.R. 1941 Pat. 550=22 P.L.T. 1035=7 B.R. 802=42 Cr. L. J. 603=194 Ind. Cas. 622.

—Ss. 299, 300, 302—Inference.

Where a man inflicts a wound in a vital spot such as on the head causing the substance of the brain to protrude from the head and death ensues, it is no defence to a charge of murder for the accused to say that he did not intend the injury to be fatal. A.I.R. 1941 Rang. 319=43 Cr. L. J. 266=197 Ind. Cas. 786.

—Ss. 300 and 302—Accused assaulting deceased with intention of causing his death and after rendering him unconscious placing him on railway line where death is caused by running train—No evidence that accused carried deceased to railway line under belief that he was dead.

Where an accused has assaulted the deceased with the intention of causing his death and after rendering him unconscious by lathi blows has placed him on railway line where death is actually caused by being run over by a train and there is no evidence that when the accused carried the deceased to the railway line, he was under the belief that the victim was dead, the offence committed by the accused is murder, for the acts so closely following upon and so intimately connected with each other cannot be separated, assigned the one to one intention and the other to another, but must both be ascribed to the original intention which prompted the commission of those acts and without which neither would have been done. A.I.R. 1939 Pat. 625=18 Pat. 485=6 B. R. 316=41 Cr. L. J. 276=186 Ind. Cas. 256.

—Ss. 300 and 302—Killing with beating on all parts of body.

Where men armed with weapons like spears, refrain from using the sharp end but beat to pulp the victim with the lathi end, they can be found guilty of murder. Where people kill a man by beating him on all parts of the body with weapons like lathis, the inevitable inference is that they intend to kill or know that such a beating is likely to cause death. A.I.R. 1937 Lah. 632=I.L.R. (1937) Lah. 231=38 Cr. L. J. 1077=171 Ind. Cas. 353.

—Ss. 300 and 302—Injuries fracturing skull—Presumption as to intention.

Injuries on the head which have fractured the skull are sufficient in the ordinary course of nature to cause death, and the person or persons who inflicted them must be presumed to have had the intention of causing injuries so sufficient. A.I.R. 1936 Rang. 46=37 Cr. L. J. 290=160 Ind. Cas. 459.

—Ss. 300 and 302—Blows on head in quick succession—Inference.

A man who delivers two blows in quick succession on or in the neighbourhood of the head with a heavy weapon such as a rice pounder must be regarded, in the absence of any extenuating circumstance, to intend to cause injury sufficient in the ordinary course of nature to cause death. A.I.R. 1935 Rang. 427=37 Cr. L. J. 181=159 Ind. Cas. 902.

—Ss. 300 and 302—Blows inflicted on abdomen with heavy sharp-cutting weapon—Death—Offence.

Where three or four blows are inflicted on the abdomen with a heavy sharp-cutting weapon like a *gandasa* or chopper, it is sufficient to make manifest the intention of the assailant that he intended to cause such bodily injury as he knew was likely to cause the death of the victim and the offence is murder and not culpable homicide not amounting to murder. A.I.R. 1934 Oudh 405=35 Cr. L. J. 1113=11 O.W.N. 851=150 Ind. Cas. 819.

—Ss. 299, 300 and 302—Accused striking deceased—Deceased chased and struck with second weapon on breaking of first weapon—Intention.

Where the accused struck the deceased with such determination that when the stick broke, he armed himself with another weapon and chased the deceased into another man's compound and assaulted him further with the second weapon, with the result that death ensued:

**Held**, that the accused's action in so following up the injured man and repeatedly striking him with these weapons showed that, apart from any intention which the second assailant may have shared with him he himself had the intention of causing the death of the deceased, or at least of causing injury sufficient in the ordinary course of nature to cause death and that the offence committed by the accused was the offence of murder. A.I.R. 1933 Rang. 278=34 Cr. L. J. 1245=146 Ind. Cas. 216.

—Ss. 300, 302, 304—Accused firing shot gun with fatal effect—Offence.

Where it is proved that the accused fired a shot gun at such a close range that it could not have had other than a fatal effect and it is indicative of the intention of the accused that after firing at one person he re-loaded the gun and fired another shot at another person, there is a clear indication of his intention to commit murder and the offence falls under S. 302, and not under S. 304. A.I.R. 1933 Pat. 147=34 Cr. L. J. 1071=145 Ind. Cas. 771.

—Ss. 299 and 300—Intention—Presumption.

Where a man strikes another on the head with a sharp instrument with such force as to penetrate to the brain, the only possible intention that can be



inferred is an intention to cause an injury which the accused knew would be likely, [and indeed bound to cause death. A.I.R. 1934 Bom. 156=36 Bom. L. R. 210=35 Cr. L. J. 829=148 Ind. Cas. 1004.

—Ss. 300 and 302—Intention—Presumption of.

Where the action, which ultimately results in the death of a person, is continuous and it is impossible to resolve the different incidents into wholly separate actions, inspired by different motives and committed for different reasons the person, who did that act, must be deemed as having done it with the intention of causing death and as having succeeded in carrying out his object and must therefore be held to be guilty of murder. 1931 Cr. C. 91=A.I.R. 1931 Lah. 27.

—Ss. 300 and 302—Intention—Presumption of—Previous grudge—Stabbing at vital part—Intention to cause fatal injury presumed.

It must be assumed that a person who goes armed with a stabbing weapon to assault another person against whom he has a previous grudge and actually strikes that person at a vital part of his body and causes his death, intends to cause such bodily injury as is imminently dangerous to life and such person must be held guilty of murder. 129 Ind. Cas. 289=A.I.R. 1930 Lah. 534.

—Ss. 300 and 302—Intention—Evidence—Accused provoked by resolve of deceased to report his offence to police—Sudden and heavy blow with chopper—Intention established.

K seized the accused in the act of stealing; but the accused escaped from him. K convened a panchayat consisting of several members of whom J was one. The accused admitted his offence and asked for pardon as it was a trivial offence. J, however, insisted that the matter must be reported to the police. On hearing this the accused suddenly struck J a heavy blow with a chopper which he had carried with him. J died of the heavy blow;

**Held:** that the accused either intended to cause J's death, or that he intended causing bodily injury to J and the bodily injury which he intended to be inflicted was sufficient in the ordinary course of nature to cause death. 120 Ind. Cas. 274=1930 Cr. C. 28=31 Cr. L. J. 79=A.I.R. 1930 Lah. 60.

—Ss. 300 and 302—Previous enmity—Assault lying in wait—Lathi blows—Serious injuries—Intention to cause death presumed.

Where four persons deliberately lay in wait for the deceased intending to beat him with lathis on account of enmity in regard to a grove; there was evidence of eye-witnesses, one of whom accompanied deceased and others who were close to the scene of occurrence, who stated that they had witnessed the assault and that all the four accused beat the deceased with lathis. The first report, made without delay, named the four as assailants. In the dying declaration the deceased named all the four as his assailants. The medical evidence showed that the death was due to injuries to the lung caused by the fracture of six ribs, and haemorrhage of the brain produced by contused wound on the head, and that there were numerous other injuries;

**Held,** that the intention of the accused must have been to cause death or such injuries as would in the ordinary course of nature cause death. 118 Ind. Cas. 190=10 L.R.A.Cr. 138=1929 Cr. C. 291=30 Cr. L. J. 899=12 A.I.Cr.R. 339=A.I.R. 1929 All. 707.

—Ss. 299 and 300—Armed robbery—Intending use of guns in case of obstruction—Intention to kill presumed.

Where certain persons, armed with guns, go to commit robbery and it was their intention to use the guns in case obstruction was offered to them, it would be legitimate to presume that they had the intention to kill anybody who would stand in the way of the attainment of their object. 120 Ind. Cas. 180=11 L. L. J. 20=31 Cr. L. J. 41=A.I.R. 1929 Lah. 292.

—Ss. 299 and 300—Lathi blow on the head—Intention presumed.

A blow on the head with a lathi is certainly likely to cause death and the person who inflicts lathi blow on the head of another person must be presumed to have the intention of causing such bodily injury as is likely to cause death. But it does not necessarily follow that a lathi blow on the head is always sufficient in the ordinary course of nature to cause death. 106 Ind. Cas. 433=7 Pat. 638=29 Cr. L. J. 17=9 A. I. Cr. R. 330=9 P. L. T. 286=A.I.R. 1928 Pat. 169.

—Ss. 299 and 300—Stabbing in the abdomen—Force enough to pierce—Intention presumed.

If a person stabs another in the abdomen with sufficient force to penetrate the abdominal walls and the internal viscera, he must undoubtedly be held, whatever his station in life, to have intended to cause injury sufficient in the ordinary course of nature to cause death. The offence would then fall under the third clause of S. 300: A.I.R. 1924 Rang. 93, Foll. 108 Ind. Cas. 268=10 A.I.Cr.R. 37=29 Cr. L. J. 369 (Lah.).

—Ss. 299 and 300—Violent blow with dang on vulnerable part—Intention presumed.

A person delivering a violent blow with a lethal weapon like a dang on a vulnerable part of the body such as the head must be deemed to have intended to cause such bodily injury as he knew was likely to cause death of the person to whom the injury was caused. 105 Ind. Cas. 678=26 P.L.R. 363=28 Cr. L. J. 966=A.I.R. 1928 Lah. 93.

—Ss. 299 and 300—Violent blow on neck severing spinal cord—Intention presumed.

A person giving such a violent blow on the neck as to sever the spinal cord must be presumed to have the intention of killing his assailant. 99 Ind. Cas. 93=21 S.L.R. 159=7 A.I.Cr.R. 454=28 Cr. L. J. 61=A.I.R. 1927 Sind 108.

—Ss. 299 and 300—Intention—Violent blows on head causing fracture—Proving absence of intention on the accused.

A person who struck another on the head such violent blows as to cause the fracture of temporal and parietal bones and consequent death, must ordinarily accept the onus of proving that his intention was not to cause such bodily injury as would in all probability cause death or that he did not know that the injury inflicted by him would in all probability cause death. 99 Ind. Cas. 77=28 Cr. L. J. 45=7 A.I.Cr.R. 220=A.I.R. 1927 Lah. 63.

—Ss. 300 and 302—Accused ran off after causing injuries—Blood stains on his clothes—Blows perforated



heart and divided intestines—Intention to cause fatal injuries.

Where, in continuation of an altercation which had taken place between the accused's mother and the deceased's wife the two men were struggling in front of their houses when the accused suddenly struck the deceased with a weapon who collapsed and died at once whilst the accused ran off to his house where he was shortly afterwards arrested with blood-stains on his clothes, and the medical evidence showed that the person of the deceased bore two wounds of a penetrating nature one of which completely perforated the heart; the other penetrating the abdomen on the left side had divided the intestines and death was due to shock and haemorrhage and the accused himself bore no mark of injury upon his person:

**Held**, that intention of the accused was, if not to cause death, at least to cause such bodily injury as was likely to cause death. 92 Ind. Cas. 222=7 L.L.J. 582=27 Cr. L. J. 238=26 P. L. R. 829=A. I. R. 1926 Lah. 143.

—Ss. 300 and 302—Accused frenzied by ill-treatment of elderly husband—Avenging on him by murderous attack on infant step-son—Intention.

Where accused, a young woman of fifteen years of age being roused to frenzy by the ill-treatment of her husband who was 40 years of age and whom she did not like, seized a stick lying by and made a murderous attack on her step-son in order to avenge herself against her husband and caused the death of the infant son:

**Held**, that her intention was to cause death and she was therefore guilty of murder. 89 Ind. Cas. 461=26 P.L.R. 550=26 Cr.L.J. 1373=A.I.R. 1926 Lah. 144.

—Ss. 300 and 302—Feroocious cut on the leg—Intention to cause injury causing death.

A man who cuts another, even on the leg with ferocity and with such a weapon as to cause such an injury as causes death within a few hours must be presumed to intend to cause injury sufficient in the ordinary course of nature to cause death, and if death results, is guilty of murder unless the case is shown to fall within the exceptions provided in the Code. 76 Ind. Cas. 575=2 Bur. L. J. 103=25 Cr.L.J. 207=A.I.R. 1923 Rang. 247.

—Ss. 300 and 302—One club blow—No excuse—Imminent danger not known—Murder—No intention to kill.

Where accused gave one blow with a club but when committing the act did know that it was so imminently dangerous that it must in all probability cause death, and he did commit that act without any excuse:

**Held**, he committed murder but as there was no intention to kill the deceased, the accused should be given the lesser punishment of transportation for life. 74 Ind. Cas. 257=21 A.L. J. 316=4 L.R.A.Cr. 89=24 Cr.L.J. 753=A.I.R. 1923 All. 355.

—Ss. 300 and 302—Quarrel over the enticement of sister of deceased—Blow with spear—Intention to cause death.

Accused had enticed away the sister of the deceased. The deceased and the accused with his brother who were armed with a spear met at first before the house of the deceased near a mosque where abuse was exchanged and demand was made by the deceased to the accused to return his sister. At the persuasion of a relation the accused retreated being followed by the deceased and between the two Mohallas where each lived at a spot at a considerable distance from the houses of each the accused struck a blow with the spear to the deceased who in no time succumbed to the fatal wound. **Held**: the accused did cause the death of the deceased intentionally and he is not entitled to the benefits of any exception to section 300, I.P.C., but under the circumstances it was not necessary to impose the capital sentence. A.I.R. 1923 Lah. 195.

—Ss. 299 and 300—Intention—Several blows.

The fact that a person is killed by repeated blows, negatives the plea that there was no intention to kill the deceased. 157 P. L. R. 1911=12 Cr.L.J. 217=56 P.W.R. 1911 Cr.=10 Ind. Cas. 119.

—Ss. 299, 300 (1) and (2)—Knowledge or intention.

Persons making an attack of violent and determined character followed by 16 wounds rupture of healthy spleen and death, are guilty of murder whether they attacked with the intention to cause death or in a brutal manner regardless of consequence. 37 Cal. 315=11 Cr.L. J. 417=6 Ind. Cas. 921.

—Ss. 299, 300 (1) (2), 302—Murder—Intention to cause death or such bodily injury as is likely to cause death.

**Held**, that an attack of a violent and determined character which caused 16 wounds on the deceased's body and ruptured a healthy spleen carried with it the inference that the accused had either intended to cause death or attacked the deceased in such a brutal manner, regardless of the consequence, well knowing they would be likely to cause death. (1908) 6 Ind. Cas. 921=37 C. 315=11 Cr.L.J. 417.

9 (h). Intention—Not sufficient.

—Ss. 300, 302 and 304—Death by rupturing of spleen—Offence.

Where the accused voluntarily caused hurt to the deceased who was suffering from an enlarged spleen but without his knowledge it cannot be said that the accused had the intention of causing death or of causing an injury sufficient to cause death in the ordinary course. A.I.R. 1945 Lah. 43=46 Cr. L.J. 736=46 P.L.R. 379=220 Ind. Cas. 325.

—Ss. 300, 302.

Where during the course of a quarrel an accused instigates other accused to attack and knock down the deceased and the language used for instigation does not mean stabbing, the accused cannot be convicted for murder. 1941 M.W.N. 872.

—Ss. 300 and 302—Motive inadequate—Minor injuries—Neither intention nor knowledge.

Where on a charge of murder the evidence of the motive was inadequate and the majority of the injuries inflicted were slight:



**Held**, that the safer inference to draw in such a case is that the assailants of the deceased neither intended to cause death nor knew that they were likely to cause death. 93 Ind. Cas. 1043=27 Cr.L.J. 547=A.I.R. 1926 Lah. 419.

—Ss. 300 and 302—No vital part struck—No intention to kill or cause fatal injury.

Where so far as the external marks of violence afford an indication, assailants had desisted from striking on any vital part of the body, and the only serious injuries above the waist were those inflicted on the two cheeks. The medical witness, however, found the soft tissues of the head and the lining of the brain congested but he did not disclose the exact cause of this congestion.

**Held**, having regard to the nature of the injuries and in view of the fact that the assailants scrupulously avoided the vital parts of the body they did not intend either to cause death or to cause such bodily injury as they knew was likely to cause death. Nor does the case come within the purview of clauses "thirdly" and "fourthly" of Section 300. 6 L.L.J. 533=A.I.R. 1923 Lah. 319.

—Ss. 299 and 300—Intention—No evidence of.

Where there is no evidence that the accused intended to cause the death of the deceased, or that he intended to cause such injuries as were likely to result in death or that he intended to cause such injuries as would in the ordinary course of nature cause death, the only legal conviction which could be had would be under S. 304, Part II, of the Indian Penal Code. 102 Ind. Cas. 558=28 Cr.L.J. 590=9 L.L.J. 365=8 A.I.Cr.R. 340=28 P.L.R. 631=A.I.R. 1927 Lah. 526.

—Ss. 299 and 300—Intention—Beating to death—Exorcising evil spirit.

Accused professing to be a specialist in witchcraft beat a woman believed to be possessed by an evil spirit with the object of exorcising the spirit. The woman died of the beating, protesting that she was not possessed and refusing to be beaten. **Held**, that the accused was guilty of an offence under the second part of the S. 304, I.P.C. Intention is a question of fact which must be decided on the circumstances of each particular case. 19 Cr.L.J. 375=3 U.B.R. (1917) 54=44 Ind. Cas. 679.

—Ss. 299, 300, 304 and 395—Intention—Dacoity—Stuffing cloth in the deceased's mouth in order to silence him—Likelihood of death.

Where, in committing a dacoity the appellants stuffed a cloth into the deceased's mouth in order to silence him and not with any idea of killing him; **Held**, that they committed offences under Ss. 304 and 395, I.P.C. 18 M.L.T. 103=(1915) M.W.N. 621=16 Cr.L.J. 614=30 Ind. Cas. 438.

10. Interpretation—Clauses of and Illustrations to S. 300.

—S. 300—Interpretation—Clauses—Exhaustive in themselves.

Before the exceptions begin and immediately preceding the illustrations, four clauses are enacted. Those clauses must be taken to define the limits and deemed

exhaustive in themselves, for the purposes of the Code, of the offence of culpable homicide. 106 Ind. Cas. 213=3 Luck. 244=1 L.C. 579=28 Cr.L.J. 1029=9 A. I. Cr. R. 217=A.I.R. 1928 Oudh 15.

—S. 300—Clauses and Illustrations—Interpretation.

Per Wazir Hasan, J.—In interpreting several clauses or explanations in S. 300, aid must be taken from the illustrations enacted in the section. Though there are not express words to show that a particular illustration in a section applies to any particular clause of the same section yet if the clauses and illustrations of S. 300 are read as a whole, it can at once be inferred that a particular illustration applies to no other but a particular clause. 106 Ind. Cas. 213=3 Luck. 244=1 L.C. 579=28 Cr.L.J. 1029=9 A.I.Cr.R. 217=A.I.R. 1928 Oudh 15.

11. Killing under officer's order.

—Ss. 299 and 300—Soldier killing another under illegal orders of superior.

Even when a soldier obeys the orders of a superior officer, if the order is obviously improper or illegal, the soldier is not excused even though he may be put in the awkward predicament of choosing whether he will risk being shot by order of a Court Martial for not obeying the order, or being hanged by the Criminal Court for murder of obeying it. Obedience to an illegal order can only be used in mitigation of punishment. A.I.R. 1940 Lah. 210=41 Cr.L.J. 639=I.L.R. (1940) Lah. 521=188 Ind. Cas. 440.

—Ss. 299 and 300—Killing under Officer's orders—Shooting under illegal orders of superior officer no excuse—Officer and Subordinate equally guilty.

A Police party with six prisoners went to a village and demanded water and food and when they did not receive the attention to which they thought themselves entitled, the head constable lost his temper and struck one of the villagers. Other villagers also joined them; the Head constable asked one constable to fire. He hesitated but later on fired at a man S who died of the shot;

**Held**, that they were both equally guilty. The command of the Head constable cannot of itself justify the subordinate in firing, if the command was illegal, for he and the Head constable had the same opportunity of observing what the danger was, and judging what action the necessities of the case required. The order, the second accused obeyed, was manifestly illegal, and the second accused must suffer the consequences of his illegal act. 21 Mad. 249, Foll.

**Held**: however, that there should be a difference in the sentences awarded to the head constable and the constable. 83 Ind. Cas. 702=17 S. L. R. 182=26 Cr.L.J. 142=A.I.R. 1924 Sind 33.

12. Knowledge.

—Ss. 299 and 300.

The knowledge referred to in Ss. 299 and 300 is personal knowledge of the person who struck the blow and it cannot be shared by his co-assailants. A.I.R. 1939 Oudh 207=1939 O.W.N. 576=40 Cr.L.J. 722=14 Luck. 660=182 Ind. Cas. 345.



—Ss. 299 and 300—Knowledge, whether sufficient to establish murder.

An intention to cause death is a part both of S. 299 and also of S. 300. But intention is not a necessary ingredient of murder. If the act is done with the knowledge that death is likely to be caused thereby, it is culpable homicide; and if it is done with the further knowledge that the act was so imminently dangerous that it must, in all probability cause either death or such bodily injury as was likely to cause death, then that culpable homicide is murder. Thus knowledge is sufficient to establish murder without any intention, whatever, being proved. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

—Ss. 299 and 300—Offence of murder or culpable homicide, when constituted.

It is not only an intention to kill that constitutes an offence of murder or of culpable homicide. If a person does an act with the knowledge that his act is likely to cause death, or such bodily injury as is likely to cause death, he can be guilty of culpable homicide or even of murder in that case also. A.I.R. 1938 Oudh 88=1938 O.W.N. 184=39 Cr.L.J. 330=173 Ind. Cas. 339.

—Ss. 299 and 300—Hitting on head with iron rod.

If one man hits another on the head with a heavy iron rod, even if it is only a comparatively gentle tap, he must be held to know that death would be a natural and probable result of his action, if that tap does in fact cause the death of the person injured. A.I.R. 1937 Rang. 401=39 Cr.L.J. 79=172 Ind. Cas. 134.

—Ss. 299 and 300—Presumption.

Men who go to attack their opponents with spears and *vaholas* must be held to have, if not the definite intention of killing, at least the knowledge that they are likely to inflict such injuries as will result in death. A.I.R. 1933 Lah. 296=35 Cr.L.J. 626 (2)=148 Ind. Cas. 36.

—Ss. 299 and 300—Bomb throwing—Knowledge of causing death or injury likely to cause death presumed—No intention to kill any body in particular—No excuse.

From the definition of murder in Cl. (4), S. 300, it follows that if a person does an act of the nature described in the clause, he is guilty of an attempt to murder.

Any person of average intelligence knows that the explosion of a bomb in a crowded room, however carefully it may be thrown, is an imminently dangerous act such as he must be deemed to know would in all probability cause death or at least such bodily injury as is likely to cause death. Accused, described by their counsel as persons of exceptional intelligence must, therefore, be presumed to know that their act was dangerous and likely to cause death. The fact that accused had no deliberate intention of killing any particular individual does not take their case outside Cl. (4), S. 300, when they had no excuse for running the risk. It is no excuse to say that they were sincerely and passionately actuated by the desire to alter the present order of things. The defence of an anarchist is no defence to the charge. 121 Ind. Cas. 726=31 Cr.L.J. 290=31 P.L.R. 73=A.I.R. 1930 Lah. 266.

—Ss. 299 and 300—Striking with knife in the throat—Knowledge presumed.

A man who strikes another man with a knife in the throat must know that the blow is as imminently dangerous that it must all probability cause death and injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. 121 Ind. Cas. 452=8 Pat. 911=31 Cr.L.J. 243=A.I.R. 1930 Pat. 168.

—Ss. 299 and 300—Assault with dangs—Thighs much bruised and legs fractured—Minor injuries on the trunk and no injury on the head—Injuries likely to cause death—Knowledge presumed.

Five persons armed with dangs assaulted the deceased and beat to such an extent that one of his thighs became a mass of bruises, fractured both his legs below the knee and also gave him various other minor injuries on the legs and on the trunk which caused death. But no injury was caused to the head and the injuries on the trunk also were minor:

Held, that the offence would not come under any of the clauses of S. 300 but would come under third part of S. 299 as the assaulting persons must be credited with a knowledge that the beating that they did actually give to the deceased was likely to cause death. 113 Ind. Cas. 333=10 Lah. 477=30 P.L.R. 674=30 Cr.L.J. 141=12 A.I.Cr.R. 87=A.I.R. 1929 Lah. 157.

—Ss. 299 and 300—Knowledge—Presumption as to natural consequences—Presumption as to knowledge.

No doubt a man is presumed to intend the natural and inevitable consequences of his own act, but the presumption of intention must depend upon the facts of each particular case, and 'knowledge' as used in Cl. (2), S. 300, I.P.C. is a word which imports a certainty and not merely a probability. 106 Ind. Cas. 433=7 Pat. 638=29 Cr.L.J. 17=9 A.I.Cr.R. 330=9 P.L.T. 286=A.I.R. 1928 Pat. 169.

—Ss. 299 and 300—Avoiding vital parts—Prolonged and deliberate thrashing—No intention to cause death—Knowledge that ordinarily death must result present.

If a man is killed as a result of innumerable blows none of which itself is sufficient to cause death and if the assailants have deliberately avoided striking any vital parts, under some circumstances the inference may be drawn that by avoiding dealing blows upon vital parts of the body they showed that they did not intend to cause death but rather, carefully avoided causing death. But on the other hand, if the circumstances show that prolonged thrashing has been deliberately administered with the knowledge of the assailants that such a thrashing must in the ordinary course of nature result in death, the assailants are guilty of murder. They may avoid striking vital part deliberately so as to put themselves in a position if the assault is brought home to them, to plead that they never intended to do more than administer a thrashing. 103 Ind. Cas. 843=8 A.I.Cr.R. 562=28 Cr.L.J. 763=A.I.R. 1927 Lah. 654.

—Ss. 299 and 300—Administering dhatura poison to facilitate robbery—Knowledge presumed.

Where the accused administered Dhatura poison to five men in order to facilitate the commission of robbery and in consequence thereof three men died.

Held: the accused must be presumed to have knowledge that their act was so dangerous that it was likely



to cause death and the offence would fall under S. 300; 30 All. 568, Diss.; A.I.R. 1924 Patna 635, Dist. 20 All. 143; 31 All. 148 and 40 All. 360, Foll.

Per Madgavkar, J.—The question of knowledge is a question of fact in the circumstances of each case. It is impossible for the Courts to lay down a rule of law to deprive the jury, for instance, in each case, of their right to pronounce on the question of the presence or absence of fatal knowledge or intention. 97 Ind. Cas. 654=28 Bom. L.R. 1003=27 Cr.L.J. 1134=A.I.R. 1926 Bom. 518.

—Ss. 299 and 300—Knowledge that act is likely to cause death.

Knowledge that the act is likely to cause death is insufficient for conviction under Clause 4 of S. 300 but is sufficient for conviction under 2nd part of S. 304. 2 Bur. L.J. 99=A.I.R. 1924 Rang. 33.

—Ss. 299 and 300 — Accused grappled from behind—Striking with pocket knife—No intention—But knowledge presumed.

Where the deceased in the course of a certain fight grappled with the accused from behind and the accused thereupon struck him with his pocket knife without any deliberate aim.

Held: that the accused did not intend to cause death or to inflict such injury as was likely to cause death but as he must have known that a blow with a weapon of that kind was likely to cause death, the offence committed was one under Cl. (2) of S. 304. 99 Ind. Cas. 119=8 L.L.J. 51=27 P.L.R. 6=28 Cr.L.J. 87.

—Ss. 299 and 300 — Quarrel over a pumpkin—Provoked by abuse — Striking with a lump of limestone weighing 3 lbs.—No intention—Knowledge presumed.

There was no enmity between accused and deceased. The accused's wife and the deceased who were the wives of two brothers were quarrelling about sharing a pumpkin. The accused coming along broke the pumpkin into two against the wishes of the deceased wherefore she abused him. He thereupon struck her with a lump of limestone weighing 3 pounds. This resulted in the injury.

Held: Accused acted from impulse of moment and had no intention either to kill her or to fracture her skull; but that as the lump of limestone weighed 3 pounds it must be taken that he knew that there was a probability of fatal injury being inflicted. 81 Ind. Cas. 320=5 L.R.A.Cr. 175=25 Cr.L.J. 800=A.I.R. 1925 All. 4.

—Ss. 299 and 300—Knowledge—Not presumed—Victim already suffering—Injury accelerating death—Knowledge cannot be presumed.

If a person was suffering from an injury which would render injuries, which would not have a fatal effect to an ordinary man, fatal to that person, it does not necessarily follow that the person inflicting the fatal injuries knew it to be likely that death would be caused thereby. 66 Ind. Cas. 1000=34 C.L.J. 515=A.I.R. 1921 Cal. 64.

—Ss. 299 and 300—Allowing snake to bite to prove efficacy of tattoo—Belief in efficacy—Onus on accused—If proved guilty of rash and

negligent act—If not, culpable homicide, though no intention or knowledge present.

Accused who professed to be able by tattooing to render persons tattooed by him immune from the effect of snake-bite, tattooed a number of villagers and then allowed a poisonous snake, which he was himself handling, to bite one of them. The man who was bitten died at once:

Held, that the burden of proving that the accused was justified in believing, and did really believe, that his tattooing gave immunity was on him. If the accused proved that he honestly believed himself to be able to produce immunity, he would be guilty merely of a rash and negligent act not amounting to culpable homicide. But otherwise he would be guilty of culpable homicide not amounting to murder because he caused death by an act done with the knowledge that it was likely to cause death but had neither the intention nor the knowledge necessary to make his offence murder. 64 Ind. Cas. 843=11 L.B.R. 56=A.I.R. 1921 L.B. 26.

—Ss. 299, Exp. (1) and 300 (2)—Knowledge or intention—Injury accelerating death—Knowledge of disorder—Offence.

Expl. (1) to S. 299, I. P. C., assumes that the bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it. Where death has been caused it is no defence that the deceased was suffering from a complaint which would have caused his death in any event. S. 300 (2) of the Code makes it clear that offender is not responsible for death in such a case unless he knew that the condition of the deceased was such that his act was likely to cause death. 11 S.L.R. 81=19 C.L.J. 322=44 Ind. Cas. 338 (F.B.).

—Ss. 299 and 304—Knowledge or intention.

A person striking another on a vital part with a cutting instrument should be presumed to have intention of causing bodily injury amounting to death but the striker need not be found guilty of murder because his act may fall under one of the exceptions to S. 300, I. P. C. The parts of Ss. 299, 300 and 304 dealing with knowledge do not apply where bodily injury has resulted in death. The question of what knowledge must be attributed to the accused comes in only as a means of arriving at his intention and not for deciding whether a case falls within last part of S. 304. 7 Bur. L.T. 290=15 Cr.L.J. 513=24 Ind. Cas. 601.

—Ss. 299, 300 and 301—Knowledge or intention—Death of the deceased not intended.

The death of the person killed need not be intended to constitute the killing a murder. (1912) M.W.N. 136=11 M.L.T. 127=13 Cr.L.J. 145=22 M.L.J. 333=13 Ind. Cas. 833.

—Ss. 299 and 300—Knowledge or intention.

Where the accused suspecting his wife of infidelity stabbed her four times and when she ran and sought the protection of her aunt who begged him not to stab his wife, plunged the knife into the aunt's back which killed her. Held, Per Abdur Rahim and



**Sundara Aiyar, JJ.**—that the offence amounted only to culpable homicide not amounting to murder as he had no intention of killing the deceased or causing a vital injury though the wound was sufficient to cause death in the ordinary course of nature. Per **Spencer, J.** That the accused is guilty of murder as the accused must have intended or known to be likely to have caused bodily injury sufficient to cause death in the course of nature. (1912) M.W.N. 193=13 Cr.L.J. 129=13 Ind. Cas. 817.

—**S. 300 — Knowledge or intention — Test to find out—Essentials.**

In order to be guilty of the offence of murder it is sufficient if the accused commits an act which even if not committed with intention of causing death or bodily injury likely to the knowledge of the accused or in the ordinary course sufficient to cause death was so imminently dangerous that it must in all probability cause death. 32 P.L.R. 1911=12 Cr.L.J. 125=9 Ind. Cas. 731.

—**S. 300—Knowledge or intention.**

Where **Dhathura** poison is administered by the accused so as to cause death he must be held guilty for an offence under S. 302, I. P. C., because though there was no intention to cause death he must have known that it was likely to cause death. 31 All. 148=6 A.L.J. 129=9 Cr.L.J. 383=1 Ind. Cas. 765.

13. Motive.

—**Ss. 299, 300 and 302—Motive—Need for proof.**

In a murder case it is not obligatory for the prosecution to prove adequate motive for the crime. A.I.R. 1942 Cal. 36=74 C.L.J. 208=43 Cr.L.J. 277=197 Ind. Cas. 815.

—**Ss. 299 and 300—Materiality of motive.**

In a case where there is direct evidence of the act of the accused, the question of motive is not material if the acts themselves are sufficient to disclose the intention of the actor. A.I.R. 1939 Pat. 443=18 Pat. 101=20 P.L.T. 802=5 B.R. 955=40 Cr.L.J. 786=183 Ind. Cas. 499.

—**Ss. 299, 300 and 302.**

In a murder case it is not necessary for the prosecution to prove motive of the accused. 1937 M.W.N. 993.

—**Ss. 299, 300 and 302.**

Case of murder depending entirely on circumstantial evidence—Motive should be found out;

**Held**, on facts that where the case entirely depended on circumstantial evidence, the failure of the Judge to give a definite finding on the point of the motive can be explained only on the ground that he had failed to discover, from the evidence on record, any motive whatsoever, on the part of the accused to have committed the alleged diabolical murder. A.I.R. 1936 Nag. 88=37 Cr.L.J. 821=163 Ind. Cas. 319.

—**Ss. 299, 300 and 302—Motive—Duty of Court.**

In criminal cases it is not proper to consider first whether the evidence establishes a motive for the

crime, the proper course to adopt is to examine the evidence as to the commission of the crime. The motive may never be discovered and the suggestion of a motive, possibly wrong motive, may well lead the Court astray. A.I.R. 1931 Oudh 119=8 O.W.N. 107=32 Cr.L.J. 697=6 Luck. 475=131 Ind. Cas. 439.

—**Ss. 299, 300 and 302—Motive—Proof of motive—Immaterial.**

Where no sufficient motive for the assault on the deceased is shown the mere fact that the prosecution does not establish any additional motive for the assault cannot be taken as a fatal defect in the prosecution case. The accused may be the only surviving person knowing the cause of enmity with the deceased and the failure of the prosecution to elicit it is not a sufficient reason to disbelieve the eye-witnesses. 126 Ind. Cas. 572=A.I.R. 1930 Lah. 490.

—**Ss. 299, 300 and 302—Absence of—Powerful influence or homicidal tendency—Not inferred.**

The circumstances of an act of murder being apparently motiveless is not a ground from which the existence of a powerful and irresistible influence or homicidal tendency can be safely inferred. 112 Ind. Cas. 222=29 Cr.L.J. 1006.

—**Ss. 299, 300 and 302—Failure to prove motive—Immaterial—But relevant to prove intention.**

Per **Cuming, J.**—When in a case of murder facts are clear, it is immaterial that no motive has been proved. The motive which induces a man to do any particular act is known to him and to him alone. At the highest the prosecution can only suggest what is or may be the motive for any particular act. It may be known only to the accused or possibly to the deceased and it is quite impossible to prove.

Per **Mukerji, J.**—Motive though not a *sine qua non* for bringing the offence of murder home to the accused is relevant and important on the question of intention. 109 Ind. Cas. 482=47 C.L.J. 240=32 C.W.N. 345=29 Cr.L.J. 546=10 A.I.Cr.R. 259=A.I.R. 1928 Cal. 430.

—**Ss. 299 and 300—Motive irrelevant.**

Adequacy or inadequacy of motive is irrelevant when the offence alleged is murder. 100 Ind. Cas. 226=7 A.I.Cr.R. 371=28 Cr.L.J. 258=A.I.R. 1927 Lah. 729.

—**Ss. 299 and 300—Motive—By itself insufficient to convict.**

In this country and among Jats, murders are actually committed from motives of pride to avenge what appear to be comparatively harmless insults; but where the evidence of the alleged eye-witnesses cannot be relied on, the presence of motive only will not be sufficient for a conviction under S. 300. 92 Ind. Cas. 417=7 L.L.J. 442=26 P.L.R. 791=27 Cr.L.J. 241.

—**Ss. 299 and 300—Motive—Unnecessary to prove—Failure to prove cannot outweigh positive evidence.**

It is not necessary for the prosecution to prove the motive for the crime. It is enough if it is established



that the crime was committed. When however the prosecution put forward a substantive case as to the motive for the crime, the evidence regarding the motive has got to be considered in order to judge of the probabilities. Failure to prove motive however cannot outweigh the positive evidence to the crime. 86 Ind. Cas. 453=41 C.L.J. 35=26 Cr.L.J. 805=A.I.R. 1925 Cal. 525.

—Ss. 299 and 300—Deceased failed to negotiate divorce proceedings—Gave evidence against accused—Motive sufficient.

Where the accused had engaged the deceased to carry on negotiations for the divorce of a woman whom accused had abducted, from her husband but the deceased had failed to settle the matter to the satisfaction of the accused, and the deceased gave evidence against accused in an enquiry under S. 202, Criminal Procedure Code. Held, there was sufficient motive for the crime. 81 Ind. Cas. 64=25 Cr.L.J. 576=A.I.R. 1923 Lah. 619.

—Ss. 300 and 302—Proof of motive—Co-accused.

Though the motive for murder for one of the co-accused is proved satisfactorily while for others there is no satisfactory evidence, the High Court can uphold conviction without assigning motive. 17 Cr.L.J. 386=35 Ind. Cas. 818 (Cal.)

#### 14. Murder and culpable homicide.

- (a) Distinction between
- (b) Culpable homicide, when amounts to murder
- (c) Culpable homicide, when does not amount to murder.

##### 14 (a). Murder and culpable homicide—Distinction between.

—Ss. 299, 300 and 304—Murder and culpable homicide not amounting to murder, distinction—Injury to vital part not necessary for murder—Death need not be an 'almost certain result' to make injury one 'sufficient in ordinary course of nature to cause death'—Person mercilessly beaten to death—Offence is murder.

In order to constitute murder under S. 300 it is not necessary that the injury inflicted must be one of which death will be an "almost certain result." Where a person knowingly causes injuries which are more likely than not in the ordinary way to cause death, his offence falls under cl. 2 or cl. 3 of S. 300 and amounts to murder. The infliction of injury on a vital part of the body is not essential to make the offence a murder.

Where a person is mercilessly beaten with heavy sticks and dies as a result of the injuries received, the offence is one of murder.

(Per Pollock, J.)—Clause (3) of S. 299, Penal Code and Cl. (4) of S. 300 and second part of S. 304, are intended to apply, primarily at least, to cases in which there was no intention to cause death or bodily injury such as reckless driving or shooting, and Cl. (2) of S. 300 is intended to apply, primarily at least, to cases in which the accused knew that the particular person was likely from some peculiarity of constitution or other special cause, to die of an injury that would not ordinarily

cause death. Where there was an intention to cause bodily injury and death has ensued, the question will ordinarily be whether the injury which the accused intended to inflict was sufficient in the ordinary course of nature to cause death or was merely likely to cause death, and that will depend mainly on the weapon used, the force with which it was used, the number of blows struck, and the part of the body injured. A.I.R. 1946 Nag. 120=I.L.R. (1945) Nag. 991=222 Ind. Cas. 389.

—Ss. 299 and 300—Culpable homicide and murder—Scheme of Code stated.

The scheme of the Code is first to define culpable homicide in S. 299, then to lay down in S. 300 that one of the three definitions of culpable homicide given in S. 299 [299 (a)] and other fresh definitions of culpable homicide amount to murder if the exceptions given do not apply, then to give the punishment for murder [S. 302] and finally to give the punishment for the residuary cases of culpable homicide not amounting to murder, irrespective of whether they do not so amount by reason of the exceptions of S. 300 applying or whether they are offences of culpable homicide pure and simple which do not so amount because they are not hit by S. 300. Cases where death is intended can only be merely culpable homicide by reason of the exceptions to S. 300 applying. (In this one instance S. 304 (1) refers back to S. 300.). They are mentioned in the first part of S. 307 *pari passu* with cases falling under S. 299 (b), merely because the same maximum punishment was thought suitable in both cases. A.I.R. 1940 Rang. 259=1940 Rang. L.R. 441=42 Cr.L.J. 124=191 Ind. Cas. 306 (F.B.).

—Ss. 299 and 300—Murder or culpable homicide—Test.

According to the scheme of the I.P.C. 'murder' is merely a particular form of culpable homicide, and one has to look first to see in every murder case whether there was culpable homicide at all. If culpable homicide is present then the next thing to consider is whether it is of that type which under S. 300, I.P.C., is designated 'murder' or whether it falls within that residue of cases which are covered by S. 304 and are designated 'culpable homicide not amounting to murder.' A.I.R. 1940 All. 486=1940 A.L.J. 563=42 Cr.L.J. 146=I.L.R. (1940) All. 647=1940 A.W.R. 488=191 Ind. Cas. 328.

—Ss. 299 and 300—Act done with knowledge of consequences is not murder—Act, when becomes murder.

It is not murder merely to cause death by doing an act with the knowledge that it is so imminently dangerous that it must in all probability cause death. In order that an act done with such knowledge should constitute murder it is necessary that it should be committed without any excuse for incurring the risk of causing the death or bodily injury. An act done with the knowledge of its consequences is not *prima facie* murder. It becomes murder only if it can be positively affirmed that there was no excuse. The requirements of the section are not satisfied by the act of homicide being one of extreme recklessness. It must in addition be wholly inexcusable. A.I.R. 1940 All. 486=1940 A.L.J. 563=42 Cr.L.J. 146=I.L.R. (1940) All. 647=1940 A.W.R. 488=191 Ind. Cas. 328.



—Ss. 299 and 300—Culpable homicide under S. 299 with intention of causing bodily injury likely to cause death, can exist independently of S. 300.

Per Full Bench (Mackney, J. in order of reference contra.)—Before deciding that a case of culpable homicide amounts to a *prima facie* case of murder, there must be proof of intention sufficient to bring it under S. 300. Culpable homicide under S. 299 with the intention of causing such bodily injury as is likely to cause death can exist consistently with the other sections of the Code dealing with the causing of death and bodily injury, even in the case where none of the exceptions set out in S. 300 apply. A.I.R. 1940 Rang. 259=1940 Rang. L.R. 441=42 Cr. L.J. 124=191 Ind. Cas. 306 (F.B.)

—Ss. 299, 300, 304—Essentials of culpable homicide and murder—Degrees of culpable homicide.

Section 304 divides the offence of culpable homicide into two degrees of guilt, the graver of which depends on the intention proved or to be inferred from all the circumstances and the less serious of which does not depend on intention at all. But though the absence or presence of intention is the criterion to be adopted in deciding on which side of the line an offence under S. 304 falls, that is, whether on the graver or on the less serious side, there are cases in which there is an intention which makes the offence, the graver offence of culpable homicide but which would yet fall short of the intention requisite to satisfy S. 300. Where no higher intention can be imputed than to inflict an injury which is in fact likely to cause death, there is the graver degree of guilt in culpable homicide, but there are no elements which bring the case under S. 300. Section 300 would only apply if it were possible to go a step further and say that the offender intended the injury to be sufficient in the ordinary course of nature to cause death, or knew that in the special circumstances of the case, not death merely, but the death of the particular person to whom the harm was caused likely. If he knew that, he had knowledge from which the intention to cause that person's death could be inferred, confusion is reached if S. 300 is looked to when deciding under which part of S. 304 the offence of culpable homicide falls. The section to be regarded in this connection is S. 299 which alone defines the separate offence of culpable homicide not amounting to murder. A.I.R. 1940 Rang. 259=1940 Rang. L.R. 441=42 Cr. L.J. 124=191 Ind. Cas. 306. (F.B.)

—Ss. 299 and 300—Question of murder, when arises.

The basis of murder under S. 300 is culpable homicide as defined in S. 299. Therefore, it is necessary in every case in which one person by his act has caused the death of another to enquire whether culpable homicide has or has not been committed by the accused, for unless it has been, no question of murder can arise. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

—Ss. 299 and 300—Criterion.

Per Davis, J.C.—Generally speaking, the proposition that murder is killing with the intention of killing or inflicting a fatal injury will cover broadly cls. 1, 2 and 3 of S. 300. Cases under cl. 4 of S. 300, I.P.C., are so rare that Judges can in each case well refer to the words of that clause and Illus. (d) as a sufficient guide.

While deciding whether a particular offence is culpable homicide amounting to murder or not amounting to murder, Sessions Judges should not allow themselves to be confused by over-much analysis, but to turn to the words of the law themselves. They should look at S. 300. If the killing comes within any one of the four clauses, it is, exceptions apart, murder. If on referring to S. 300, the Judge is of the opinion that the killing does not come within one of the four clauses he can then refer to S. 299. If the killing comes within the second part of S. 299, that which relates to the intention of causing a bodily injury likely to cause death, it comes under S. 304, Part I, and if there is no intention but only knowledge, that is to say, if there is no intention to cause death or a bodily injury likely to cause death, but only knowledge that death is likely to be caused, the offence is under S. 304, Part 2. Cases under the exceptions to S. 300 will fall under S. 304, Part I.

In murder cases, as in other cases, a man's intentions are to be judged by his acts in relation to the surrounding circumstances, but the provisions of the law of culpable homicide in India are merciful. The burden of proof in these cases, as in other cases, lies on the prosecution, and the distinction between "knowledge" and "intention" made in S. 299 and again in S. 304, in Parts I and II, allows the Judge, when he thinks the prosecution have proved not intention but only knowledge to convict of the lesser offence. The intention of the accused should be judged at the time of striking the blow, which is the material time, but not at the time they left the house, which is not the material time.

Per Lobo, J.—If Judges would lay more emphasis on the wording of the sections themselves and less on judicial pronouncements, which are almost invariably coloured by the facts of the particular case, there would be no room for confusion. If death is caused by an act done with the intention of causing death or done with the intention of causing a fatal injury, the offence is murder and is covered by cl. 1 or cl. (3) of S. 300. Clause (2) of S. 300, is clearly intended to cover what may conveniently be classified as "spleen cases" such as are referred to in Illus. (b) to S. 300. A case under cl. (4) of S. 300 is very unusual and Illus. (d), is a sufficient indication to what class of cases it is intended to apply. Ordinarily, therefore, the exceptions to S. 300 apart, the test to be applied in any particular case of culpable homicide is whether the intention specified in cl. (1) or cl. (3) of S. 300, is established on the evidence and circumstances. If it is, the offence is murder, if it is not, the offence is culpable homicide. If the offence is culpable homicide and the offender's intention was to cause such bodily injury as is likely to cause death (secondly of definition in S. 299,) the offence is punishable under Part I of S. 304. If the offender had not such intention but had knowledge that his act was likely to cause death, (thirdly of definition in S. 299,) the offence is punishable under Part II of S. 304.

Held, on facts that the offence was clearly one of culpable homicide amounting to murder and fell under S. 300 "Thirdly". A.I.R. 1939 Sind 57=32 S.L.R. 18=40 Cr. L.J. 375 (2)=180 Ind. Cas. 418.

—Ss. 299 and 300—Criteria.

Cases of homicide cannot be decided by adherence to mechanical rules; the decision in each case must depend upon the knowledge and intention with which the injuries were inflicted, and the knowledge



and the intention of the culprit must be judged with reference to the particular circumstances of each case, and in arriving at a decision on this crucial point reported cases can be of very little assistance. To establish the offence of murder, it is not sufficient that the injury inflicted was in fact sufficient in the ordinary course of nature to cause death: it must further be proved that the assailant intended to cause an injury of this kind. A.I.R. 1938 Rang. 156=39 Cr. L. J. 561=175 Ind. Cas. 345.

**—Ss. 299 and 300 — Distinction — Effect of drunkenness.**

To constitute the offence of murder, there must be the intention to kill or to inflict such bodily injury as is known to be sufficient in the ordinary course of nature to cause death. It is sufficient to constitute the offence of culpable homicide if the offender causes death by doing an act with the knowledge that he is likely by such act to cause death. Section 86, I.P.C. does not say that the offender shall be liable to be dealt with as if he had the same intent as he would have had if he had not been intoxicated, but only as if he had the same knowledge. Intoxication should be taken into consideration in cases where intention on the part of the accused is necessary to constitute the offence charged and the intention which would be ascribed to a sober man in connection with that act must not necessarily be ascribed to an intoxicated man who does the same act. If the accused was so drunk as to be unable to form the intent to kill the offence would be one of man-slaughter only, i. e., culpable homicide only. A.I.R. 1938 Rang. 219=39 Cr. L. J. 689=176 Ind. Cas. 103.

**—Ss. 299 and 300—Accused killing while drunk —Offence.**

Although in appropriate cases drinking may negative intention, it does not negative knowledge and S. 299, I.P.C. speaks of intention, or knowledge in the alternative. Therefore, where a person who is drunk kills another he is still guilty of murder. 1937 M.W.N. 1329.

**—Ss. 299 and 300—Culpable homicide, when committed.**

In order that a person should be guilty of culpable homicide it is indispensable that the death of deceased should be connected with the act of violence or other primary cause, not merely by a chain of causes and effect, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances. A.I.R. 1935 Rang. 418=37 Cr. L. J. 205=159 Ind. Cas. 1032.

**—Ss. 299 and 300—Criteria.**

In every case where the death results in consequence of blows given on the head with a blunt weapon such as a stick, the intention of the assailant must be judged by the circumstances under which the blows were delivered, the weapon used, the force with which the blows were inflicted, and the extent of the injuries caused. A.I.R. 1934 Rang. 110=35 Cr. L. J. 1112=150 Ind. Cas. 599.

**—Ss. 299 and 300—Distinction.**

The provisions relating to murder and culpable homicide are probably the most complicated in the I.P.C. and are so technical as frequently to lead to confusion. Not only does the Code draw a distinction

between intention and knowledge but fine distinctions are drawn between the degrees of intention to inflict bodily injury. A.I.R. 1934 Sind 145=28 S.L.R. 353=36 Cr. L. J. 22=152 Ind. Cas. 271.

**—Ss. 299, 300, 301 and 304—Distinction.**

Roughly, the distinction between S. 302 and S. 304 is this. Where the intention to kill is present, the act amounts to murder; where such an intention is absent the act amounts to culpable homicide not amounting to murder. To determine what the intention of the offender is, each case must be decided on its own merits. No hard and fast rule can be laid down. A.I.R. 1933 Rang. 338=35 Cr. L. J. 43=146 Ind. Cas. 315.

**—Ss. 299 and 300—Distinction — Injuries inflicted on old man with intention of causing death—Knowledge of sufficiency of injury to cause death—Offence.**

Whether an offence is culpable homicide or murder depends upon the degree of risk to human life. If death is likely result it is culpable homicide. If it is the most probable result, it is murder.

Injuries were inflicted on an old man of 50 years of age and it appeared that the act was done with the intention of causing such bodily injury as the offender knew to be likely to cause his death or that the act was done with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death.

**Held**, that the offence was of murder falling within cl. (2) and (3) of S. 300 and punishable under S. 302.

Murder and culpable homicide distinguished. A.I.R. 1932 Oudh 186=9 O.W.N. 285=33 Cr. L. J. 561=7 Luck. 634=138 Ind. Cas. 123.

**—Ss. 299 and 300—Culpable homicide or murder—Distinction between.**

The elements which constitute the offence of culpable homicide are expressed and explained in terms of four explanations enacted in S. 300. If an act which an accused person is said to have committed does not fall within any of those explanations, and does not fall within any of the exceptions, the act is murder, but if it does fall under one or other of those explanations and also falls within any of the exceptions enacted in S. 300, the act is one of culpable homicide not amounting to murder. 106 Ind. Cas. 213=3 Luck. 244=1 L.C. 579=28 Cr. L. J. 1029=9 A.I.Cr.R. 217=A.I.R. 1928 Oudh 15.

**—Ss. 299 and 300—Culpable homicide or murder—Essential requisites of.**

Where there was a struggle between two girls for the possession of some gram, and one of them hit the other with a stick, whereupon the uncle of the latter came running with a lathi in his hand struck the other girl on her head, and after she had fallen down, also struck her on the thigh:

**Held**, that the accused can be convicted only of culpable homicide not amounting to murder and not of murder.

**Per Kulwant Sahay, J.**—The essence of crime of murder under Cl. (2), S. 300, I.P.C., is that there must be the intention of causing such bodily injury as the offender knows is likely to cause death, and in



order to convict a person of the offence of murder under Cl. (2) of the section, it has to be found that he had the intention of causing the injury, and also that he had the knowledge that such injury which he intended to inflict was likely to cause death.

A blow on the head with a lathi is certainly likely to cause death and the person who inflicts lathi blow on the head of the another person must be presumed to have the intention of causing such bodily injury as is likely to cause death. But it does not necessarily follow that a lathi blow on the head is always sufficient in the ordinary course of nature to cause death.

If a person causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, his offence comes under S. 299, and it is only if the intention was to cause bodily injury, which injury was sufficient in the ordinary course of nature to cause death, that the offence would come under S. 300, Cl. (3).

The difference between culpable homicide and murder is merely a question of different degrees of probability that death would ensue. 106 Ind. Cas. 433=7 Pat. 638=29 Cr. L.J. 17=9 A.I.Cr.R. 330=9 P.L.T. 286=A.I.R. 1928 Pat. 169.

**—Ss. 299 and 300—Culpable homicide or murder—Point for consideration.**

Culpable homicide is not murder unless the act by which the death is caused is done with the intention stated, in one or more of the four clauses to be interpreted in the light of the four illustrations appended to it one for each cause. If the question is whether the injuries caused in a case were sufficient in the ordinary course of nature to cause death, the Courts have to take into consideration the nature of the weapon used and the injuries caused. If it was so light that even if used with sufficient violence, no lethal blow could be inflicted with it, it would follow that it was used to give a thrashing and not to inflict fatal or dangerous injuries. Where the number of blows given were not less than 50, but no blow was inflicted on any vital part with sufficient violence to cause serious damage such as fracture of the skull.

**Held**, it cannot be said that the injuries which the appellant intended to inflict were sufficient in the ordinary course of nature to cause death. All that can be inferred from his act of prolonged beating is that he knew that the injuries that he was inflicting might cause death. 75 Ind.Cas. 689=25 Cr.L.J. 1=A.I.R. 1923 Lah. 317.

**—Ss. 299, 300 and 304—Murder of culpable homicide—Intention to cause injury, sufficient in ordinary course of nature to cause death—Intention to cause injury likely to cause death—Distinction.**

The distinction between the intention to cause injury sufficient in the ordinary course of nature to cause death, and the intention to cause injury likely to cause death, depends upon the degree of probability of death resulting from the Act committed. Apart from cases falling within the second clause of S. 300 of the Penal Code, if from the intentional act of injury committed, the probability of death is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death and the conviction should be of

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murder unless one of the exceptions applies; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death and the conviction should be of culpable homicide not amounting to murder. 5 L.B.R. 80=10 Cr.L.J. 359=3 Ind. Cas. 710.

**—S. 300—Murder or culpable homicide.**

An act amounts to culpable homicide if the provocation be grave and sudden. It is murder when the element of suddenness is wanting in the provocation. 18 A.L.J. 851=21 Cr.L.J. 607=57 Ind. Cas. 175.

**—Ss. 302 and 300, Excep. 1—Offence.**

The act of the accused being covered by the first exception to S. 300, I.P.C., the offence was converted to one under S. 304, I.P.C. 14 Cr.L.J. 208=3 P.R. 1913 Cr.=209 P.L.R. 1913=19 Ind.Cas. 208.

**14 (b). Murder and culpable homicide—Culpable homicide, when amounts to murder.**

**—Ss. 300, 302 and 304 — Attack on deceased planned and carried out deliberately.**

Where as a result of a previous enmity between the accused and the deceased the former deliberately armed themselves with lathis and arranged to waylay the deceased and did actually waylay him and beat him severely with the lathis all over the body including the head and the deceased died within a few hours thereafter:

**Held**, in the circumstances, the only inference to be drawn was that the accused intended to cause such injuries as they knew were likely to cause death and that hence the case was covered by S. 300 (2), Penal Code and they should be convicted under S. 302. S. 304 could have no application to such a case. 1950 A.L.J. 75.

**—Ss. 300 and 302—Sudden exchange of abuse—Rice-pounder—Skull fractured with rice-pounder—Offence.**

There was no fight between the accused and the deceased. There was only an exchange of abuse and accused picked up a rice-pounder and hit the deceased with such force as to cause an extensive fracture of the skull.

**Held**, that even if there was no intention to kill, there could be no doubt that he intended to inflict the injury which he actually inflicted; and he must have known that such an injury is sufficient in the ordinary course of nature to cause death. A.I.R. 1944 Mad. 251=57 L.W. 11=(1944) 1 M.L.J. 14=1944 M.W.N. 130=45 Cr.L.J. 733=I.L.R. (1944) Mad. 818=214 Ind. Cas. 122.

**—S. 300 and 302—Death caused by blood poisoning.**

The deceased man in spite of his physique which was exceptionally robust, died as a direct result of the injuries inflicted upon him by the accused who intended his death. The result was not as immediate as he intended and not perhaps quite in the manner that he intended. But in the processes of nature, in spite of medical attention, one of the well-known perils from a wound supervened, namely blood poisoning, and the deceased died;



**Held**, that in order to decide whether the offence is murder or a lesser one, the test is whether the cause of death is to be directly associated with the act and in this case the chain of causation was direct in view of the injuries inflicted, even had the intention to cause death not been clear. The accused must be presumed to have known that the injuries were such as were likely to cause death. The accused should, therefore, be convicted of murder. A.I.R. 1944 Mad. 157=1943 M.W.N. 797=(1943) 2 M.L.J. 660=I.L.R. (1944) Mad. 437=45 Cr. L.J. 513=212 Ind. Cas. 12.

—**Ss. 300 and 302**—Two persons attacked a woman with the intention of causing death. After the intention was apparently carried into effect but in fact was not, the body of the woman was thrown in a well. The injuries on the body of the woman were sufficient to cause death.

**Held**, that there was at the beginning an intention to cause death. Even if at the time when the woman was thrown into the well she was alive, and even if the accused then thought her dead, he would be guilty of murder. A.I.R.=1943 Mad. 571=1943 M.W.N. 342=56 L.W. 340=(1943) 2 M.L.J. 13=44 Cr. L.J. 790=208 Ind. Cas. 487.

—**Ss. 300 and 302.**

Where the accused attacked an unarmed person and caused his death, case is *prima facie* under S. 302, I.P.C. and charge should be framed under that section. A.I.R. 1943 All. 271=1943 A.W.R. 117=1943 A.L.J. 267=44 Cr. L.J. 624=207 Ind. Cas. 158.

—**S. 300.**—If two persons set upon an unarmed man and beat him with sticks so severely that he dies within a few minutes, there is no doubt that the offence is one either under the first or second clause of S. 300. The circumstance that the *sela* was not used from its sharp edge does not alter the nature of the offence committed. (1943) 45 P.L.R. 121.

—**S. 300—Death by merciless beating.**

If a person knowingly causes injuries which are more likely to cause death than not in the ordinary way his offence falls under either cl. (2) or cl. (3) of S. 300. When a person dies as a result of what is usually called a "merciless beating" the offence is one of murder. A.I.R. 1942 Lah. 255=43 Cr. L.J. 812=I.L.R. (1942) Lah. 145=202 Ind. Cas. 315.

—**S. 300—Sudden and unpremeditated attack.**

The fact that the accused found the deceased in a compromising position with his wife, is not sufficient to take the offence outside the category of murder where he had made a murderous attack on him seeing it. It only shows that the affair was a sudden and unpremeditated one, calling for transportation for life and not death. A.I.R. 1942 Lah. 37=43 P.L.R. 672=43 Cr. L.J. 370=I.L.R. (1943) Lah. 77=198 Ind. Cas. 441.

—**S. 300—Death not necessary consequence of blow**—Person giving it, when can be guilty of murder—Heavy blow on head fracturing skull and proving fatal—Offence.

A person can be guilty of murder even though death is not a necessary consequence of the blow given. A person commits the offence of murder if the act he does is done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted

is sufficient in the ordinary course of nature to cause death. Where the blow given to the deceased was so heavy as to cause such a severe injury resulting in extensive fracture of the skull and death, the accused must be presumed to have intended the probable consequence of such a blow. The injury so caused being sufficient in the ordinary course of nature to cause death the accused commits the offence of murder and should be convicted accordingly. A.I.R. 1942 Mad. 227=(1941) 2 M.L.J. 999=1941 M.W.N. 1025=43 Cr. L.J. 521=199 Ind. Cas. 133.

—**S. 300—Accused striking with heavy stick fracturing temporal bone—Offence.**

Where the accused being in bad temper and irritated by the interference of the deceased, an old woman of 55 years, picked up a heavy stick and gave her such a blow on the head so as to break her temporal bone into several pieces resulting in her instantaneous death:

**Held**, that the offence fell within the purview of S. 300 (3) and not S. 304, Second Part. A.I.R. 1942 Mad. 213=1941 M.W.N. 1028=43 Cr. L.J. 516=199 Ind. Cas. 139.

—**Ss. 300 and 302.**—Where the injury with a hatchet was a deliberate blow on the chest, struck with violence causing a mortal injury the offence committed is murder. A.I.R. 1942 Sind 11=I.L.R. (1941) Kar. 525=43 Cr. L.J. 308=198 Ind. Cas. 110.

—**Ss. 300 and 302.**—The accused having already attacked four persons, was running in the street armed with a knife and the deceased attempted to take it from him or to stop him. Thereupon, the accused stabbed him in a vital part of his body in such a way that he died immediately:

**Held**, that only offence which could be committed under these circumstances was that of murder under S. 302 and the proper sentence was that of death. A.I.R. 1941 Mad. 251=1940 M.W.N. 811=42 Cr. L.J. 668=195 Ind. Cas. 64.

—**Ss. 300 and 302—Victim's leg severed close below knee—Man dying from loss of blood—Offence committed.**

Everybody knows that if a man's leg is severed close below the knee the man must die from loss of blood in a very short time, unless some skilful person appears, who can stop the arterial bleedings. It is not possible for a person who inflicts an injury like this to say that he did not intend to cut the arteries or to cause the man to bleed to death. The case is very different from the frequent case of stabbing with a knife or dagger. If a man armed with a knife or dagger stabs another in the arm or in the leg it can generally be urged on his behalf that he was not trying to kill, and that he was trying to inflict such bodily injury as sufficient in the ordinary course of nature to cause death. An ordinary person is not presumed to know the precise location of the arteries in the human lives. If, therefore, a stab with a knife or dagger aimed at an arm or a leg, severs an artery and the injured man dies as a result it may be quite reasonable to argue that the offence is not one of culpable homicide and that the assailant can only be presumed to have intended to cause hurt, or grievous hurt with a dangerous weapon. The case is quite different when a weapon like a sword is used in order to chop off or to hack at a limb. The person who uses the sword or aruval chopping at an arm or a leg, and by so doing



sever the arteries of the arm or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death. The offence is clearly one of murder. A.I.R. (1940) Mad. 745=1940 M.W.N. 479=1940-2 M.L.J. 92=52 L.W. 224=41 Cr. L.J. 900=190 Ind. Cas. 360.

**—Ss. 300 and 302—Blow with axe in the region of abdomen and spine—Offence.**

**Held**, on facts that though the blow might have been struck in a quarrel, yet the circumstances were such that the accused could not possibly pray in aid any of the exceptions to S. 300. The blows were extremely vicious and savage ones, and the person who struck them must have either intended to cause death or cause such bodily injury as would in the ordinary course of nature result in death. Even the most illiterate and ignorant person would realise that a savage blow with an axe in the region of the abdomen and spine was bound to cause death or injury which would result in death. The accused, therefore, was guilty of the offence of murder. A.I.R. 1940 Pat. 605=41 Cr. L.J. 587=6 B.R. 693=188 Ind. Cas. 429.

**—S. 300—Merciless beating resulting in death.**

Nine accused armed with dangs and hatchets who were lying in wait for the deceased knocked down the deceased as he passed that way and attacked him while lying prostrate, and began to shower blows but they assiduously avoided hitting him on the head or in the region of the chest. As many as 34 wounds, one of which was a multiple contusion, were inflicted. The bones of both legs and arms were broken at several places. The victim died shortly afterwards. The doctor's evidence showed that there were only ten per cent. chances of saving the life of the deceased had he been brought to the hospital within half an hour from the receipt of the injuries.

**Held**, that all persons who deliberately joined a concerted beating of this character would be covered by cl. (1) of S. 300. Even assuming that cl. (1) did not cover the case, cl. 3 did. Even if it be held that none of the accused intended death, or knew that death would follow the beating, they did intend a beating the almost inevitable result of which was death. All the accused who took part in the beating were, therefore, guilty of murder and the mere fact that they avoided injuring the vital parts of the victim's body did not save them from conviction of murder. A.I.R. 1939 Lah. 245=I.L.R. (1939) Lah. 77=41 P.L.R. 443=40 Cr. L.J. 712=182 Ind. Cas. 900.

**—S. 300—Death caused by single lathi blow—Other injuries not indicating determination to beat deceased to death—Offence.**

In a case where death has been caused by a single blow with a lathi, and the other injuries found on the body of the deceased do not indicate a determination to beat the deceased to death, such as is indicated in many cases, it is not possible to hold that death was caused by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, but it may be held that death was caused by the doing of an act with the knowledge that by such act the person who did it was likely to cause death (vide S. 299). In such a case, the act of the striker can similarly only be brought within the provisions of clause fourthly in S. 304, which clause is based not upon intention but upon knowledge. A.I.R.

1939 Oudh 49=1939 O.W.N. 7=40 Cr.L.J. 187=1939 A.W.R. 27=14 Luck. 1378=179 Ind. Cas. 338

**—S. 300—Striking on head with great force—Offence.**

The accused during an altercation between him and the deceased deliberately went outside and fetched a yoke-pin and returned after more than five minutes had elapsed and struck the deceased on the head with it with great force, causing injury resulting in the death of the deceased shortly afterwards:

**Held**, that the accused must be taken to have known that his act was imminently dangerous that it must, in all probability, cause death, or such bodily injury as was likely to cause death, and was guilty of murder as he had no excuse for incurring such a bodily injury. A.I.R. 1939 Rang. 225=40 Cr. L. J 725=183 Ind. Cas. 145.

**—S. 300—Death caused by cumulative effect of multiple injuries.**

The deceased had received no less than 28 injuries. Of these 12 were punctured wounds on the legs and arms; both the legs and the arms had been fractured at several places; the right ulna bone had been dislocated and one of the incisor teeth in the upper jaw was missing. There were also two contused wounds skin-deep on the head, and contusions on other parts of the body. Although none of these injuries individually might have been sufficient to cause death, yet the death was due to the cumulative effect of the multiple injuries:

**Held**, that the accused had assaulted the victim with the intention of causing such bodily injuries as were sufficient, in the ordinary course of nature, to cause death. Their case, therefore, clearly fell within clause thirdly of S. 300, I.P.C. A.I.R. 1938 Lah. 834=40 Cr.L.J. 314=180 Ind. Cas. 62.

**—S. 300—Injuries inflicted several and very serious—Offence.**

Where the injuries inflicted by the accused on the deceased were several in number and of a very serious nature and one of them cut the neck and severed the fourth cervical vertebra and another wound cut the skull and exposed a part of the surface of the brain, etc:

**Held**, that there was intention to kill and the offence committed was murder. A.I.R. 1938 Rang. 331=40 Cr.L.J. 49=178 Ind. Cas. 298.

**—Ss. 300 and 302.**

The accused who was a boy of 18 years, on his wedding day, being excited by some incident and being inflamed to some extent by drink, struck a heavy blow on the top of the head of the deceased who was already lying prostrate owing to the assault on him by other person, which caused his death. The stick was a heavy one but there was no evidence that it was specially picked out from other sticks. The medical evidence was that the blow was necessarily fatal:

**Held**, although the case was somewhere near the border line between culpable homicide and murder, yet it was not for the Court to invent a defence which would bring the accused within the ambit of culpable homicide merely. The size of the stick by itself was not necessarily a fair indication of the



accused's intention, but the injury was inflicted upon a person who was already lying prostrate which was necessarily fatal, and as such, the offence was one of murder. A.I.R. 1938 Rang. 62=39 Cr. L. J. 403=174 Ind. Cas. 442.

—S. 300—Death caused by single blow.

Where the deceased intervenes during the struggle between the accused and another person, and is fatally struck by the accused on the head with a blow of a rice-pounder, so heavy as to require ordinarily the use of both the hands for its use, the accused can be convicted of murder, even if the death results from a single blow. A.I.R. 1937 Mad. 634=1937 M.W.N. 456=45 L.W. 698=(1937) 1 M.L.J. 743=I.L.R. (1937) Mad. 684=38 Cr. L. J. 1109=171 Ind. Cas. 694.

—S. 300 — Blow causing fracture of skull—Offence.

Where the deceased fell immediately on receiving the first blow from the accused which was inflicted with sufficient force to produce a fissured fracture of the skull and a clot of blood was found present in the brain underneath the skull, the offence committed is one of murder. 1937 M.W.N. 1129.

—S. 300—Killing with sword—Offence.

Where an accused cut the deceased with a sword several times and then spread hay around her when she was unconscious and set fire to it he is guilty of murder. 1937 M.W.N. 93.

—Ss. 300 and 302.

Where the wife of the accused was living with the deceased for some time and the accused himself sought out the deceased and stabbed him when he was unarmed, the offence committed is one of murder. 1937 M.W.N. 94.

—S. 300—Accused wilfully and without justification inflicting wound resulting in death.

Where a person wilfully and without justifiable excuse inflicts a wound which is ultimately the cause of death of another person, he shall be deemed to have caused the death of that other person. Though in fact an injury may be sufficient in the ordinary course of nature to cause death, it is not murder unless it was intended that the injury should be sufficient in the ordinary course of nature to cause death. Where there was such an intention, it is murder. A.I.R. 1937 Rang. 396=1937 Rang. L.R. 384=38 Cr. L. J. 1097=171 Ind. Cas. 574 (F.B.).

—Ss. 300 and 302.

If a person intending to cause an injury to another person strikes him on the head with a heavy wooden bar with the knowledge that it is likely to cause death it cannot be held that he did not intend to cause the injury that he knew he was likely to cause. There is no alternative but to convict the accused of murder punishable under S. 302, Penal Code. A.I.R. 1937 Rang. 540=39 Cr. L. J. 255=173 Ind. Cas. 92.

—Ss. 300 and 302—Death caused by intervening disease—Offence.

When the disease which actually causes death is meningitis, peritonitis, tetanus, pneumonia, etc. etc.,

and it is natural and probable result of the injury which the person inflicting the injury has caused, the person who inflicts the injury must be held responsible for the disease arising from the injury. A.I.R. 1937 Rang. 429=39 Cr.L.J. 217=172 Ind. Cas. 926.

—Ss. 300, 302 and 34—Responsibility.

Where each assailant mercilessly belaboured a prostrate victim, dealing more than one blow on the head resulting in fractures of the skull and breaking of ribs with laceration of a lung and a kidney, it is murder and not culpable homicide not amounting to murder on the part of the assailants, although it cannot be ascertained which of them was actually responsible for the particular fatal blows, and the conviction for murder under S. 302 read with S. 34, Penal Code, is correct. A.I.R. 1937 Nag. 335=39 Cr.L.J. 131=I.L.R. (1937) Nag. 388=172 Ind. Cas. 367.

—Ss. 300 and 302.

When death is caused by a stab inflicted with great force, offence committed is one of murder and not culpable homicide not amounting to murder. 1936 M.W.N. 525.

—Ss. 300 and 302—Depth of wound not less than five inches—Blow delivered with great force—Presumption.

Where the total depth of the injury from the point of entry into the body was not less than five inches, and it is obvious that the blow with which the wound was inflicted must have been delivered with great force and the injury was necessarily fatal, the presumption arises that the person who inflicted it intended to cause death, and, therefore, *prima facie* that that person is guilty of the offence of murder. A.I.R. 1936 Rang. 474=38 Cr.L.J. 183=166 Ind. Cas. 419.

—S. 300—Blow with da on forehead—Intention—Offence.

It is idle to say that a blow with a da on the forehead could have been delivered without the accused's knowing that it was sufficient in the ordinary course of nature to cause death. The offence in such a case is murder. A. I. R. 1936 Rang. 477=38 Cr.L. J. 52=165 Ind. Cas. 762.

—S. 300—Death caused by knife.

Where the knife was used on the abdomen with force enough to cut the intestines and peritonitis set in:

Held, that the accused committed murder with the meaning of Cl. 4, S. 300. A.I.R. 1935 Pesh. 155=37 Cr.L. J. 87=159 Ind. Cas. 284.

—Ss. 300, 302, 304—Accused strongly suspecting fidelity of his wife—Summoning of paramour—Accused acting with deliberation—Confession of wife in paramour's presence—Accused stabbing paramour to death—Offence.

The accused strongly suspected that his wife had gone wrong with the deceased. Acting with considerable deliberation the accused sent for the deceased and when he arrived he asked his wife as to whether



she was amusing herself with the deceased, and she confessed her misconduct with the deceased. Then he asked the deceased if it were true and without waiting for a reply, drew a knife from his waist and stabbed him in his chest which proved fatal:

**Held**, that the accused was guilty of murder and not of culpable homicide not amounting to murder; that it was not the matter of any sudden confession on the wife's part that surprised him and took him off his balance but only a confirmation of that which he had already suspected, if he had not really believed it.

**Held further**, that in view of the fact that the accused was a man who was wounded in his tenderest part, that he had been brooding over this matter and that at the moment of the crime what he was already feeling was intensified by the way his wife replied to him and the nature of her replies, the sentence might be reduced to one of transportation for life. A.I.R. 1934 Mad. 176=1933 M.W.N. 543=39 L.W. 190=66 M.L.J. 213=35 Cr.L.J. 694=148 Ind. Cas. 590.

**—S. 300—Culpable homicide, when amounts to murder.**

Per Nanavutty, J.—Culpable homicide is murder not merely if the act by which the death is caused is done with the intention of causing death but also in those cases, where the act by which the death is caused is done with the intention of causing such bodily injury as the offender knew to be likely to cause the death of the person to whom the harm was caused, and also if the act was done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. A.I.R. 1934 Oudh 405=35 Cr.L.J. 1113=11 O.W.N. 851=150 Ind. Cas. 819.

**—Ss. 300 and 302—Injury with axe causing fracture of skull.**

Where the wound on the head of the deceased is inflicted with an axe on the right side of the top of the head and there is a clean-cut fracture of the skull along the whole length of the wound nearly 2 inches and penetrating to the depth of about 2 inches right into the brain, the accused is guilty of murder. A.I.R. 1934 Pat. 603=1 B.R. 85=36 Cr.L.J. 184 (2)=152 Ind. Cas. 636.

**—Ss. 300 and 302.**

Criminals who assault and kill officers of the law who interfere with them in the commission of a felony are guilty of murder. A.I.R. 1934 Pat. 603=36 Cr.L.J. 184 (2)=1 B.R. 85=152 Ind. Cas. 636.

**—Ss. 300 and 302—Accused strangling deceased and placing her on railway line—Decapitation by train—Nature of offence—Murder or culpable homicide not amounting to murder.**

It cannot be laid down as an invariable rule that if persons intend to cause the death of another or others and do an act in furtherance of that intention, which act does not in fact cause the death of that person or the other persons, and, in the belief that the act has caused death, those persons do another act, for example, for the purpose of hiding the traces of their crime, and such act results in death, the offenders cannot be convicted of murder but of some lesser

offence. If the acts follow closely upon one another and are intimately connected with one another, then the offence will amount to murder so also when the facts suggest that the accused acted with a reckless indifference and ignorance as to whether the body he handled was alive or dead.

Where it appeared that the two accused deliberately intended to kill the wife of one of them, that they decoyed her to a certain place and after an attempt to strangle her, dragged her immediately either in an unconscious or semi-conscious condition on to the railway line and placed her in front of the train and she was decapitated by the train:

**Held**, that the accused were clearly guilty of murder. The two acts were intimately connected with each other and the latter act followed immediately upon the former, that both the acts of the appellants must be treated as being only one transaction, the transaction being to kill the deceased. A.I.R. 1933 Mad. 798=1933 M.W.N. 745=38 L.W. 522=34 Cr.L.J. 1109=65 M.L.J. 597=57 Mad. 158=145 Ind. Cas. 953.

**—Ss. 300 and 302.**

Where a person was killed by a stab wound between the 9th and 10th ribs which punctured the liver and diaphragm:

**Held**, that in view of the nature of the wound, there was no doubt that in the absence of extenuating circumstances the man who inflicted the wound was guilty of murder. A.I.R. 1933 Rang. 423=35 Cr.L.J. 434=147 Ind. Cas. 440.

**—S. 300—Death with lathi blow on head.**

Where the accused struck lathi blows on the head of the deceased and practically killed him on the spot:

**Held**, that the accused were guilty of murder and that the fact that the deceased zamindar was harsh in his treatment towards the accused tenants would not affect the nature of the crime. (1932) 137 Ind. Cas. 817=33 Cr.L.J. 537=9 O.W.N. 350.

**—Ss. 300 and 302.**

Attack on an old man of 70 causing many injuries resulting in death is a murder. 1931 M.W.N. 132.

**—Ss. 300 and 302—Premeditated assault—Offence.**

The rule that where a single blow is inflicted and it is not shown that it was the intention of the accused to cause death the offence committed by him if his blow results in the death of his victim would be culpable homicide not amounting to murder or an offence under S. 325, does not apply to cases where the assault was premeditated and not committed on a sudden quarrel. A.I.R. 1932 Lah. 308=33 P.L.R. 279=33 Cr.L.J. 580=138 Ind. Cas. 410.

**—S. 300—Thrashing with oxgoad—Lathi blow on the head—More blows after felling down—Sufficient for murder.**

A zamindar ordered A, a tenant, to proceed and plough gratuitously a field belonging to him and his brother. A demurred saying that he had his own work to attend to and that he could not come that



day, but he promised to come and work for the two brothers on the following day. The services of A were to be taken gratuitously though the zamindar was not entitled in any way to exact those services. When A refused to come, the zamindar seized A and commenced thrashing him with an oxgoad, which he had in his hand. He struck A with lathi a blow over the head which felled him to the ground. After he had struck him this blow on the head the zamindar hit him again more than one blow which caused the death of A.

**Held**, that the zamindar had been rightly convicted of murder. 113 Ind. Cas. 481=5 O.W.N. 391=12 A.I.Cr.R. 2=30 Cr.L.J. 173=A.I.R. 1928 Oudh 282.

—Ss. 300, 302 and 304.

The accused made friends with three young men Tika, Gopal and Raghbar, who were returning to service and got into conversation with them; and in the evening they proposed to cook dal and roti for them and did so. Shortly after partaking of this food all three became more or less insensible. Tika died eventually. Gopal and Raghbar were taken to hospital and ultimately recovered after treatment. The cause of Tika's death was **dhatara** poisoning. The property which these persons had, had been removed by the accused which was subsequently recovered from their possession:

**Held**, the accused were guilty under Section 302 and not Section 304. 75 Ind. Cas. 361=45 All. 557=24 Cr.L.J. 937=A.I.R. 1923 All. 608.

—S. 300—Drug poisoning.

Administering poisonous drug in the form of purgative—It amounts to murder as the accused must know that the drug in all probability would cause death. 1935 M.W.N. 1230.

—Ss. 300 and 302—Death by dhatara poisoning.

Once it is established that a woman with a motive to get rid of her husband in order to facilitate her intrigue with her paramour has administered in his food a fatal dose of **dhatara**, the conclusion to be drawn is that she has committed murder unless her explanation is such as to create some doubt in the mind of the Court. A.I.R. 1938 Nag. 318=39 Cr.L.J. 405=I.L.R. (1940) Nag. 125=174 Ind. Cas. 386.

—Ss. 300 and 302—Causing death by arsenic poisoning—Offence.

Although very strict proof is necessary before it can be found as a fact that a person has died of arsenical poisoning and without a quantitative analysis, it is difficult to prove positively that death has been due to arsenic, yet where having regard to the medical evidence, the result of the **post mortem** examination, and the nature of the chemical examiner's report, there is no room for reasonable doubt that the deceased did in fact die from arsenic poisoning by drinking milk into which the arsenic had been put by the accused and which the accused gave him to drink, a conviction under S. 302, is proper. A.I.R. 1933 Oudh 382=10 O.W.N. 771=35 Cr.L.J. 189 (2)=146 Ind. Cas. 817.

—Ss. 300 and 302—Murder or culpable homicide—Wife mixing arsenic in milk—Husband dies—Offence is murder.

Where S who was on bad terms with her husband administered arsenic poison to him in milk by way of medicine and the husband died, and was convicted by the Court of Sessions under S. 304 of Penal Code and an appeal was made on behalf of Government:

**Held**, that S was guilty of culpable homicide amounting to murder and should have been convicted under S. 302, Penal Code. 40 All. 360, Foll. 7 O.W.N. 980=A.I.R. 1930 Oudh 502.

—Ss. 299, 300 and 302—Unprovoked and surprised assault—One blow fractured the skull—Offence is murder.

Where the accused committed an unprovoked and cowardly assault upon the deceased rushing out at him by surprise and striking him one blow and one blow alone upon the head with a lathi and the blow fractured the skull of the deceased from temple to temple, the offence is murder: A.I.R. 1923 All. 592 Foll. 95 Ind. Cas. 286=13 O.L.J. 646=3 O.W.N. 451=27 Cr.L.J. 766.

—S. 300—Provocation grave but not sudden—Offence.

A person who kills another under provocation which is grave but not sudden is not entitled to claim the benefit of Excep. 1 to S. 300. (1931) 134 Ind. Cas. 596 (2)=32 Cr.L.J. 1244=8 O.W.N. 528.

**14 (c). Murder and culpable homicide—Culpable homicide, when does not amount to murder.**

—Ss. 300, 302 and 304, Part 2—Accused striking deceased on head single blow with piece of wood and rendering her unconscious—Accused wrongly believing victim dead and placing body on pyre and setting fire to same—Death caused—Offence—Plea of mistake of fact—If available.

In the course of a heated quarrel, the accused struck the deceased, a woman, on the head, a single blow with a piece of fire-wood. The deceased fell down bleeding from her nose, and did not regain consciousness though the accused sprinkled water on her face and wiped the blood with a piece of cloth and tried to restore her to her senses. Wrongly surmising her to be dead the accused, with the object of screening himself from the consequences of the crime, placed the deceased on a wooden pyre, made by him, poured ghee and set fire to it. The medical evidence showed that death was caused not by the blow but by the burns which were of the third degree.

**Held**: (1) that the accused had no intention to cause the death of the deceased, and was therefore not liable to be convicted on the charge of murder under S. 302, I. P. Code;

(2) that the accused could not be allowed to plead mistake of fact as in burning the deceased the accused was not performing a **prima facie** innocent act, but perpetrating a wrongful act, if not a crime, viz., deliberately causing disappearance of his previous crime;

(3) that on the principle that when an act is done with gross negligence the law imputes to the offender the necessary knowledge, or **mens rea**, the accused must be held to have known that his act



was likely to cause the death of the victim, and it therefore followed that he was guilty of an offence under S. 304, Part. 2, I.P. Code, and liable to conviction thereunder. 27 Pat 67=29 P.L.T. 277=A.I.R. 1949 Orissa 48=50 Cr. L. J. 1013.

—**Ss. 300, 302 and 304—Exchange of abusive language—Attack with knife on unarmed deceased—No previous enmity—S. 302, if applies.**

A was charged with murder of B. A and B exchanged abusive language of ordinary type. A thrust a knife of ordinary size, which was lying by his side and which was used by him in ordinary course of business, in the abdomen of B who was empty handed, resulting in B's death. There was no previous enmity between A and B.

**Held**, that A's offence did not fall under S. 302 but under S. 304, Part II. A.I.R. 1946 Lah. 41=47 Cr. L. J. 234=48 P.L.R. 56=281, Ind. Cas. 675.

—**Ss. 299, 300 and 304 — Death caused by strangulation.**

When a man kneels on the body of another and presses his throat with great violence he knows he is likely to cause death and if death results of strangulation, the knowledge merges into intention and he is guilty of murder under S. 300 firstly, unless he can obtain the benefit of any of the exceptions to S. 300. But when during the act of strangulation the victim dies suddenly due to rupture of the enlarged spleen and the enlargement of the spleen was not known to the accused, the accused's knowledge stops short of intention and the case comes under S. 304, part 2. A.I.R. 1943 All. 344=1943 A.L.J. 456=45 Cr. L. J. 97=1943 A.W.R. 215=I.L.R. (1943) All. 853=209 Ind. Cas. 205.

—**Ss. 299 and 300—Ill-treated wife endeavouring to escape from husband jumping into well—Offence.**

Where an ill-treated wife who was in dread of her husband, in endeavouring to escape from her husband gets into a panic on seeing him behind her and jumps into an open well with her baby in her arms, the offence committed is culpable homicide not amounting to murder. A.I.R. 1940 All. 486=1940 A.L.J. 563=42 Cr. L. J. 146=I.L.R. (1940) All. 647=1940 A.W.R. 488=191 Ind. Cas. 328.

—**Ss. 299 and 300—Effect of Exception 4 to S. 300.**

Where Exception 4 to S. 300 is brought into play, the effect is to reduce what would otherwise be murder to culpable homicide not amounting to murder. A.I.R. 1939 Rang. 225=40 Cr.L. J. 725=183 Ind. Cas. 145.

—**Ss. 299 and 300.**

Where in a case it has not been shown that any constitutional or other peculiarity existed in the case of the deceased which would have made it likely that injuries which ordinarily would not cause death, would be fatal in his case nor has it been shown that his assailants were aware of it, the case does not fall under Cl. 2 of S. 300. A.I.R. 1938 Lah. 834=40 Cr. L. J. 314=180 Ind. Cas. 62.

—**Ss. 300, 302, 304—Accused injuring deceased's leg above ankle with dah—Bones and arteries cut—Offence.**

**Held**, that where the intention of the accused was to cut the deceased on the leg, and the cut inflicted was quite low down near the ankle, a man who directed a blow in this direction as a general result would be a man who did not intend to cause injury sufficient in the ordinary course of nature to cause death, because most cuts on the leg are not injuries sufficient in the ordinary course of nature to cause death. Though the blow was delivered with great force, and cut the bone and arteries, and even residents in the jungle must be held to know that a violent blow of this nature with a formidable weapon was likely to cause death wherever the blow may fall, no intention higher than this could be imputed against the accused. His conviction, therefore, under S. 302, I. P. C., must be altered to one under S. 304 Part. I. A.I.R. 1938 Rang. 17=1937 Rang. L.R. 393=39 Cr. L. J. 244=173 Ind. Cas. 87.

—**Ss. 300, 302, and 304—Death caused by one blow of hatchet.**

Only one blow with a hatchet was struck suddenly in circumstances which were in doubt. There was probably no intention in the mind of the accused either to kill or to cause a fatal injury:

**Held**, that the act was sudden; and it was proper under the circumstances to impute to him 'knowledge' rather than 'intention'. The offence, therefore, would fall more probably under S. 304, Part II, I. P. C., than under S. 302 or S. 304, Part I. A.I.R. 1938 Sind 63=31 S.L.R. 480=39 Cr. L. J. 460=174 Ind. Cas. 497.

—**Ss. 299 and 300—Injury not ordinarily fatal—Offence.**

Where an injury caused to the deceased was one which does not ordinarily result in death e.g., in the thigh the accused cannot be held guilty of murder. 1937 M.W.N. 333.

—**Ss. 299 and 300—Death not probable result of action—Offence.**

When the death of the deceased was not the most probable but only likely result of the action of the accused he is only guilty of culpable homicide not amounting to murder. 1936 A.L.J. 73.

—**Ss. 300, 302, 304—Accused giving only one blow on non-vital part of body—Offence.**

Where the accused gives only one blow and that on a non-vital part of the body, the accused cannot be attributed the intention to cause either death or a wound sufficient in the ordinary course of nature to cause death and where death has ensued as a result of such blow, the conviction under S. 302, Penal Code, should be altered to one under S. 304, first part. A.I.R. 1936 Rang. 112=37 Cr. L. J. 473=161 Ind. Cas. 515.

—**Ss. 299 and 300 — Culpable homicide not amounting to murder—Distinction.**

An offence may amount to culpable homicide but not murder even though none of the exceptions in S. 300 are applicable to the case. The clauses of S. 300, imply a direct mental intention and a special degree of criminality.

**Held**, on facts, that although the accused, when he strangled the deceased, might be imputed the intention of causing such bodily injury as was likely to cause



death, it could not be said that he acted with the intention of causing such bodily injury as he knew to be likely to cause death, or as is sufficient in the ordinary course of nature to cause death and that there was no intention to cause death and that the bodily injury was not sufficient in the ordinary course of nature to cause death. A.I.R. 1935 Oudh 239=10 Luck. 664=1935 O.W.N. 140=154 Ind. Cas. 93.

**—Ss. 299 and 300 — Culpable homicide not amounting to murder.**

Section 299 clearly defines "the offence of culpable homicide." Culpable homicide may not amount to murder: (a) where though the evidence is sufficient to constitute murder, one or more of the exceptions to S. 300, apply, or (b) where the degree of *mens rea* specified under S. 299, is present but not the special degrees referred to by S. 300. A.I.R. 1934 Sind 145=36 Cr.L.J. 22=28 S.L.R. 353=152 Ind. Cas. 271.

**—Ss. 300, 302, 304—Striking with formidable lathi and fracturing skull — Persons giving only one blow each—Offence.**

When a man strikes another on the head with a formidable lathi and fractures the skull, it may safely be assumed that he intended to cause such an injury as would be likely to cause death and he should be dealt with under S. 302. Other persons who give only one blow each should be convicted only under S. 304, Part II. A.I.R. 1933 Lah. 930=35 Cr.L.J. 101=146 Ind. Cas. 496.

**—Ss. 300, 302, 304, Part II—Intention of accused not to commit murder—Sentence.**

Where the circumstances and evidence showed that all that the accused intended and all that he had knowledge of at the time was to strike a dang blow on the deceased who refused to pay him:

Held, that the offence fell under S. 304, Part II and a sentence of transportation for life was excessive. A.I.R. 1932 Lah. 372=33 Cr.L.J. 445=33 P.L.R. 474=137 Ind. Cas. 235.

**—Ss. 300, 302, 304—Strangling with turban on sudden provocation—Offence.**

The deceased was grazing his sheep. The accused came along with a dog. The deceased hit the dog of the accused with a stick for having molested his sheep whereupon the accused seized hold of him in a sudden temper, took the turban of the deceased from his head and strangled him to death. There had been no enmity between the two and it was a sudden and unpremeditated attack:

Held, that the accused was guilty of the offence of culpable homicide punishable under S. 304, Part II and not of murder punishable under S. 302, inasmuch as the injury which the accused intended to inflict was not sufficient in the ordinary course of nature to cause death, but the act of the accused was done with the knowledge that he was likely to cause death. A. I. R. 1931 Lah. 189=32 Cr.L.J. 1205=134 Ind. Cas. 583.

**—Ss. 300 and 302 — Death caused by random blow.**

Where death is due to a random blow inflicted in the heat of a fight the offence committed is culpable homicide and not murder. 1931 M.W.N. 1320.

**—Ss. 299 and 300—Numerous injuries—Each nothing more than simple hurt—Culpable homicide not amounting to murder.**

Where the deceased was given an unmerciful beating, but although the injuries inflicted upon him were so numerous, no bones were broken and not a single one of the injuries individually amounted to more than simple hurt.

Held, that if it had been the accused's intention to kill him or to cause him such injury as they knew to be likely to cause his death or such as was sufficient in the ordinary course of nature to cause his death, they would have inflicted wounds of much more serious nature. Therefore, the offence committed by them is not murder, but culpable homicide not amounting to murder as they must be deemed to have known that by giving the accused such a beating as they did they were likely to cause his death. 91 Ind. Cas. 61=7 L.L.J. 524=26 P.L.R. 702=27 Cr.L.J. 29=A.I.R. 1925 Lah. 621.

**—Ss. 299 and 300—Injury likely to cause death—No intention—Not murder.**

The Sessions Judge held that a stab with a downward direction in the lower part of the body given with sufficient force to penetrate the abdominal cavity is known even by an ignorant Coringhee cooly to be an injury likely to cause death.

Held, that it is not a sufficient finding to constitute the offence culpable homicide amounting to murder. There must always be a finding in such cases that the act which caused death was done with the intention of causing death, or with the intention of causing bodily injury sufficient, in the ordinary course of nature, to cause death. An injury that is merely likely to cause death does not of necessity amount to murder. 75 Ind. Cas. 295=1 Rang. 285=2 Bur. L. J. 94=24 Cr.L.J. 919=A.I.R. 1923 Rang. 174.

**—Ss. 299 and 300 (3)—Death caused by a single blow — Culpable homicide not amounting to murder.**

Owing to a quarrel between the deceased and the accused, the latter struck one blow with an iron shod stick on the head of the deceased which caused his death. He was convicted of murder. Held, that the blow struck by the accused may have exceeded in violence, the injury he had in view at the moment of striking therefore the conviction should be altered from murder to culpable homicide not amounting to murder. 41 Bom. 27=18 Bom.L.R. 793=17 Cr.L.J. 530=36 Ind. Cas. 578.

**—Ss. 299, 300, 302 and 304—Murder or culpable homicide—Stabbing with intention of causing injury—Likely to cause death resulting in death.**

Where the accused stabbed a person with the intention of causing such injury as was likely to cause death and death followed. Held, that he should be convicted under S. 304 and not under S. 302, I. P. C. 17 Cr.L.J. 544=36 Ind. Cas. 592 (L.B.).

**—Ss. 299, 300 and 304 — Murder or culpable homicide—Distinction.**

Culpable homicide may not amount to murder, (1) where notwithstanding that the mental state is sufficient to constitute murder, still one of the exceptions to



S. 300 applies or (2) where the mental state though within the description of S. 299, is not of special degree of criminality required by S. 300. 19 C.W.N. 653=21 C.L.J. 377=16 Cr.L.J. 561=30 Ind. Cas. 113 (F.B.).

**—Ss. 299, 300 (3) and 304—Injuries not sufficient to cause death—Offence.**

Where the injuries inflicted were found not sufficient to cause death in the ordinary course of nature but quite likely to have produced death, **Held**, the offence did not amount to murder but only to culpable homicide not amounting to murder. 8 S.L.R. 337=16 Cr.L.J. 472=29 Ind. Cas. 104.

**—Ss. 299 and 300—Murder or culpable homicide—Strangulation—Sentence.**

The accused and the deceased quarrelled over the stealing by the deceased of some crops and proceeded to fight and in the fight the accused got the deceased down and strangled him to death with his hands. **Held** that the accused was guilty of an offence under S. 304, Penal Code, and that the sentence of four years rigorous imprisonment was quite sufficient to meet the ends of justice in the case. 68 P.L.R. 1912=6 P.W.R. 1912 Cr.=13 Cr.L.J. 478=15 Ind. Cas. 318.

**—Ss. 299 and 300—Murder or culpable homicide—Difference.**

All murder is culpable homicide but all culpable homicide is not murder. Every act falling within S. 299 and not falling under S. 300 is culpable homicide not amounting to murder. 11 Cr.L.J. 295=6 Ind. Cas. 251 (Cal.).

**—S. 300.**

If a murder is not premeditated but committed, under grave and sudden provocation, it is culpable homicide not amounting to murder. 1935 M.W.N. 1161.

**—S. 300—Sudden and grave provocation.**

Where in a sudden and unpremeditated fight under grave provocation injuries by a knife are caused resulting in death of the injured who was the aggressor, the offence committed is culpable homicide not amounting to murder and not murder. 1929 Cr.C. 278=A.I.R. 1929 Pat. 518.

**15. Murder and hurt.**

**(a) When amounts to murder.**

**(b) When amounts to hurt.**

**15 (a). Murder and hurt—When amounts to murder.**

**—Ss. 300, 302 and 326—Severe injuries inflicted by accused—Victim dying due to gangrene caused by injuries—Offence.**

Where a person is seriously injured by the accused and as a result of the injuries a gangrene sets in and becomes the immediate cause of death of the victim, the accused is guilty of an offence under S. 302,

(**Held**, however, that the question whether the accused were guilty under S. 302 or not, was more or less academic as, even if the accused were found to be guilty of offence punishable under S. 326, only they would deserve nothing less than transportation for life, considering the number and nature of injuries inflicted by them on their victim). A.I.R. 1938 Lah. 31=39 Cr.L.J. 265=173 Ind. Cas. 30.

**—S. 300—Absence of injury on head—Offence.**

It is wholly unnecessary to injure the head of a person in order to kill him. One of the methods of a killing in this country with a sharp weapon is to attack the stomach. And an accused inflicting no less than 44 injuries on the body of the deceased can be convicted of murder, even though there is no injury on the head. A.I.R. 1937 Lah. 692=39 P.L.R. 479=38 Cr.L.J. 1057=171 Ind. Cas. 314.

**—Ss. 300 and 326.**

The common intention referred to in S. 34, is an intention to commit the crime actually committed. Consequently, where the crime committed is held to be murder, it is wrong to convict the accused under S. 326, Penal Code read with S. 34 of the Code. A.I.R. 1935 Rang. 299=36 Cr.L.J. 1380=158 Ind. Cas. 441.

**—Ss. 300 and 325—Single blow with axe—Slight injury—Blows caused by others resulting in death—Offence.**

During the course of an altercation between two parties, the deceased, who was aged 17, was hit on the thigh with an axe by the first accused. The deceased sustained a trivial wound but fell down. Thereupon, the two other accused persons set on him with their dangs striking him several blows on the head and fracturing his skull. He died the next afternoon:

**Held**, that the first accused who had dealt the trivial blow was guilty only under S. 325, but the others were guilty of murder. 134 Ind. Cas. 205=32 P.L.R. 401=32 Cr.L.J. 1127.

**—Ss. 300 and 325—Continuous act of striking on head, throwing in pool and removal of dead body—Offence.**

The accused struck the deceased two or three times on the head and when the latter fell down unconscious, threw him face downwards into a pool containing a few inches of water, removed the contents of his pockets and covered the body with the branches of a tree. Later on the accused carried the body of the deceased in a dhoti and threw it into a canal. The Sessions Judge holding that the offence of murder had not been made out, convicted the accused under Ss. 325 and 379, Penal Code. On appeal:

**Held**, that the action being continuous and it being impossible to resolve the two incidents into two wholly separate actions, inspired by different motives and committed for different reasons, the accused must be treated as having done one act with the intention of causing death and as having succeeded in carrying out his object and he was therefore, guilty of murder. A.I.R. 1931 Lah. 27=32 Cr.L.J. 483=130 Ind. Cas. 321.



**15 (b). Murder and hurt—When amounts to hurt.**

—Ss. 300, 302, 307 and 324—Throwing of acid on another causing burns of a simple nature—Development of complications on account of pneumonia resulting in death—Offence made out.

Where the accused are found to have thrown acid on the deceased which caused only burns of a simple nature but death resulted as a consequence of complications during the course of the illness, it could not be said that the accused intended to cause the injuries which he knew were likely to cause death and hence he could be convicted only under S. 324, Penal Code and cannot be convicted under S. 302 or S. 307, Penal Code. 4 A.I.Cr.D. 125=A.I.R. 1950 Ajmer 21=51 Cr.L.J. 905.

—Ss. 300, 302 and 326—Offence under—Accused participating in assault along with others—Death due to multiple injuries.

Where the accused participated in an assault along with others and there was no direct evidence as to how many injuries were caused by him and there was no proof that each injury on the head was sufficient in the ordinary course of nature to cause death and the cause of death was stated to be the multiple injuries inflicted on the deceased:

Held, that in the circumstances it was difficult to say that death had been caused by the act of the accused or that injuries attributable to him could result in death in the ordinary course, but that as injuries on the head of the deceased was on a very vital part, each one of them could prove dangerous to life and it would therefore be safer to convict the accused under S. 326, I.P. Code. 3 A.I.Cr.D. 343=A.I.R. 1949 Ajmer 29=50 Cr.L.J. 583.

—Ss. 300, 302 and 325—Death caused by fracture of skull—Two injuries collectively sufficient to cause death—Assailant armed with ordinary stick and aged only 18 years—Likelihood of fatal injury being due to knocking against hard substance when falling—Offence.

The deceased had received two injuries, both of which collectively, were sufficient, in the opinion of the doctor, to cause death in the ordinary course of nature, but one of which was not sufficient so to cause death. The post mortem examination revealed that the skull of the deceased had been fractured and that death was due to the consequences resulting from the fracture. It appeared that the assailant (accused) was only a lad of 18 and had only an ordinary stick. It was not clear that more than one blow was dealt by the accused. There was a possibility that the deceased fell down and in falling sustained an injury as a result of knocking against a hard substance.

Held, that it could not be held that the accused had the intention of causing death or of causing injuries sufficient to cause death in the ordinary course only an intention to cause grievous death or an injury likely to result into grievous hurt could be presumed and the accused was therefore liable to conviction only under S. 325 and not under S. 302, I.P. Code. 229 Ind. Cas. 293=48 Cr.L.J. 367.

—Ss. 300, 325 and S. 34—Four persons beating deceased with lathis—Uncertainty as to who struck fatal blow—Common intention not to kill

deceased but to cause only grievous hurt—Conviction changed from S. 302 to S. 325-34.

Where out of the four accused who beat the deceased with lathis it was not certain as to who struck the fatal blow and the common intention of them was, as shown by the circumstances, only to break him up in such way as legally amounted to grievous hurt and not to kill the deceased, the accused cannot be convicted of murder but only under S. 325 read with S. 34. A.I.R. 1946 Oudh 250=1946 A.W.R.C.C. 162=47 Cr.L.J. 714=1946 O.W.N. 249=21 Luck. 527=225 Ind. Cas. 308.

—Ss. 300 and 325.

Theft of jewels by cutting nostrils—Death of the woman attacked—Deceased of feeble health and elderly in age:

Held, that the charge of murder must fail and that the accused must be convicted only under S. 325, I.L.R. (1945) Mad. 73=(1944) 1 M.L.J. 281=57 L.W. 211=1944 M.W.N. 233.

—Ss. 300 and 323—Contusions on head—Offence.

The causing of contusions on the head not resulting in the fracture of any of the bones of the skull and though these are by no means small, in the absence of anything to show that they were caused by a blow aimed with a weapon which can be called deadly or with an unduly violent force, does not amount to murder but only a simple hurt. A.I.R. 1944 Mad. 223=(1944) 1 M.L.J. 25=57 L.W. 13=1944 M.W.N. 29=45 Cr.L.J. 729=I.L.R. (1944) Mad. 763=214 Ind. Cas. 113.

—Ss. 300 and 328—Giving aconite to make mad—Death caused—Offence.

Where a woman gives aconite powder to her husband by mixing it with his food, not with the intention of causing his death but with the intention of making him "mad" and the husband ultimately dies, the woman is not guilty of murder but of offence under S. 328. A.I.R. 1943 Mad. 396=56 L.W. 19=(1943) 1 M.L.J. 51=1943 M.W.N. 128 (2)=44 Cr.L.J. 550=I.L.R. (1943) Mad. 679=206 Ind. Cas. 633.

—Ss. 300, 302 and 326.

There was no premeditation about the matter. The party did not go to attack armed in any way. They had gone there to rescue the cattle from the deceased who was taking them to the pound. The attack was only a scuffle between the rescuers and the deceased except that one of the rescuers suddenly inflicted a blow with his knife on the deceased which proved fatal:

Held, that it was clear that grievous hurt endangering life was caused to the deceased and there could be no doubt that the accused voluntarily caused hurt to him and intended or knew himself likely to cause hurt endangering life. He was, therefore, clearly guilty under S. 306, while there was room for doubt as regards the charge under S. 302. A.I.R. 1942 Cal. 426=43 Cr.L.J. 455=199 Ind. Cas. 55.

—Ss. 300 and 328—Accused administering dhatura with food to three persons—All of them found lying in open next day—Two of them recovering from poisoning but one dying after a



**week after developing pneumonia—Death held not due to poisoning—Offence held fell not under S. 302, but under S. 328.**

On the night of December 6, the accused gave some food with which *dhatara* was mixed to three Malayees in order that he might rob them of whatever they had on their person. The three men were found next morning lying out in the open in a state of coma or unconsciousness and they were taken to the hospital. The medical evidence showed that all of them had been given *dhatara*. Two of them recovered completely. The third developed pneumonia and died on December 13:

**Held**, that the conviction of the accused for the offence of murder could not be sustained, since it was not shown that pneumonia was a likely consequence of the administration of *dhatara* nor was it established that the pneumonia was caused by the exposure or was a probable consequence of sleeping out. The accused must therefore, be held to be guilty under S. 328, Penal Code. A.I.R. 1942 Mad. 100=(1941) 2 M.L.J. 661=43 Cr.L.J. 320=1941 M.W.N. 1038=198 Ind. Cas. 225.

**—Ss. 300 and 326.**

Accused stabbing deceased with knife on forearm during altercation between them—Death resulting due to haemorrhage—Accused held guilty under S. 326 only and not under S. 302. A.I.R. 1939 Mad. 269=1938 M.W.N. 1274=(1939) 1 M.L.J. 123=40 Cr.L.J. 308 (1)=179 Ind. Cas. 982.

**—Ss. 300, 302 325 and 34.**

Several accused attacking deceased with lathis and beating him—Death caused by two serious injuries on vital part while other bodily injuries simple—They are guilty of offence under S. 325 read with S. 34 and not under S. 302. A.I.R. 1939 Oudh 254=1939 O.W.N. 662=40 Cr.L.J. 754=1939 A.W.R. 96=183 Ind. Cas. 265.

**—Ss. 300, 302 and 326.**

Where the common intention of the two accused was to effect an attack on some one with *dahs*, and they had knowledge that the probable result of that attack at least would be to cause grievous hurt with a deadly weapon, but there was no sufficient proof to show that there was a common intention of the two accused to cause death or injury sufficient in the ordinary course of nature to cause death:

**Held**, that the accused could be convicted only under S. 326, and not under S. 302. A.I.R. 1939 Rang. 263=40 Cr.L.J. 871=184 Ind.Cas. 78.

**—S. 300—No intention to cause grievous hurt but knowledge that such hurt is likely to be caused—Injured person dying—Offence.**

A person can be guilty of voluntarily causing grievous hurt who does not intend to cause grievous hurt but only knows himself likely to cause grievous hurt; and if he did not intend to cause grievous hurt but only knew himself likely to cause grievous hurt, it would probably not fall under any of the clauses of S. 300, and so would not be murder. A.I.R. 1937 Mad. 792=46 M.L.W. 486=39 Cr.L.J. 139=(1937) 2 M.L.J. 490=1937 M.W.N. 1124=172 Ind. Cas. 382.

**—S. 300.**

Where there was no evidence that the accused caused the injuries which were sufficient in the ordinary course of nature to cause death, the accused cannot be held to be guilty of murder, but only of causing grievous hurt. A.I.R. 1936 Rang. 444=37 Cr.L.J. 1022 (2)=164 Ind. Cas. 967.

**—Ss. 300 and 326.**

Where there is nothing to show which of two accused persons committed the crime or that there was any common intention to commit the crime of murder, one of them must have committed it, but it cannot be said that the other man abetted the crime of murder by his mere presence, in the absence of any evidence to show that he instigated the murder or intentionally committed it or engaged in a conspiracy to commit murder or, what is much the same thing, that the murder was committed in pursuance of a common intention. The mere fact that the accused's companion tried to commit an assault on the deceased's companion is not sufficient in itself to show that the accused's companion contemplated murder being committed. The accused were held guilty under S. 326. A.I.R. 1936 Rang. 131=37 Cr.L.J. 531=162 Ind. Cas. 6.

**—Ss. 300, 302, 304 and 323.**

The deceased who was 65 years old received a blow on the chest and died of cerebral haemorrhage due to excitement.

**Held**, the offence fell under S. 323 and not under S. 302 or 304. 1935 M.W.N. 812.

**—Ss. 300, 302 and 325—Five persons beating two—Death of one five days after by grievous hurt—Offence.**

Five persons took part in beating two persons one of whom sustained grievous hurt and the other died five days after. The motive for the beating could not be ascertained. The deceased had received seven injuries on the head and one injury fracturing the ulna bone and the other had received only one grievous injury:

**Held**, that the conviction under Ss. 302-149, Penal Code, for causing death was wrong and that the proper conviction was to be under Ss. 325-147 as regards both. A.I.R. 1934 Lah. 486=35 Cr.L.J. 1355=151 Ind. Cas. 391.

**—Ss. 300, 302 and 326—Fight during drunken brawl—Blow resulting in death—Offence.**

Where there was a fight at the accused's house in which he, his brothers and the deceased took part and in the course of this drunken brawl the accused gave one blow to the deceased, which ultimately resulted in his death:

**Held**, that a conviction under S. 302 or S. 304, Penal Code, could not be passed but that S. 326, Penal Code, applied. A.I.R. 1934 Lah. 477=36 P.L.R. 88=35 Cr.L.J. 1407 (2)=151 Ind. Cas. 760.

**—Ss. 300, 302 and 325.**

Where the only inference possible from all the circumstances of the case was that the accused did not intend anything more than causing grievous hurt



to the deceased under sudden impulse when he found that another person had escaped due to the accused having been brought on one side by the deceased, and the accused struck him on the head by a **dang** lying near by;

**Held**, that S. 325, Penal Code, applied and not S. 302. A.I.R. 1934 Lah. 335=35 Cr.L.J. 1348=36 P.L.R. 313=151 Ind. Cas. 390.

—Ss. 300, 302 and 326—Injuries not necessarily sufficient to cause death—Death due to meningitis and compression of brain—No connection between this and injuries—Offence.

Where in a trial for murder, the medical evidence was that the injuries inflicted on the deceased were not necessarily sufficient in the ordinary course of nature to cause death, and that death was due to meningitis and compression of the brain but this had no direct connexion with the injuries:

**Held**, that the offence fell under S. 326, Penal Code, and not under S. 302. A.I.R. 1934 Lah. 368=35 Cr.L.J. 1283=151 Ind. Cas. 238.

—Ss. 300 and 326.

Death caused by seven accused—No clear evidence as to who inflicted the fatal wound and of common intention to murder—Conviction only under S. 326. 1934 M.W.N. 729.

—Ss. 300, 302, 304, 326—Deceased given one blow with **takwa**—Injury not dangerous to life—Deceased dying of septicaemia—Offence.

The accused struck one blow with a **takwa** on the head of the deceased from whom the provocation had proceeded. No further advantage was taken of the fallen man. The medical evidence disclosed that the injury was not by itself dangerous to life and it was more probable than not that a man would normally recover from such injuries. Further, it was impossible to say whether the poison was introduced at the time wound was inflicted or subsequently. The deceased died of septicaemia long after the wound was inflicted after keeping a normal temperature for a number of days:

**Held**, that the offence committed was neither murder nor culpable homicide not amounting to murder but one under S. 326. A.I.R. 1931 Lah. 103=33 Cr.L.J. 183=135 Ind. Cas. 668.

—Ss. 300, 302 and 326—One blow with spear on fleshy part—Not fatal in the natural course.

A, B, C, D, assembled together, three of them armed with spears with the intention of attacking another party of men. A gave only one blow with a spear on fleshy part of the body of one of his opponents.

**Held**, that such injury was not necessarily fatal and A could not be convicted under S. 302, and his case fell within the purview of S. 326, but as there had been a loss of life in the fight, a severe sentence was called for. A's companions having been acting in furtherance of a common intention were also guilty under S. 326, read with S. 34. 1930 Cr. C. 1046=A.I.R. 1930 Lah. 950.

—Ss. 300, 302 and 325—Intention—Absence of—Accused chagrined at his melons not brought—

**Fit of temper—Dang lying close by—Picking up dealt a blow—No intention to cause death.**

The accused, who was chagrined because his melons were not purchased, went into a fit of temper and lost self-control. The **dang**, with which the blow on the uncovered head of the deceased came to be inflicted, was lying close at hand. The accused picked it up and at once dealt the blow which resulted in the fatal injury to the deceased.

**Held**: that there was no intention on the part of the accused to cause the death;

**Held further**, that the case fell within the purview of S. 325 instead of S. 302. 1929 Cr.C. 639=A.I.R. 1929 Lah. 863.

—S. 300—Death due to shock from multiple injuries—No single injury fatal—Not known who inflicted which injury—No common intention—Guilty of grievous hurt only.

Three persons were accused of having injured a person and thus causing his death. The deceased died of shock from multiple injuries which included a fracture of five ribs. None of the injuries in itself was such as could be called a fatal injury. They were believed to have been caused by a blunt weapon like a **sota**.

**Held**: It was not possible to attribute any particular injury to any individual assailant. Nor could it be said that any particular injury was a direct cause of death. The common intent of the assailants could not be held to have been to cause such injury as they knew was likely to result in death. The accused could not therefore be safely convicted of murder. They were guilty of grievous hurt. 114 Ind. Cas. 704=30 P.L.R. 171=30 Cr.L.J. 368=1929 Cr.C. 8=A.I.R. 1929 Lah. 456.

—S. 300—Murder or hurt—Drunken man shooting at point blank range—Injury not in the ordinary course causing death—Supervening causes leading to death—Guilty of grievous hurt.

The accused, when he was full drunk, fired at the deceased and caused a wound on the upper portion of his thigh with a shot which was fired at point blank range. The injury was not fatal and was not such as in the ordinary course of nature would cause death. After nearly two months the injured person died, the wound having become septic and dysentery having supervened a few days before his death.

**Held**: that neither 300 (3) nor (4) applied to the case, and the accused was not guilty of murder; he was not also guilty under S. 304. But he was guilty under S. 326 and as the shot was fired at point blank range on the upper portion of the thigh maximum sentence should be passed. 120 Ind. Cas. 183=11 L.L.J. 44=31 Cr.L.J. 44=1929 Cr.C. 4=A.I.R. 1929 Lah. 433.

—Ss. 300 and 325—Hitting with hockey stick in return for injuries received the previous day—Death by internal bleeding and clotting of blood on the surface of the brain—Guilty of grievous hurt only.

The accused and the deceased were both young men of about 18 years. The deceased and a friend



of his gave a beating to the accused. The next day the accused unexpectedly met the deceased, and forthwith formed the design of hitting him in return for the beating which he had received. Then he struck him a violent blow on the back of his head, with a hockey stick which he was carrying and ran away. The deceased walked on for about 30 paces and sat down. He was taken home where, half an hour later, he was unconscious. The blow caused internal bleeding and a clot of blood on the surface of the brain. This caused death.

**Held**, that the accused was not guilty of murder, but of an offence under S. 325 as it could not be said under the circumstances of the case that the accused knew that the blow was so imminently dangerous that it must in all probability cause death or that the bodily injury which he intended to cause was sufficient in the ordinary course of nature to cause death. 88 Ind. Cas. 286=7 L.L.J. 573=26 Cr.L.J. 1118=26 P.L.R. 430=A.I.R. 1925 Lah. 559.

—S. 300—Quarrel among young boys living near each other—Lathi blow found on dead body—Guilty of grievous hurt only.

Where a quarrel began with young boys calling each other by perverted names and it ended in the death of one man, but it was found that both the parties were peaceably living near each other but that lathi wounds were found on the body of the deceased,

**Held**: the accused should be convicted of causing grievous hurt only and not of murder. 83 Ind. Cas. 636=26 Cr.L.J. 76=A.I.R. 1925 Oudh 284.

—Ss. 300 and 325—Swinging sideways blow of lathi—Intention or knowledge of rupturing liver proved—Guilty of grievous hurt only.

Where the accused did not lift his lathi above his head, with both hands and bring it down on the head of the deceased but struck a swinging sideways blow and it was not proved that the accused intended to rupture the deceased's liver or even knew that he was likely to do so. **Held**, the offence committed was one under S. 325. 81 Ind. Cas. 969=11 O.L.J. 563=25 Cr.L.J. 1145=A.I.R. 1925 Oudh 135.

—Ss. 300 and 325—Blow aimed at woman trying to close the door—Child, the woman carried, was struck and killed—Guilty of grievous hurt only.

The accused with three others, came to beat the owner of the house. His wife who had her small son, aged 1, in her arms, tried to close deorhi door but the three men forced it open and the accused aimed a blow at her which struck the little child and killed it. It was doubtful whether he ever knew that the owner's wife was carrying the child. The affray took place at half past seven in the evening on the threshold of the deorhi which was a roofed building. The sun had set at 6 o'clock and it was, therefore, dark. The woman was trying to shut the door to keep out the three men who had come to attack her husband, and the accused struck at her as he forced the door open.

**Held**: A woman or anybody else closing a door against a person trying to get in would naturally

put down anything he or she was carrying in order to have both hands free. Therefore the offence appears to be equivalent to striking the woman and nothing more. Conviction altered from S. 304 to S. 325. 71 Ind. Cas. 52=5 L.L.J. 228=24 Cr.L.J. 4=A.I.R. 1924 Lah. 47.

—Ss. 300 and 326—Boyish quarrel—Stab with pen-knife—Offence is one under S. 326 only.

In a case where as a result merely of a boyish quarrel just a short time before, the accused stabbed the deceased with a pen-knife four inches in length, there can be no conviction for murder or culpable homicide not amounting to murder where the 'corpus delicti' is not established. The offence of which the accused is guilty is voluntarily causing grievous hurt by an instrument used for cutting. 63 Ind. Cas. 450=3 L.L.J. 581=22 Cr.L.J. 658=A.I.R. 1922 Lah. 26.

—Ss. 300 and 325—Murder or hurt.

In a case where it is found that there was no intention of the accused to cause death or to deal such a bodily injury as is likely to cause death and if the injured party succumbs to death due not directly to the blows struck by the accused but the disease having supervened, the conviction ought to be either under S. 304 or 325 but not under S. 302 as the case would not fall within the definition of murder. 42 All. 302=18 A.L.J. 224=21 Cr.L.J. 783=58 Ind. Cas. 463.

—Ss. 300 and 323—Murder or hurt—Intervention of woman with a child in a scuffle—Death of child—Offence.

A woman with a child interfered unexpectedly in a scuffle between her husband and the accused in a dark night. The blow aimed at the husband missed its aim, but fell on the head of the child causing severe injuries, from the effects of which it died. **Held**, that as the blow, if it had reached the complainant would have caused simple hurt, the accused was guilty of simple hurt only. 21 Bom. L.R. 1101=54 Ind. Cas. 485.

—Ss. 300 and 326—Murder or hurt—Intention to cause death—Grievous hurt.

L who had a stick attacked B. Learning that G was coming to help B, L, entered his house whence he fetched a chopper and renewed his attack on B, inflicting more than one injury. B was sent to the hospital where he died of septic pneumonia. **Held**, that there being no intention to cause death, L could not be convicted of murder but only of having caused grievous hurt under S. 326. 17 A.L.J. 56=1 U.L.R. (H.C.) 42=20 Cr.L.J. 137=49 Ind. Cas. 169.

—Ss. 300 and 320—Murder or hurt.

Where a person squeezed the testicles with a considerable force for a considerable time in a sudden quarrel and the medical evidence showed that under normal conditions it would not endanger life, **Held**, it was a simple hurt and not an offence of culpable homicide not amounting to murder, since the offender did not know that the injury would endanger life or under normal conditions would cause death. 19 Bom. L.R. 823=18 Cr.L.J. 1010=42 Ind. Cas. 754.



—Ss. 300 and 325—Murder or hurt—Provocation—Anger.

Where being provoked by the conduct of the deceased and his son coming armed with a pitch fork and stick respectively and abusing accused's sister and striking on her head the accused in a moment of anger and without premeditation struck a blow on the deceased's head, with a pitch fork, not knowing it was likely to cause death, she was guilty of an offence under S. 325 and not under S. 304, I.P.C. 69 P.L.R. 1916=17 Cr. L. J. 270=48 P.W.R. 1916 Cr.=34 Ind. Cas. 990.

—Ss. 300, 302 and 328—Murder or hurt—Grievous hurt.

Where the chemical analysis did not disclose how much arsenic was found and there is no evidence otherwise, it is doubtful whether the case would come under S. 302 or S. 328, I.P.C. 20 C.W.N. 512=23 C.L.J. 477=17 Cr. L. J. 188=33 Ind. Cas. 823.

—Ss. 300 and 326—Murder or hurt—Causing death by dhatara—Commission of robbery.

The accused who had caused the death of two persons by administering to them dhatara in order to facilitate the commission of robbery, were guilty of offence under S. 326 of the Penal Code and not under S. 302, 31 All. 148, not foll. 19 P.R. 1916 Cr.=20 Cr.L.J. 510=51 Ind. Cas. 670.

—Ss. 300 and 325—Murder or hurt.

No adequate motive for the murder was proved. A perusal of the medical evidence showed that although there were two contused wounds on the head a bruise on the forehead and a bruise on the neck, there was no fracture of any bones of the skull. Nor was there any fracture of any bone of the body. Death probably resulted from direct violence. None of the injuries taken alone could be termed mortal but taking all the injuries into consideration it might be inferred that they caused death. Held, that the accused cannot be held to have intended to cause the death. The hurts caused having actually resulted in death amounted collectively to grievous hurt. The accused caused grievous hurt and either he intended to cause or knew that he was likely to cause grievous hurt when he gave the deceased such a severe beating and he committed an offence under S. 325, I.P.C. 1 Lah. L. J. 247.

—Ss. 300, 304 (2) and 320(8)—Murder or hurt—Death caused by injury with weapon—Grievous hurt—Mis-direction.

Where death has been caused by a blow which does not necessarily suggest an intention to cause such bodily injury as would ordinarily cause death, and it is presumed in accused's favour that he had no knowledge that the injury which he intended to cause was likely to cause death, it is not unreasonable to infer intention to cause hurt dangerous to life and conviction should be had under S. 320 (8). S. 304(2) is not appropriate to a case where there was deliberate intention to inflict bodily injury to the person whose death resulted from such injuries. 6 S.L.R. 116=13 Cr.L.J. 750=17 Ind. Cas. 62.

—S. 300—Murder or hurt.

In a riot the accused gave blows one of which fell on the temple of the deceased of which he died 4 days after. The accused did not commit culpable homicide but only an offence of grievous hurt. (1911) 2 M. W. N. 188=12 Cr. L. J. 528=12 Ind. Cas. 296.

—Ss. 300, 302, 304, 325, 328, 329—Administration of dhatara for the purpose of facilitating robbery—Death of person to whom dhatara is so administered—Offence not murder, but only causing grievous hurt.

Where for the purpose of facilitating robbery, dhatara was administered by two persons to certain travellers in consequence of which one of the travellers died and others were made seriously ill, it was held that in respect of the traveller who died the offence committed was that punishable under S. 325 viz., grievous hurt; and in respect of the travellers who did not die the offence committed was that defined by S. 328. 20 A. 143, not foll. 1908 A.W.N. 243=30 A. 568.

16. Murder with consent of Victim—S. 300, Exception (5).

—S. 300, Excep. (5)—Accused killing deceased with her own consent—Offence.

The accused and the deceased who was his concubine were on affectionate terms and there was no motive whatever for the accused to encompass the death of the deceased. In his confession to the Magistrate, the accused stated that he killed the deceased at her own request and with her glad consent.

Held, that the offence amounted to culpable homicide not amounting to murder. A.I.R. 1940 Mad. 138=1939 M.W.N. 1132=50 L. W. 784=41 Cr.L.J. 322=1.L.R. (1940) Mad.428=(1940)2 M.L.J. 89=186 Ind. Cas. 479.

—S. 300, Excep. (5)—Accused killing person above 18 years of age with deceased's consent—Offence.

Where the accused killed a woman above the age of 18 years, at her request and with her consent:

Held, that the accused was entitled to the benefit of Excep. 5 to S. 300, and was guilty of culpable homicide not amounting to murder, punishable under the earlier part, S. 304. A.I.R. 1931 Mad. 436=33 L.W. 218=1931 M.W.N. 393=32 Cr.L.J. 659=60 M.L.J. 616=54 M. 504=131 Ind. Cas. 147.

—Ss. 300—Exception (5).

The accused strangled his beloved aged 16 years to death upon their decision to die together in despair of the future separation and feeling that they could not live apart,

Held, that this was essentially the case where the spirit, if not the letter, of Exception 5 may be applied and, though convicted of murder, sentence should be transportation for life.



117 Ind. Cas. 890=30 Cr. L. J. 855=A. I. R. 1929 Lah. 50.

—S. 300, Excep. 5—Murder or culpable homicide—Murder with the consent of victim—Liability for.

Applicant killed his step-father, an infirm old man and an invalid, with the latter's consent with the object of getting 3 innocent men (his enemies) hanged, Held, that the offence was covered by the fifth exception to S. 300, I.P.C., and was punishable not under S. 302 but under S. 304. 45 P.R. 1917 Cr.=19 Cr.L.J. 125=43 Ind. Cas. 413.

—S. 300, Exception 5—Murder or culpable homicide—Essentials—Onus of proof.

A person claiming the benefit of exception 5 has to show that the person, whose death he caused, consented to have the particular act done upon him, knowing that it would cause his death or knowing that his life would be endangered thereby. It is not sufficient to show that the person voluntarily took the risk of death. 3 Bur.L.T. 64=5 L.B.R. 160=11 Cr.L.J. 345=5 Ind. Cas. 988.

### 17. Nature of weapon.

—Ss. 299, 300 and 302—Weapon used—Inference of offence.

A man who drives a spear into the stomach of another and causes that man's death, commits murder, and should be charged under S. 302. A.I.R. 1943 Pat. 397=22 Pat. 338=10 B.R. 168=45 Cr.L.J. 213=210 Ind. Cas. 210.

—Ss. 299 and 300—Inference from weapon used.

When a rifle is aimed at the head of another, accompanied by words of abuse which cannot be spoken in jest, and the rifle is one not liable to sudden or accidental discharge, and the person with the rifle had full knowledge that the rifle was loaded, it is impossible to hold that the rifle was fired without an intent to inflict such bodily injury as would in the ordinary course of nature result in death. A.I.R. 1937 Nag. 274=39 Cr.L.J. 92=172 Ind. Cas. 204.

—Ss. 299 and 300—Accused hitting deceased with lathi — Fracture of skull — Death — Offence.

Where the accused hit the deceased with a lathi first on the arm when he attempted to ward a blow off his head and then when his arm was disabled, gave him two blows on the head on which the deceased's skull was fractured and he died as a result of the injuries.

Held, that there was no reason for supposing that the accused intended to cause death or to cause such injuries as would be sufficient in the ordinary course of nature to cause death or to do an act so imminently dangerous that it must in all probability cause death and that the offence was one of culpable homicide not amounting to murder. (1936) 164 Ind. Cas. 662=1936 A.W.R. 327=(1936) A.L.J. 383=37 Cr.L.J. 1020.

—Ss. 299 and 300.

If weapons like lathis or the blunt side of axes are used in order to break every limb of a man's body, it is just as surely a murder as if the head had been smashed. A.I.R. 1936 Lah. 233=37 Cr. L. J. 751=38 P. L. R. 695=163 Ind. Cas. 143.

—Ss. 299 and 300 — Severe blow with deadly weapon fracturing skull—Offence.

Where a severe blow was delivered by the accused on the head of the deceased and the weapon used was a deadly one causing extensive fracture of the skull as not to leave much hope of recovery, even if skilled treatment had been applied from the beginning.

Held, that the accused was guilty of murder and that the fact that the deceased died only a month after the commission of the offence was immaterial. A.I.R. 1935 Lah. 94=26 Cr.L.J. 1335=16 Lah. 589=37 P.L.R. 705=158 Ind. Cas. 336.

—Ss. 299 and 300 — Inference from weapon used.

The use of a pocket knife in a sudden fight does not necessarily mean that the accused intends to cause death or that he knows it to be likely that death will follow. Every case is to be decided on its own merits. It depends on the way the weapon is used and part of the body selected for the purpose and not only on the nature of the weapon. The violent use of a pocket knife on a vital part of the body would necessarily imply the knowledge that the act committed was so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death as is laid down in cl. 4 to S. 300, and would therefore be murder. A.I.R. 1935 Pesh. 155=37 Cr.L.J. 87=159 Ind. Cas. 284.

—Ss. 299 and 300—Causing death by wounds on head with sharp cutting weapon.

Causing of several wounds on the head and neck with sharp cutting weapon should be presumed to be done with intention of causing death, the crime in such cases, is murder. A.I.R. 1934 Sind 172=36 Cr.L.J. 223=29 S.L.R. 1=152 Ind. Cas. 1032.

—Ss. 299 and 300 — Inference from weapon used.

If a man, who is armed with a deadly weapon like a sela, thrusts that weapon into the chest of his victim and causes instantaneous death, he can have only one intention, namely, intention to murder. A.I.R. 1934 Lah. 741=35 P.L.R. 715=36 Cr.L.J. 696=155 Ind. Cas. 275.

—Ss. 299 and 300—Nature of weapon.

A pen-knife which has a blade 4 inches in length is not only a dangerous but a deadly weapon. 1933 M.W.N. 1420.

—Ss. 299 and 300—Inference—Wooden handle.

Where the accused gave a blow to the deceased with the wooden handle of a hoe measuring



3" X 10" and weighing 82 tolas, and it appeared that the accused gave only one blow on the spur of the moment on the thinner part of the head:

Held, that the weapon could not be said to be a formidable one and that as the intention to kill could not be presumed, the offence was culpable homicide not amounting to murder. A.I.R. 1933 Rang. 338=35 Cr.L.J. 43=146 Ind. Cas. 315.

—Ss. 299 and 300—Inference from weapon used.

A person who thrusts a knife into the abdomen of another must be presumed to have intended to inflict an injury which he knows to be likely to cause the death of that person. A.I.R. 1933 Lah. 434=34 P.L.R. 255=34 Cr.L.J. 711=144 Ind. Cas. 292.

—Ss. 299 and 300.

Violent stabbing with a chhuri on the chest with death resulting therefrom, constitutes the offence of murder and not merely of culpable homicide not amounting to murder. A.I.R. 1932 Lah. 302=33 P.L.R. 154=33 Cr.L.J. 577=138 Ind. Cas. 321.

—Ss. 299 and 300 — Inference from weapon used.

A person plunging a dangerous weapon like a knife into a vital part of the body of the victim, is to be deemed to have intended to cause such injury as he knew was likely to cause death. A.I.R. 1932 Lah. 254 (2)=33 Cr.L.J. 375=33 P.L.R. 145=137 Ind. Cas. 65.

—Ss. 299 and 300—Violent blow on head with lethal weapon.

A person inflicting a violent blow on the head of his victim with a lethal weapon such as an iron-shod dang must be presumed to intend to cause such injury as he knew was likely to cause death. A.I.R. 1932 Lah. 244=33 P.L.R. 130=33 Cr.L.J. 378=137 Ind. Cas. 86 (1).

—Ss. 299 and 300—Death by blow with heavy stick—Offence.

Where a person strikes another on the head with a heavy stick and thereby causes the death of the latter he is guilty of murder, as he must be taken to have known that what he was doing must in all probability cause the death of the deceased. A.I.R. 1931 Mad. 420=1931 M.W.N. 266=32 Cr.L.J. 623=34 L.W. 631=130 Ind. Cas. 847.

—Ss. 299 and 300—Violent blow with lethal weapon at vital part—Intention must be presumed.

The best criterion of the force and character of a blow is to regard the result which it has effected. A person delivering a violent blow with a lethal weapon like a lathi on a vulnerable part of the body as the head must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused.

Where therefore there are no indications that the accused dealt any other kind of blow or to cause

any other sort of injury he can be held guilty under S. 302. 126 Ind. Cas. 572=A.I.R. 1930 Lah. 490.

—Ss. 299 and 300—Fatal wounds with knife—Intention to cause death presumed.

A person who inflicts on the deceased fatal wounds with a knife intends nothing short of inflicting death and so the offence in the absence of extenuating circumstances, is murder. 1930 M.W.N. 681=32 M.L.W. 220=129 Ind. Cas. 228=53 Mad. 861=A.I.R. 1930 Mad. 972=59 M.L.J. 939.

—Ss. 299 and 300—Fight with lathis—knowledge of probability of death presumed.

When men who expected a lathi fight use their lathis with the result that a man is killed, it must be taken, in the absence of special circumstances, that they knew that they were doing an act so eminently dangerous that it must in all probability cause such bodily injury as is likely to cause death. 116 Ind. Cas. 19=1929 A.L.J. 244=10 L.R.A.Cr. 47=11 A.I.Cr.R. 299=30 Cr.L.J. 559=A.I.R. 1929 All. 160.

—Ss. 299 and 300—Plunging knife into stomach—Intention to cause death or fatal injury—If can be presumed—Rule of intending natural or probable consequences of act—If applicable to Indian Criminal law.

Per Cuming, J.—The natural result of plunging a knife into a man's stomach is death or such bodily injury as is likely to result in death. The man who plunges a knife into another man's stomach must know that it would cause death or such bodily injury as is likely to cause death and that hence death would be the probable result of his act. The man who does such an act therefore must be held to intend to cause death or such bodily injury as is likely to result in death, for a man is presumed to intend the natural consequence of his action. If he had not that knowledge or intention in the circumstances and he did the act with some other knowledge or intention then it is for him to prove it, for that is a fact peculiarly within his own knowledge.

Per Mukerji, J.—The presumption that one must be taken to intend the natural or probable consequences of his act—a rule of English criminal law which, originally but a rule of evidence, has now acquired the dignity of a legal axiom—is not always quite easy to apply to the Indian Criminal Law in view of the distinction that the Indian Penal Code makes between intention and knowledge. On the question of knowledge much depends on the intellectual capacity of the actor. 109 Ind. Cas. 482=47 C.L.J. 240=32 C.W.N. 345=29 Cr.L.J. 546=10 A.I.Cr.R. 259=A.I.R. 1928 Cal. 430.

—Ss. 299 and 300—Nature of weapon—Club wound.

Where a person gave the deceased a club-wound sufficient to cause the death of a man in the ordinary course of nature:

Held, that person was guilty of murder irrespective of intention to cause death. 90 Ind. Cas. 147=26 Cr.L.J. 1491=A.I.R. 1926 Oudh 184.



—Ss. 299 and 300—Organised fights with lathis—Combatant using fire-arm.

Organised fights with each side armed with lathis are grave infractions of the law and frequently result in the death of one or more combatants. The introduction of the pistol is an added aggravation and in such cases transportation for life is the only appropriate sentence that could be passed against the combatant who uses the fire-arm and brings down a man to the ground though not dead, at least wounded. 87 Ind. Cas. 597=20 Cr.L.J. 997=6 L.R.A.Cr. 81=A.I.R. 1925 All. 664.

—Ss. 299 and 300—Violent blow with takwa cutting through skull—Intention presumed.

A takwa is a deadly weapon and a person who strikes a blow on the head with such a weapon and with such violence as to cut through the skull should be presumed to do so with the intention of causing death or such bodily injury as is likely to cause death. 88 Ind. Cas. 995=7 L.L.J. 175=26 P.L.R. 221=26 Cr.L.J. 1251=A.I.R. 1925 Lah. 373.

—Ss. 299 and 300—Striking with wooden pestle on head—Knowledge presumed.

Where the accused killed his wife by striking her on head with a wooden pestle:

Held, that he must be presumed to know that he is likely to fracture her skull and to cause her death. 84 Ind. Cas. 942=6 L.L.J. 527=26 Cr.L.J. 398=A.I.R. 1925 Lah. 244.

—Ss. 299 and 300—Stab in the stomach—Sufficient in ordinary course to cause death—Intention to cause injury sufficient to cause death presumed.

Common knowledge and experience tell us that any cut into peritoneum and stomach, is sufficient, in the ordinary course of nature, to cause death, unless done by a skilful surgeon under safe-guards discovered during comparatively recent years. The fact that persons have under medical treatment, recovered from wounds in the stomach affords no ground for holding that a stab in the stomach, is not sufficient in the ordinary course of nature to cause death. If a person stabs another in the abdomen with sufficient force to penetrate the abdominal walls, and the internal viscera, he must undoubtedly be held (whatever his station in life) to have intended to cause injury sufficient in the ordinary course of nature to cause death. A.I.R. 1922 All. 487 Dis. 27 M. 119, Foll. 76 Ind. Cas. 711=1 Rang. 436=25 Cr.L.J. 247=A.I.R. 1924 Rang. 93.

—Ss. 299 and 300—Attack with chhavis on the head—Intention presumed.

When two persons armed with dangerous weapons like chhavis attacked their enemy on the head, they were deemed to intend to cause his death and sentence of death was passed.

Where a person is convicted under S. 302 of murder, sentence of death should ordinarily be imposed unless there are mitigating circumstances which would justify a Court in awarding a lesser sentence. 75 Ind. Cas. 359=6 L.L.J. 62=24 Cr.L.J. 935=A.I.R. 1323 Lah. 598.

12—F. Y. D.—15.

—Ss. 299 and 300—Striking blow with deadly weapon—Knowledge of probability of death presumed.

A man, who deliberately strikes a blow with a weapon such as a takwa, on the head of another who is held in position so that he can make no mistake as to what he is doing, must know that his act is so imminently dangerous that it must in all probability cause death, and the circumstances are aggravated when the murderer is not one of those taking part in the original quarrel. 69 Ind. Cas. 439=23 Cr.L.J. 711=A.I.R. 1923 Lah. 68.

—Ss. 299 and 300—Striking with blunt edge of chhavi—Not killed outright—Death by the supervision of erysipelas—No intention to kill or cause fatal injury.

The deceased was not killed outright but survived for eleven days. The Assistant Surgeon was moreover doubtful whether the deceased would have died if erysipelas had not supervened. Had it been the intention to kill deceased, Jalal would naturally have struck him with the sharp edge of his chhavi and the other men also would have inflicted more serious injuries than they did. There was nothing to prevent them from despatching him at once.

Held, taking all the circumstances into consideration, it has not been shown that any of the appellants intended to kill deceased or to cause such injury as they knew to be likely to cause his death. There is, however, no doubt that they all knew that grievous hurt was likely to result from an assault of so serious nature, as dangerous weapons were employed. A.I.R. 1923 Lah. 441.

—Ss. 299 and 300—Single blow on head with hollow bamboo—Factors for consideration.

It would be most unsafe to suggest that in all cases where death is caused by a single blow from a hollow bamboo, the offence is not murder i.e., that the sole criterion is the nature of the weapon used. The size, and the weight of the stick, the manner in which it is used, and the actual injuries caused by the blow must all be considered. 65 Ind. Cas. 495=11 L.B.R. 115=A.I.R. 1921 L.B. 4.

—Ss. 299, 300, 301, 304 and 304-A—Use of deadly weapons.

A person is not absolved from the charge of culpable homicide even without intention of causing death or such bodily injury as would likely to cause it, in cases where the offender commits lurking house trespass by night and strikes the inmates with a dangerous weapon to evade his arrest and the inmate dies eventually, simply because his guilt is far more serious than mere rash and negligent act not amounting to culpable homicide. 12 P.R. 1911 Cr.=41 P.W.R. 1911 Cr.=12 Cr.L.J. 591=12 Ind. Cas. 967.

—Ss. 299 and 300—Use of deadly weapons—Savage attack—Dangerous wounds followed by blood poisoning and fever—Whether murder.

When a person dangerously wounded by a savage attack with murderous weapons was detained in hospital where he developed blood poisoning and fever and died, the accused were found finally



guilty of murder. 7 S.L.R. 83=15 Cr.L.J. 376=23 Ind. Cas. 744.

—Ss. 299 and 300—Use of deadly weapons—Nature of offence—How found out.

Where death is caused recklessly and without premeditation, the safer criterion to decide the nature of the offence committed is the nature of the weapon used. 1 B. 342, Foll. 7 S.L.R. 29=14 Cr.L.J. 459=20 Ind. Cas. 619.

—Ss. 299 and 300 (4)—Use of deadly weapons—Fight.

Trespass on other's lands with dangerous weapons and a fight with those weapons with the object of asserting a supposed right which ended in death of a person makes the trespasser guilty under S. 300 (4). 11 Cr. L.J. 295=6 Ind. Cas. 251.

### 18. Private defence.

- (a) Onus.
- (b) Plea in appeal.
- (c) Right exceeded—Offence—S. 300, Exception (2).
- (d) Right, when affords defence.
- (e) Right, when does not afford defence.

#### 18 (a). Private defence—Onus.

—Ss. 300 and 302—Onus.

Where in a murder case the accused sets up the plea of self-defence, the burden lies on him under S. 105, Evidence Act to prove it and in the absence of proof it is not possible for the Court to presume the truth of plea of self-defence. A.I.R. 1941 Mad. 280=52 L.W. 884=(1940) 2 M.L.J. 1018=42 Cr. L.J. 305=1940 M. W. N. 1236=192 Ind. Cas. 525.

—Ss. 300 and 302—Private defence—Right of—Onus.

In a murder case, the burden of proving right of private defence rests on the accused who takes such a plea. A.I.R. 1941 Sind 117=42 Cr. L.J. 786=195 Ind. Cas. 833.

#### 18 (b). Private defence—Plea in appeal.

—Ss. 299 and 300—Plea of self defence in appeal.

There is nothing to prevent an accused from raising the plea of self-defence in appeal if the facts on record would justify such a plea. A.I.R. 1932 Lah. 606=33 P.L.R. 718=34 Cr. L.J. 462=142 Ind. Cas. 901.

#### 18 (c). Private defence—Right exceeded—Offence—S. 300, Exception (2).

—S. 300, Excep. 2—Applicability—Conditions of.

In order that Exception 2 to S. 300, I. P. Code, should apply, it is essential that the person causing

hurt in the exercise of his right of private defence should act "without any intention of causing more harm than is necessary for the purpose of such defence." 231 Ind. Cas. 462=48 Cr. L.J. 809.

—S. 300, Excep. 2—Applicability and scope—Damage to crops by cattle grazing—Owner of crops hitting owner of cattle with bhala on chest—Death caused—Offence.

Exception 2 to S. 300, I.P. Code, is a necessary corollary to S. 99. A person whose ripe crops are about to be damaged or being damaged by cattle grazing in the field, is not entitled to kill the owner of the cattle who grazes them in defence of his property. If he strikes a blow on the chest of the grazer with a bhala and inflicts an injury which is sufficient in the ordinary course of nature to cause death, he is guilty of murder under S. 302, I. P. Code, and his case does not fall under Exception 2 to that section. 26 Pat. 49=48 Cr.L.J. 565=230 Ind. Cas. 167=13 B. R. 462=A.I.R. 1948 Pat. 62.

—S. 300, Excep. 2—Applicability—Attempt at house-breaking by persons armed with lorch and deadly axe—Aiming of axe at face and head of pursuer—Death caused—Offence.

Where two persons armed with a lorch and a deadly axe with a blade 8 1/4 inches broad, proceed upon a house-breaking expedition, and in order to escape capture, the man with the axe uses that axe aiming his blows at the face and head of a pursuer armed only with a lathi or lorch, it cannot be held that he is bona fide exercising the right of private defence without premeditation or without the intention of causing more harm than is necessary, so as to reduce his act of killing from murder to culpable homicide. I.L.R. (1946) Kar. 443=A.I.R. 1947 Sind 107=48 Cr.L.J. 823.

—Ss. 300, 304 and 99.

Right of private defence—Extent of—Deceased armed with weapon—Accused snatching it from him and causing his death by inflicting several wounds—If exceeds his right. See Penal Code, Ss. 99 and 304. 223 Ind. Cas. 99=47 Cr.L.J. 358=A.I.R. 1947 Lah. 37.

—S. 300, Excep. (2)—Exceeding right of private defence.

The accused and the deceased were the land-lords of a village. The deceased who was a lambardar, on being informed that the accused had prevented his tenants from paying revenue direct to the deceased, went to the dera of the accused with a number of unarmed persons with the object of remonstrating the accused. On seeing these men the accused got frightened and lost control of himself and in that confused state of mind he picked up a gun and fired without having any intention to kill, as a result of which the deceased and one other man of his party died.

Held, that the accused was not justified to pick up the gun and fire, as he could not have reasonably expected to be killed by the party which was coming up to his house or to receive grievous injuries from them. But as he was undoubtedly overawed by the number of the



members of the party and must have felt that they had come to his dera with the intention of insulting or annoying him, he might have been justified to use a much lesser force. He was not in any case entitled to use his gun. The accused, therefore, exceeded his right of self-defence and was guilty of culpable homicide not amounting to murder under the first part of S. 304. A.I.R. 1944 Lah. 97=45 P.L.R. 393=45 Cr. L.J. 634=212 Ind.Cas. 440.

—Ss. 300 and 304 — Using dagger in the exercise of right of self-defence — Death caused—Offence.

Where the accused, in exercise of their right of private defence of property, use daggers and cause injuries to the members of the other party resulting in death of some of them, not because they felt it necessary to use the daggers for the protection of their person or property but were actuated by the desire to punish those who tried to enter upon their land, they must be deemed to have exceeded the right of private defence and must be held to be guilty under S. 304. A.I.R. 1942 Mad. 58=1942 M.W.N. 42=201 Ind. Cas. 390.

—S. 300, Excep. (2) — Accused seeing his brother struck by deceased with cart prop, stabbing deceased and killing him—Case held fell under Exceptions I and 2 to S. 300.

What is due care and attention depends on the position in which a man finds himself, and varies in different cases. The question here must be whether the offender acted honestly, or whether he used the opportunity to pursue a private grudge and to inflict injuries which he intended to be inflicted regardless of his rights. Section 300, punishes a criminal act in excess of the right of private defence, and it is impossible to regard "due care and attention" in the sense which is usually ascribed to it as an element in such criminality.

The accused seeing his brother struck on the head by the deceased with a bamboo implement, described as a cart prop, and felled to the ground, stabbed the deceased which resulted in his death:

Held, that the accused was so provoked as to be deprived of the power of self-control and there was no reason to suppose that the accused was actuated by any impulse but that of exercising the right of private defence of the body. The exceptions 1 and 2 to S. 300, therefore applied. A.I.R. 1940 Rang. 129=1940 Rang. L.R. 109=41 Cr. L.J. 634=188 Ind. Cas. 578.

✓ —Ss. 300 and 304—Exceeding right of private defence and killing—Offence.

Held, on facts that the accused had a right of private defence but in hitting the deceased on head with axe and killing him, he exceeded that right. (The conviction was altered to one under second part of S. 304). A.I.R. 1939 Lah. 534=41 Cr. L.J. 150=1.L.R. (1950) Lah. 217=42 P.L.R. 711=185 Ind. Cas. 274.

—Ss. 300 and 304—Exceeding right of private defence—Offence.

Where, in a course of fight, a person from one of the parties runs away but is chased by another from the opposite party and is overtaken at a considerable distance and is killed, the person chasing would be deemed to have exceeded his right of private defence and is, therefore, guilty under S. 304 (1). A.I.R. 1939 Lah. 393=41 P.L.R. 360=40 Cr. L.J. 904=184 Ind. Cas. 270.

—S. 300, Excep. (2) — Accused acting cruelly —Right of self defence.

An accused cannot plead the right of self-defence, if his action is cruel and unusual, and he is guilty under S. 302. He has no right of private defence, because he has no occasion to apprehend death or grievous hurt. Few scratches on his back do not give him this right, the burden of proving which, is on him. A.I.R. 1937 Pesh. 101=39 Cr.L.J. 142=172 Ind. Cas. 499.

—Ss. 300 and 304—Exceeding right of private defence and causing death—Offence.

Where, while the deceased and others were grazing their cattle on land in the ownership of the accused, the accused came with lathis and began to drive the cattle away towards the pound and on the deceased and his party rescuing the cattle, there was a lathi fight between the accused and the deceased and his party during which the deceased received fatal injuries:

Held, that although the accused had a right to drive the cattle that had strayed into their land to the cattle pound, that right did not extend to the causing of the death of the deceased. But as it appeared that the deceased and his men did attack the accused, while the accused were not free from blame, in awarding sentences consideration may legitimately be given to the fact that they were really in the right at first and were performing a legitimate duty in taking the cattle of the deceased and others to the pound which had strayed into their land, although in doing so, they exceeded the right of private defence of person and property. Consequently, the conviction for offences under Ss. 147 and 304, I.P.C., would stand but their sentences might be reduced, A.I.R. 1937 Oudh 54=37 Cr. L. J. 931=1936 O.W.N. 766=164 Ind. Cas. 151.

—S. 300, Excep. (2)—Right of self-defence when not available.

Under the first two paras. of S. 99 the right of private defence is not available against acts done or directed by public servants acting in good faith under colour of their office, even though such acts may not be strictly justifiable by law. Unlike the second proviso to Excep. 1 the exclusion of the right of private defence is not confined to things done in strict conformity with law. A.I.R. 1933 Pat. 508=35 Cr.L.J. 725=14 P.L.T. 464=148 Ind. Cas. 574.

—Ss. 300, Excep. 2, 304, Part. 1—Deceased in excitement brandishing lathi determined to use violence—Accused snatching lathi and striking deceased—Death—Offence.

Where the accused had been carrying on liaison with the deceased's wife and the deceased came



in a state of excitement brandishing a lathi determined to use violence against his wife while the accused snatching the lathi from his hand struck the deceased twice on the head which resulted in his death:

Held, that the second exception to S. 300 applied and that the conviction should be altered from one under S. 302 to one under S. 304, Part 1. A.I.R. 1933 Lah. 144=34 P.L.R. 886=34 Cr. L. J. 1160=145 Ind. Cas. 921.

—Ss. 300 and 304 — Right of self-defence exceeded—Offence.

Where of two persons A and B, A was armed with a dang and B with a knife, A tried to strike B and missed the stroke and the two then grappled with each other, in the course of which A was unarmed but threw down B who then struck A with his knife and A collapsed and died under the shock:

Held, that B exceeded the right of private defence which he had and that he should be convicted under S. 304, Part 1, I.P.C. A.I.R. 1933 Lah. 1048=35 Cr.L.J. 639=148 Ind. Cas. 243 (2).

—Ss. 300 and 304—Sudden quarrel—Altercation in relation to tree to which accused had right—Accused hitting deceased with iron-bound stick—Death—Right of private defence exceeded.

The accused was an occupancy-tenant of a field adjoining the field of the deceased. There was a kikar tree near the boundary of the two fields in respect of which there was a dispute between the parties. One day the deceased and another went to the field and lopped off branches from the tree and were collecting the leaves and branches when the accused arrived. An altercation ensued in the course of which the accused gave a lathi blow on the head of the deceased which proved fatal. It appeared that the accused was *prima facie* entitled to the tree:

Held, although the accused had a right to prevent the deceased from taking away the branches and leaves of the tree, he had no justification for going to the length of hitting the deceased on the head with an iron-bound stick as he did and hence he exceeded his right of private defence. A.I.R. 1933 Lah. 1052=35 Cr.L.J. 461=35 P.L.R. 195=147 Ind. Cas. 681.

—S. 300, Excep. (2)—Excessive exercise of right of self-defence.

Where the excessive exercise of the right of private defence results in death, Excep. 2 to S. 300 comes into play and the offence committed is culpable homicide and not murder. 1931 M.W.N. 646.

—S. 300, Excep. (2) — Right exceeded—Offence.

When the right of private defence is exceeded the offence committed is culpable homicide. 1931 M.W.N. 606.

—Ss. 300 and 302 — Private defence—Accused being abducted—Striking in self-defence causing death—Offence under S. 304 only.

Seizure of the person and dragging a debtor to his creditor by the peons of the creditor against his will, constitutes an offence of abduction within the meaning of S. 362 thereby giving the person so dragged the right of private defence of his body even to the causing of death subject to restrictions mentioned in S. 99. If while defending himself such person strikes the person against whom he was defending on a sudden irrational impulse thereby exceeding the power given to him under the statute and causes death of the other person, the offence comes not under S. 302 but under S. 304. 11 P. L. T. 381=A.I.R. 1930 Pat. 347.

—Ss. 300 and 304.

Right of killing offender found committing burglary given by S. 103 is subject to provisions of S. 99—Deceased beaten to death by lathi blow while found coming out of hole in wall after committing burglary—Accused held guilty of offence under S. 304—S. 300, Excep. (2) held applicable but accused held to have exceeded right of private defence of property. 1930 Cr. C. 948=7 O.W.N. 797=A.I.R. 1930 Oudh 408.

—S. 300. Excep. (2)—Private defence.

When a person kills a man without premeditation in excess of the right of private defence, he is guilty of culpable homicide not amounting to murder, 106 Ind. Cas. 213=3 Luck. 244=9 A.I.Cr. R. 217=28 Cr. L. J. 1029=1 L. C. 579=A.I.R. 1928 Oudh 15.

—Ss. 300 and 304.

The deceased went up the roof of the accused's house and began to remove the rafters which he had no right to do. The accused flung a heavy balla at the deceased which fractured the deceased's skull and caused his death.

Held, that although the accused had a right to defend his property, he exceeded that right and was guilty under S. 304 (2) 101 Ind. Cas. 663=28 P.L.R. 279=8 A.I.Cr.R. 164=28 Cr. L. J. 487=A.I.R. 1927 Lah. 730.

—S. 300, Excep. (2)—Enmity between parties—Challenges to come out and fight—Accused being followed by deceased inside the accused's house—Encounter occurring inside the accused's house where fatal injury inflicted—Application of the right of private defence.

Where a savage enmity had been growing up for some time between the two accused, and the deceased and his brother who were their next door neighbours, and acts of aggression had been committed on both sides on the evening of the occurrence, and challenges to come out and fight had passed from one house to the other and there was an encounter in the open space in front of the two houses, in the course of which injuries were inflicted and suffered on both sides, and at some stage of that encounter one of the accused ran into the dahliz of his own house and was followed thereby by the deceased, and a sharp struggle then occurred just inside the entrance door of the dahliz, and in the course of that struggle the same accused with his spear inflicted upon the



deceased the fatal wound, of which the unfortunate man expired almost immediately.

**Held:** that as the accused was within the threshold of his own house when he inflicted the fatal injury, though his act was not completely covered by the provisions of the law relating to the right of private defence, Exception 2 to S. 300 sufficiently covered the case to warrant the altering of the conviction to one under S. 304, I.P.C. from under S. 302, I.P.C. 89 Ind. Cas. 264=26 Cr. L. J. 1320=6 L.R.A.Cr. 113=A.I.R. 1925 All. 753.

—S. 300, Excep. (2)—Private defence.

Continued attack after the opponent has fallen down is not exercise of private defence. 6 L.L.J. 483=A.I.R. 1925 Lah. 230.

—S. 300, Excep. (2)—Exceeding right of—No apprehension of being killed—Aggressor killed in defence—May be guilty under S. 304.

If a person in defending himself exceeds the right of private defence and intends to cause death of his assailant he must not be held to be guilty of murder. A person in order to defend himself, may kill his adversary provided he has a reasonable apprehension that otherwise he himself would be killed. But if he exceeds the right of self defence where there is no reasonable apprehension of his being killed but only had reasonable apprehension of grievous hurt and in defending himself exceeds his right of private defence and kills the other, he is guilty of an offence less than murder. His act may amount to an offence under S. 304, Indian Penal Code. 88 Ind. Cas. 455=26 Cr. L. J. 1143=A.I.R. 1925 Mad. 1069.

—S. 300, Excep. (2)—More harm than necessary caused—Accused cannot claim benefit of exception.

To claim the benefit of Exception 2 to Section 300 the accused must show that they had no intention of doing more harm than is necessary. When the person killed was not merely disabled but was beaten to death by opponents in considerable numbers, with a sharp weapon held the offence of murder was committed. 81 Ind. Cas. 347=25 Cr.L.J. 811=A.I.R. 1923 Lah. 232.

—S. 300, Excep. (2)—Killing under grave provocation and in belief that murderous assault by deceased not otherwise be prevented—Accused are not guilty of murder.

If some persons were acting in the exercise of their rights to defend their master against what was certainly a murderous assault, and with such care and attention as was humanly possible at the moment and in the circumstances, they did believe that they could not protect their master from that assault otherwise than by striking the deceased with their lathis, even at the moment imminent risk of hitting him on the head and cracking his skull their acts then amply satisfy the conditions required to bring them within the terms of second exception to the definition of murder in S. 300 of the Penal Code. An assault by a mahar tenant on a Rajput Zemindar, even supposing not likely to result in anything worse than grievous hurt, would undoubtedly give so grave a provocation to the Zemindar's followers as to deprive ordinary men of

their self-control and if they suddenly and immediately assault the tenant it must be held that they acted while they were still under the full influence of the passion engendered by the provocation. 66 Ind. Cas. 665=23 Cr. L.J. 313=A. I. R. 1922 Nag. 141.

—S. 300, Excep. (2)—Lathi aimed at the head of a thief trying to run away—Exceeding the right of—Offence under S. 304.

Accused a servant employed to watch the crops of a field, went round one night and saw a man cutting the crop at midnight. The thief on seeing the accused tried to run but accused, who was armed with a lathi at once strinck him a blow on the head felling him to the ground; the victim of the blow eventually died.

**Held,** that under Exception 2 to S. 300, Penal Code, the accused exceeded the right of private defence of property. The conviction of the accused should be under S. 304 and not under S. 325, I.P.C. 64 Ind. Cas. 133=22 Cr.L.J. 741. (All).

—S. 300, Excep. (2)—Private defence—Death caused by stone throwing—Wound on the injured person—Liability—Grievous hurt.

Owing to long standing enmity and fresh altercation, two parties encountered and hurled stones against each other. One of the party was struck by a stone of considerable weight which ruptured his liver and immediately caused his death. As he fell down and lay on the ground, the accused belonging to the other party, caused a serious wound in his leg with a sword. **Held,** that the accused was not guilty of murder, as there could be no intention to kill. The stone-throwing by his party was resorted to by way of defence to a similar act by the other party and the causing of the death in stone-throwing was an unusual incident which could not be regarded as likely to result in injuries which caused death in the ordinary course of nature. In causing the wound by a sword the accused was guilty of inflicting grievous hurt. 19 Bom.L.R. 902=19 Cr. L. J. 93=43 Ind. Cas. 253.

—Ss. 300, Excep. (2), 96 and 99 (4)—Private defence—Excess of—Right of private defence—More harm than is necessary.

G while running away met the accused who tried to stop him. G hit the accused on the head with a bamboo, and the accused in return gave G a fatal blow on the neck and caused his death. The accused exceeded his right of private defence and should be convicted under the first part of S. 304 but not under the second part. 18 Cr. L. J. 284=38 Ind. Cas. 316 (L. Bur.).

—S. 300, Excep. 2—Private defence.

Accused beat the deceased with chairs and danga and caused his death as the latter was cutting the rice crop belonging to the former. They exceeded the right of private defence of property and as they inflicted more harm than necessary and caused death and therefore they were guilty of murder. 35 P.R. 1916 Cr.=18 Cr.L.J. 367=38 Ind. Cas. 751.

—S. 300, Excep. 2—Private defence—When arises—Sentence what is proper.



When a man is seen with a stick trailing in his hand and for purposes of committing theft, the right of private defence arises but when the person exercising the right has an armed companion on his side he should warn the man with the stick, to drop it and surrender, the failure to give the proper warning brings the case under S. 300, Exception 2, I.P.C., and in such cases long terms of imprisonment are not called for. Firing the first shot in the air is not a sufficient warning. 17 Cr.L.J. 335=35 Ind. Cas. 511.

—S. 300, Excep. 2—Private defence—Proclaimed offender murdering a Police Officer trying to arrest him—Publication of proclamation not proved—Cr. P. Code, S. 87 (3).

A proclaimed offender was tried for murdering a Police Officer trying to arrest him. The prosecution failed either to file the statement referred to in cl. 3, S. 87, or to adduce any other evidence of publication.

Held, that the accused was entitled to the benefit of Excep. 2 to S. 300, I.P.C. and was guilty of culpable homicide not amounting to murder. 17 Cr.L.J. 78=32 Ind. Cas. 670 (Mad.).

—S. 300, Excep. 2—Private defence—Firing at a person mistaken for thief.

Where the accused had no reason to believe that the person shot at was doing anything more than theft of certain fruits, the mere fact that the shot was fired under the mistaken impression that the person was the thief, would not entitle the accused to the benefit of exception II to S. 300. 13 Cr.L.J. 782=17 Ind. Cas. 414 (Mad.).

—S. 300, Excep. 2—Private defence—Excess of.

Where the accused who was wanted by the police on being seized by the deceased, in order to rescue himself struck two severe blows on the head in consequence of which the deceased expired within a week, held, the accused exceeded his right of private defence in that he caused more harm than was necessary. 12 Cr.L.J. 81=9 Ind. Cas. 452 (Sind.).

—S. 300, Excep. 2—Private defence—Plea not put forth in defence.

A man was assaulted at night by three men. He did not expect any danger of death or grievous hurt, but he believed that he could not escape without using a knife which he picked up and used, stabbing one to death and wounding the other. On his trial for murder the accused did not plead his self-defence.

Held, that as it was in evidence that the accused had to struggle against three persons, the Court was bound to consider the accused's right of self-defence and to decide the case on the facts proved in his favor though he had not set up those facts in his defence. Held, further, that the accused had exceeded his right of private defence, but being within the second exception to S. 300 was only guilty of culpable homicide not amounting to murder. 8 M.L.T. 462=12 Cr.L.J. 18=8 Ind. Cas. 1088.

18 (d). Private defence—Right, when affords defence.

—Ss. 300, 302, 97.—Police constable on duty going to station premises and waking up beggars sleeping on ground, without using force—One of beggars entering into argument and suddenly hitting constable on forehead with heavy implement—Constable striking beggar on head with hatchet he was carrying, while reeling from effect of blow received by him—Act of constable held could not be said to be voluntary so as to render it criminal—Even otherwise there was held a good case for exercise of right of private defence. A.I.R. 1942 Lah. 33=43 P.L.R. 721=43 Cr.L.J. 439=198 Ind. Cas. 860.

—Ss. 299 and 300.

The deceased who had two das in his possession threw one at the accused and advanced to attack with the other, whereupon the accused becoming alarmed and finding that the only way in which it was possible to defend himself was to ward off, struck at the deceased with his spear and inflicted the wound which ultimately became fatal.

Held, that the accused acted under the right of private defence of the body. A.I.R. 1941 Rang. 175=42 Cr.L.J. 661=195 Ind. Cas. 71.

—Ss. 299 and 300—Right of private defence, if can afford complete defence to culpable homicide and murder.

The possibility of murder being reduced to culpable homicide through the exercise of right of private defence is also bound up with the possibility of such right going so far as to afford a complete defence not only to a charge of murder but also to a charge of the lesser offence of culpable homicide. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

—Ss. 299 and 300—Police investigation—Suspect subjected to torture—Suspect's right to kill.

When during the investigation of a crime the suspect is mercilessly tortured and this is carried on for a length of time he has every reason to think that he might either be killed and would be justified even to the extent of killing, in endeavouring to stop the tortures to which he is being subjected. (1938) 40 P.L.R. 104.

—Ss. 300 and 302—Death caused in free fight in private defence of property.

Where both sides were prepared for battle and both sides were equally responsible for fighting, but the party of the accused had a right to turn the complainants out of the land which had been in their possession for a long time, and the complainants were the provoking party, were in the wrong and were in force and armed and it needed force and arms to turn them out, and in the course of the exercise of their right, the accused unfortunately killed a person receiving themselves serious injuries:

Held, that no criminal liability could be put upon the party of the accused at all and in these matters it was impossible to judge exactly the right amount of force to be used. (37) 169 Ind. Cas. 826=38 P.L.R. 131=38 Cr.L.J. 807.



—Ss. 299 and 300—Extent of right of self defence.

The accused who were in possession of land were attacked with dangerous weapons and while defending themselves, they inflicted fatal injuries on some of the attackers which resulted in their death:

Held, that so long as the accused were confronted by an unlawful assembly, they were entitled to deal with that assembly as a whole, so long as it continued to be dangerous to them. Though the accused inflicted fatal injuries on members of that assembly, they themselves had been dangerously attacked and were entitled to take all measures necessary for their own safety and they could not be expected to judge too accurately what was the exact amount of force necessary for that purpose and that they were entitled to acquittal. A.I.R. 1936 Pat. 622=38 Cr. L. J. 139=18 P.L.T. 21=3 B.R. 131=166 Ind. Cas. 129.

—Ss. 299 and 300—Deceased endeavouring to violate accused's wife—Accused seeing the act and striking deceased.

Where the accused, on seeing the deceased, whom he had brought up from his childhood in his own house hold lying on and trying to commit rape on the accused's wife, took a gandasa and gave the deceased a number of blows as a result of which he died, and it appeared that all the injuries were inflicted whilst the deceased was in a lying position.

Held, that the action of the accused was covered by Cl. 3, of S. 100, I.P.C., and that although the right of private defence laid down in that S. 100, is a restricted right and has to be read subject to the provisions of S. 99, the assault made by the accused upon the deceased while he was endeavouring to violate the accused's wife brought the case within S. 100, even as qualified by S. 99 and the accused was entitled to an acquittal. A.I.R. 1933 All. 213=1933 A.L.J. 472=34 Cr. L. J. 882=144 Ind. Cas. 1010.

—Ss. 300 and 302—Accused's attack on deceased while protecting himself and persons in whom he was interested—Conviction under S. 302, is not justifiable. A.I.R. 1933 Lah. 1053=35 Cr.L. J. 468=147 Ind. Cas. 705.

—Ss. 300 and 304.—Where the accused were attacked by a strong and powerful adversary who dealt them blows with an iron-bound lathi and they, in order to protect their lives, attacked the deceased and caused his death:

Held, that they could not be convicted under S. 304. A.I.R. 1933 Oudh 59=9 O.W.N. 1146=34 Cr. L. J. 243=141 Ind. Cas. 751.

—Ss. 300 and 304—Person inflicting wounds in defending himself is not guilty.

The law does not require a citizen to behave like a rank coward on any occasion. The right of self-defence as defined by law must be fostered in the citizens of every free country. If a man is attacked he need not run away and he would be perfectly justified in the eye of law if he holds his ground and delivers a counter attack to his assailants provided

always that the injury which he inflicts in self-defence is not out of proportion to the injury with which he is threatened.

Where the accused is attacked by a party of men armed with dangs and having no alternative but to defend himself to the best of his ability retaliates, he acts in private defence although in doing so he inflicts injuries some of which prove fatal. 1930 Cr. C. 109=A.I.R. 1930 Lah. 93.

—Ss. 300 and 304.—One person, charged with lathis by five men, killed two in exercising right of self-defence—Exact number and force of blows necessary for such right is impossible to decide in such situation. 117 Ind. Cas. 907=30 Cr. L. J. 863=1929 Cr. C. 58=A.I.R. 1929 Lah. 494.

—Ss. 300 and 302—Free fight over the village bandh—Resisting trespasser of rival villagers—Death caused—Right of private defence exercised—Offence under S. 326 only.

People of the village S not heeding the Sub-Inspector's warning, having assembled, proceeded to cut the bandh. People of village K resisted but were turned back. Meanwhile a large crowd collected on both sides, armed with lathis, spears, and garases. People of K, seeing that the people of S were not likely to listen to their remonstrances, proceeded in a body to prevent them from cutting the bandh and to drive them away. A free fight ensued; one man from village S received mortal injuries and died on his way to the hospital. The Sessions Judge convicted the accused, who were residents of K under S. 302 read with Ss. 147 148 and 149, I. P. C.:

Held also, that under the circumstances of the case and keeping in view the fact that mortal injuries were caused to the deceased in a free fight and in the exercise of the right of private defence of person and property, the conviction of the accused appellants under S. 302 could not be sustained, especially when the deceased had received injuries from several other assailants. The conviction was therefore altered to one under S. 326, and the sentence of transportation for life passed was reduced to one of three years' rigorous imprisonment. 1929 Cr. C. 283=A.I.R. 1929 Pat. 523.

—Ss. 300 and 304—Deadly assault on wife of accused—Accused struck with aruval and killed—Private defence.

A dispute occurred about the headship of a family under whom the deceased and his sister were joint tenants, and in consequence there was a quarrel between them over taking charge of paddy stored in a store room. During the quarrel, the sister cried out that she was being killed. The accused, her husband, ran to the place and saw that his wife was being wounded and gave a blow with an aruval to the deceased. Another person who attacked accused was also wounded and he died.

Held, that the accused acted in private defence and was not guilty under Ss. 302 and 304. 94 Ind. Cas. 361=27 Cr. L. J. 617=1926 M. W.N. 212,



18 (e). Private defence—Right, when does not afford defence.

—Ss. 300 and 304—Private defence—Free fight between persons unknown to N—Firing by N—N cannot claim right of private defence of person or property.

It is notorious that the countryside in the province of Sind is infested with dacoits and criminals. N, who was permitted by the authorities to keep a gun and use it freely when any occasion arose, fired his gun on his own initiative at a crowd engaged in free fight with out knowing the identity of the person, with the result that one A was killed. N pleaded the right of private self-defence of person and property and further contended that his case fell under S. 304-A.

Held, that as N fired at a crowd of persons engaged in free fight there was no question of a mistake of fact which occasioned the exercise of the right of private defence either as regards person or property.

Held, also that N must have known when he fired his gun at a crowd that if the shot hit one of the persons, that person would be likely to die of the injury caused to him. The proper section applicable was S. 304 and not S. 304-A.

Held, further that having regard to unsettled conditions prevailing in country side, N should be given the liberal interpretation of his act. The act of N, while amounting to culpable homicide, was not one which amounted to murder and he should be convicted under S. 304 Part II. A.I.R. 1945 Sind 38=I.L.R. (1944) Kar. 420.

—S. 300.

One K established her title to a certain plot of land by a decree against one H, one of the accused, and obtained delivery of possession in execution of the decree. She then executed a sale-deed in favour of the Chaudhuris. The Chaudhuris had gone with labourers to plough the field when they were opposed by the Mahathas the party of the accused, who demanded that the Chaudhuris should stop ploughing because H said "the land belongs to me." On the Chaudhuris objecting that they had taken the land by a registered deed the party of the Mahathas made a violent attack on them with deadly weapons with the result that three persons from the party of the Chaudhuris were killed and two injured.

Held, that on the facts there was no right of private defence and the party of the accused were fortunate in escaping from a conviction on the charge of rioting.

Held, also that the injuries ascribed to the accused were inflicted with the intention of causing death or at least injury sufficient to cause death. The accused were, therefore, guilty of murder. A.I.R. 1942 Pat. 96=8 B.R. 43=43 Cr.L.J. 41=23 P.L.T. 438=196 Ind. Cas. 587.

—Ss. 300 and 302—Accused during altercation disarming deceased and stabbing him to death—No right of private defence can be claimed—Offence held murder.

There was an altercation between the accused and the deceased who was armed with hatchet. The accused first wrested the hatchet from the hands of the deceased and then stabbed him to death while the other accused held the deceased.

Held, that the accused were not acting in the exercise of the right of private defence but were guilty of murder. A.I.R. 1941 Lah. 45=42 Cr.L.J. 450=193 Ind. Cas. 594.

—Ss. 300, 302, 325 and 34.

Dispute between deceased and accused who were brothers, over right to possess certain land—Land admittedly in possession of accused—Deceased attempting to plough land—Accused and his party arriving on the spot—Sudden quarrel arising between parties and accused and his party inflicting injuries on deceased with sticks—Accused held to be guilty under S. 325-34 and not under S. 302—No right of private defence of person or property held to exist. A.I.R. 1938 Pesh. 18=39 Cr.L.J. 627=174 Ind. Cas. 678.

—Ss. 300 and 302.

An accused began a quarrel by acting in an improper manner towards the deceased's wife, and when he was asked by the deceased and the deceased's wife to leave the scene peacefully, he declined to do so. Consequently, a fight ensued in which the accused stabbed the deceased with a knife, who died as a result.

Held, that the accused had no right of self-defence and was guilty of murder. A.I.R. 1938 Rang. 441=40 Cr.L.J. 59=178 Ind. Cas. 413.

—Ss. 300 and 302—Parties going armed to the scene of fight expecting fight—Death of one member of one party—Offence.

Members of faction A went to a school armed with sticks with the intention of causing injuries to three men of faction B who had already gone there. The partisans of faction B, knowing of this came armed with hatchets and spears. The three persons who had already gone before joined their faction B and attacked the members of faction A with the result that one of the latter got a spear thrust and died on the spot. Commuting the death sentence passed on the assailant to that of transportation for life as the party attacked was initially the aggressor:

Held, that the person thrusting the spear could not take the plea of private defence. Any of the faction B, present at the assault could be convicted under S. 302, read with S. 34, even if it was found that he did not actually strike the deceased. A.I.R. 1934 Lah. 11=35 Cr.L.J. 1441=151 Ind. Cas. 887.

—Ss. 300, 302, 304, 100.

Deceased assaulting accused's pregnant wife violently with a weapon—Accused giving blows on deceased and fracturing skull—Accused giving water and allowing deceased to return home—Conviction either under Ss. 302 or 304. A.I.R. 1934 Pat. 588=1 B.R. 183=36 Cr.L.J. 316=153 Ind. Cas. 301.



**—Ss. 300 and 304.**

Where the accused was not doing a lawful act when he was attacked but was himself the aggressor and commenced the beating of his assailants which resulted in the death of one of them, he is not entitled to claim the right of private defence. A.I.R. 1934 Oudh 207=11 O.W.N. 425=35 Cr.L.J. 801=148 Ind. Cas. 804.

**—Ss. 300 and 302—Rejection of plea of self-defence—Effect.**

In a case where on a charge of murder, the plea of self-defence is rejected, the offence can only fall under S. 302, because if a man stabs another over the heart deliberately with a knife capable of penetrating into the heart, the law would presume that he intended to cause his death, and, therefore the offence would be murder. (1932) 138 Ind. Cas. 217=33 P.L.R. 287=33 Cr.L.J. 570.

**19. Proper way to deal with case under Ss. 299 and 300.**

**—Ss. 299 and 300—Case under—Proper way to deal with, stated—Stages by which it should be dealt, enumerated.**

The proper way, in which those who have to conduct criminal trials should approach the facts and apply the law in those cases where one person has, by doing some act, caused the death of another person is to deal with the matter by stages following.

**Stage 1:** The first stage requires that it shall be established to the satisfaction of the Court that the accused person has done an act by doing which he has caused the death of another person. This is the starting point.

**Stage 2:** The trial Court must next consider whether that act on the part of the accused amounts to culpable homicide.

**Stage 3:** Section 300, now, and only now, comes into operation. If it is established that an act which caused death was done either with one of the two intentions or with the knowledge necessary to cause that act to amount to culpable homicide, then, and then only, S. 300 comes into operation, and therefore the next thing to do is to ascertain whether the ingredients of S. 300 have been satisfied.

**Stage 4:** If the culpable homicide is murder: If the prosecution has proved that the act either (a) was done by the accused with the intention of causing death, or (b) fulfilled one of the other requirements of S. 299 and also fulfilled one of the other requirements of S. 300, then it must further be considered whether, on the facts of the particular case, the culpable homicide is brought down from the higher plane of murder to which it has been raised, to the lower plane of culpable homicide not amounting to murder, by reason of the case falling within any of the Exceptions of S. 300.

If the culpable homicide is not murder. If the culpable homicide is not murder, the only matter to be considered at stage 4 is whether the accused has established (if such is his case) the right of private defence as a complete defence under S. 96.

If in a case of culpable homicide amounting to murder, it is not established that the case comes within one of the Exceptions to S. 300, then it remains a case of murder. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

**20. Sudden fight—S. 300, Exception (4).**

**—S. 300 Excep. (4)—Sudden quarrel—Death caused by a blow with hammer on head.**

If a man, even in the course of a sudden quarrel, gives a terrific blow on the head of another with a weapon like a heavy hammer or a heavy hatchet and the result is that the headbones are smashed to pieces, it must, on the principle that a man intends the natural consequences of his act, be held that he intended to cause such bodily injury as he knew was likely to cause death or that the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The offence thus committed is therefore murder both under clauses secondly and thirdly to S. 300, I. P. Code, unless some exception to that section reduces it from murder to culpable homicide. Pak. L. R. (1950) Lah. 132=51 Cr.L.J. 962=A.I.R. 1950 Lah. 149.

**—S. 300, Excep. 4 and S. 302—Applicability—Quarrel between parties over past incident—Accused flushed with drink and getting provoked—Accused picking up lathi and striking head of deceased—Death—Offence.**

Where there is no fight, but only a quarrel in respect of a past incident between the accused and deceased, and there is no offer of violence or use of force on the part of the deceased, and the accused who is in a state of drink gets provoked and takes up a lath and strikes a blow on the head of the deceased, intending to break his head, and the deceased dies in a few minutes, the offence is clearly one of murder, and Exception 4 to S. 300 does not apply so as to reduce the offence to culpable homicide. Though the accused may not intend to kill the deceased, he must be held to intend to break his head, and that is sufficient to attract the application of S. 302, I. P. Code. 49 Cr.L. J. 110=A.I.R. 1948 Lah. 75.

**—S. 300, Excep. 4—Applicability—Test of—Stab by knife following verbal altercation—Death—Offence—Right to claim benefit of exception.**

A mere verbal quarrel preceding a stab with a knife would not ordinarily raise a question as to the applicability of Exception 4, to S. 300, I. P. Code. A word or a gesticulation may be as provocative as a blow, but such a case is rare. The proper test of the applicability of Exception 4 to S. 300 is whether or not the accused shows that he acted solely out of the provocation engendered by the heat of a sudden quarrel followed by a sudden fight. Where one person picks up a knife and stabs another in the stomach merely following an exchange of heated words, the ordinary inference is that the attacker has acted out of some other motive as well as the provocation that may have been engendered by the verbal altercation. Exception 4 to S. 300, I. P. Code, cannot be availed of in such a case by the



attacker. 25 Pat. 335=A.I.R. 1947 Pat. 168=48 Cr.L.J. 838.

—S. 300, Excep. 4—Applicability—Quarrel—Exchange of hot words and blows—Parties separated and disengaged—Accused going home and fetching deadly weapon and thrusting it in back of deceased who stands unguardedly—Death caused—Offence.

Where after a sudden quarrel in which hot words and blows are exchanged between the accused and the deceased, the parties get disengaged, being separated by the persons present there, the accused runs to his house near by and comes out of it with a barchha and thrusts it in the back of the deceased who falls down, and the injury is found sufficient to cause death in the ordinary course of nature, the offence is murder. Exception 4 to S. 300, I. P. Code, does not apply to the case. The act of the accused must be held to be deliberate and calculated in that he attacks the deceased who is unguarded. 231 Ind. Cas. 400=48 Cr.L.J. 786.

—S. 300, Excep. 4 — Applicability — Conditions—Accused party going out fully armed and prepared for fight—Some carrying hatchets — Blow on head with hatchet causing death — Offence.

Exception 4 to S. 300, I.P.Code, can apply only if all the four conditions laid down are satisfied: (1) absence of premeditation; (2) there must be a sudden fight; (3) the killing must be in the heat of passion upon a sudden quarrel; (4) the offender should not have taken undue advantage or acted in a cruel or unusual manner. Where a party of persons go out fully armed and fully prepared for a fight, some of them armed with hatchets, and in the fight some of them kill one of the persons on the other side who resist the trespass and aggression by the accused party, Exception 4 to S. 300 cannot apply. Causing death by Causing a fatal injury on the head with a hatchet is murder. The intention must be presumed to be to cause death. 230 Ind. Cas. 277=18 Cr.L.J. 590=48 P.L.R. 526=A.I.R. 1947 Lah. 236.

—Ss. 300, Excep. 4, 302 and 304, Part I — Sudden fight—Accused exceeding right of private defence—Offence committed.

Where there was a sudden quarrel leading to a sudden fight and without premeditation, exception 4 to S. 300, I.P.Code, clearly applies. If when the deceased was about to strike with a stick, the accused gave him a blow on his head with his kulhari and caused his death, he exceeded his right of private defence, and is guilty of an offence under S. 304, Part I, and not under S. 302, I. P. Code. 226 Ind. Cas 29=47 Cr.L.J. 810=48 P.L.R. 39=A.I.R. 1946 Lah. 275.

—S. 300, Excep. 4—Applicability—"Fight"—Blows on each side—If necessary.

Per Mohd. Sharif. J.—If A beats B, without B having beaten A, it can nevertheless be a fight. In order to apply Exception 4 to S. 300, I.P. Code, it is not essential that there should have been blows on each side. A word or a gesticulation may be as provocative as a blow.

Per Teja Singh, J.—If a person gives a blow to another, there will be a fight only if the other hits him back or at least he gets ready and attempts to assault but none if he keeps quiet and does nothing. In that case, it will be only a one-sided attack but not a fight. If blows are exchanged, the fact that the person assaulted hits back in self-defence would not make any difference. If, in the course of a sudden quarrel, one of the parties gives a blow to his adversary and that blow results in death, he cannot take advantage of Excep. 4 notwithstanding the fact that after he has given the blow, he is belaboured by the deceased, before he dies, or by his companions, for the simple reason that at the time he gave the fatal blow, there was no fight. 221 Ind. Cas. 675=48 P.L.R. 56=47 Cr.L.J. 234=A.I.R. 1946 Lah. 41.

—Ss. 300, Excep. (4) 302 and 304—Sudden fight—No premeditation—Accused in heat of passion striking by knife—Injury caused near liver—Conviction held should be altered from one under S. 302 to one under S. 304.

Something was said in the course of a conversation between two men which led to sudden quarrel, and that led to a sudden fight. There was no premeditation, the fight was sudden and it had been the result of a sudden quarrel. In the course of the sudden fight, the accused in heat of passion, took out a knife (which was not of a very dangerous character) which happened to be with him and struck out without aiming at any particular part of the body. It landed on a part of the deceased's body which was not far removed from a vital organ, namely, the liver, and caused an injury to that organ which brought about the death of the deceased:

Held, that the accused did not take undue advantage or act in a cruel or unusual manner. The conviction should be altered from one under S. 302 to one under S. 304, para. 2. A.I.R. 1946 All. 19=1945 A.L.J. 388=47 Cr.L.J. 469=222 Ind. Cas. 477.

—S. 300, Excep. (4)—Fight—Weapon not necessary.

(Per Verma J.) The "fight" contemplated by the Exception need not necessarily be with weapons. A.I.R. 1946 All. 19=1945 A.L.J. 388=47 Cr.L.J. 469=222 Ind. Cas. 477.

—S. 300, Excep. (4) and S. 304—Illegal seizure of bullocks by person amounting to theft—Struggle between owner and such person—Owner exceeding private right of defence of person and property and causing death of such person—Lack of premeditation and sudden fight—Held accused's action fell under Excep. (4) to S. 300—No intention to cause death—Accused rightly adjudged liable under Part 2 of S. 304.

A seized some bullocks belonging to B which had strayed into his field and released them on B's assurance that the damage caused by them would be estimated by panchas. Two days later A went to B and demanded compensation, but B temporised. Next day while the cattle were being driven to field by B's servants, A with the help of his brother D seized them and began to drive them to the cattle pound. Soon B and his brother C arrived on the scene and a quarrel ensued. B opened the attack against D and in the course of the struggle A also joined and struck B who shouted for help. At this stage F, B's servant, dashed to separate B and D. Thereupon C struck A on the head with



his stick which resulted in the fracture of skull and death of A. B was convicted under S. 323, Penal Code, and C under S. 304 (2). In appeal against their convictions, B and C pleaded right of private defence of person and property:

**Held**, that (1) the seizure of the bullocks by A and D after 24 hours after the trespass was illegal and amounted to theft and therefore gave B and C a right of private defence of property under S. 97, Penal Code. But S. 97 is subject to S. 103 under which the right of private defence of property extends to the voluntary causing of death or of other harm to the thief under such circumstances as may reasonably cause the apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. Section 103 is itself subject to S. 99;

(2) that so far as the right of private defence of person was concerned, S. 97 is subject to restriction in S. 99 and the provisions of S. 100 under which the right extends to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise is *inter alia* such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault;

(3) that as B opened the attack by hitting D, he was the aggressor and the question of defending his person did not arise. When the struggle was going on there were on the scene B and C with F on one side and A and D on the other. The odds were very much in favour of B and C and as F's intervention was for peaceful purpose C could not have had a reasonable cause for apprehending death or grievous hurt either to B or to himself. He was therefore not entitled to attack A in the manner shown. Therefore C by striking A on the head clearly exceeded any right of private defence to which he might have otherwise been entitled;

(4) as C acted in the heat of passion and in view of lack of premeditation, the suddenness of fight and the absence of undue advantage, his act fell within the scope of Excep. 4 to S. 300, Penal Code, and he was rightly adjudged liable under S. 304 (2), Penal Code, as the act was done with the knowledge that it was likely to cause death but without the intention of causing death. A.I.R. 1946 Nag. 221 = I.L.R. (1946) Nag. 326 = 1946 N.L.J. 198 = 47 Cr.L.J. 348 = 223 Ind. Cas. 123.

—S. 300, Excep. (4)—Two accused charged with murder—Finding of jury that one of them came within Excep. 4 to S. 300—Effect.

Two accused were charged with murder. The jury acquitted them of this charge but found that one of them brought himself within Excep. 4 to S. 300:

**Held**, that when once the jury were satisfied that one of the accused had brought himself within Excep. 4, there was no room for the application of S. 34 against the other at all. A.I.R. 1940 Cal. 147 = 70 C.L.J. 299 = 41 Cr.L.J. 383 = 186 Ind. Cas. 847.

—S. 300, Excep. (4)—Scope.

In order to bring a case within Excep. 4 to S. 300, it is necessary to establish *inter alia* that the act was done upon a sudden quarrel and where, therefore, there is no quarrel either sudden or otherwise, it is unnecessary to look further and enquire whether there have been established any of the other facts which are essential for the purpose of bringing a case within this

exception. A.I.R. 1939 Rang. 225 = 40 Cr.L.J. 725 = 183 Ind. Cas. 145.

—S. 300, Excep. (4)—Criterion.

Whether or not the killing was premeditated is not the first test to be applied when considering, whether the exception of "a sudden fight in the heat of passion" is applicable to any given set of facts. The first test is whether the act of the accused which caused the deceased's death was done without premeditation. The distinction is not to be ignored. If the other essentials necessary to bring a case within Excep. (4) to S. 300 are also established, such as, whether the accused acted in the heat of passion or whether the accused acted in a manner which was either cruel or unusual and the exception is thereby brought into play, the effect would be to reduce what would otherwise be murder to culpable homicide not amounting to murder. A.I.R. 1939 Rang. 225 = 40 Cr.L.J. 725 = 183 Ind. Cas. 145.

—S. 300, Excep. (4)—Applicability.

The fourth exception to S. 300, Penal Code, covers acts done in a sudden fight. 1937 M.W.N. 1129.

—Ss. 300, Excep. (4), 302, 304—Sudden quarrel.

Where as a result of a quarrel between the parties which was admittedly sudden, a fight ensued and one person was killed and it appeared that in all probability the assailants had run to take part in the fight with the winnowing implements which they were using in their respective threshing floors and had inflicted blows with them.

**Held**: that the offence was one of culpable homicide not amounting to murder and fell under S. 304, Part I of the Penal Code. A.I.R. 1932 Lah. 3 = 33 P.L.R. 513 = 34 Cr.L.J. 535 = 143 Ind. Cas. 125.

—S. 300, Excep. (4)—Blow inflicted in sudden fight.

A person who strikes a heavy blow on the head of another with a weapon such as a pestle, must be deemed to intend to cause such bodily injury as is likely to cause death and even when such a blow is given in the course of a sudden quarrel between the accused and the deceased causing the death, the offence committed is one of murder. 177 Ind. Cas. 944 = 1938 M.W.N. 871 (1) = 48 L.W. 415 = 39 Cr.L.J. 979.

—Ss. 300, Excep. (4), 302—Accused armed with spears and lathis—Offence.

In a fight that took place between two sets of men it appeared that the accused were armed with spears and other sharp edged weapons and lathis and persons on the other side, were armed with lathis only. From the nature of the injuries sustained inflicted with spears in the side, breast and abdomen, it was clear that the assailants had the intention to cause death:

**Held**, that the offence was one of murder punishable under S. 302, Penal Code, and was not covered by the fourth exception to S. 304. A.I.R. 1933 Lah. 296 = 35 Cr.L.J. 626 (2) = 148 Ind. Cas. 36.

—S. 300, Excep. (4)—Use of weapon by accused against unarmed person—Exception 4 to S. 300, if applies.



The using of a weapon by one person against an unarmed person in a sudden fight is not within the limits of Excep. 4 to S. 300, of a sudden fight, because it is expressly provided that no unfair or undue advantage must be taken by one of the combatants, if the plea of sudden fight is to be raised by way of exception. A.I.R. 1938 Rang. 15=39 Cr.L.J. 300=173 Ind. Cas. 299.

**—S. 300, Excep. 4—Taking undue advantage.**

When a man attacks an unarmed person with a dagger he takes undue advantage and acts in a cruel manner. A.I.R. 1940 Pesh. 1=41 Cr.L.J. 574=188 Ind. Cas. 313.

**—S. 300, Excep. (4)—Striking unarmed person—Offence.**

Where the accused who in a sudden fight strikes an unarmed person with a stick, thereby causing his death, and himself getting a few scratches on his back, Excep. 4 of S. 300, does not apply. A.I.R. 1937 Pesh. 101=39 Cr.L.J. 142=172 Ind. Cas. 449.

**—S. 300, Excep. (4)—Application of—Sentence.**

To attract the application of the fourth exception to S. 300, Penal Code, it is necessary to show that the accused did not take undue advantage or acted in a cruel or unusual manner. Where a person without provocation takes out a knife and stabs an unarmed person, he acts in a cruel or unusual manner.

The question of sentence considered. 1937 M.W.N. 1236.

**—S. 300, Excep. (4)—Accused armed with hatchet attacking deceased unarmed—Case not one of sudden fight—Offence not committed in heat of passion—Exceptions 2 and 4, if apply.**

Where the accused was armed with a hatchet when he attacked the deceased who was unarmed and the case could not be said to be one of sudden fight, or that in the heat of passion the accused without having taken undue advantage or without having acted in a cruel or unusual manner did what he is alleged to have done, Excep. 2 and 4 to S. 300 cannot be availed of by him. A.I.R. 1936 Sind 31=37 Cr.L.J. 483=161 Ind.Cas. 414.

**—S. 300, Excep. (4)—Criterion for application of.**

The number of wounds is not the criterion, but in fact the position of the two combatants with regard to their arms and also the use of those arms are the considerations to be kept in mind when applying Excep. 4 to S. 300. Consequently, where the deceased is not armed but the accused is and he causes grievous hurt to the deceased with fatal results by causing only one wound, he is not protected by Excep. 4 to S. 300, and the offence committed is murder. A.I.R. 1935 Pesh. 59=36 Cr. L. J. 914=156 Ind. Cas. 6.

**—Ss. 299, and 300—Attack on man unarmed—Heat of passion—Undue advantage of victim's helplessness—Murder.**

Where the accused took undue advantage of the victim, who was lying on his charpoy when he was attacked with a formidable weapon, was not armed and was not in a position to defend himself.

**Held:** that the crime was one of murder even though committed without premeditation and in the heat of passion. 101 Ind. Cas. 191=28 Cr. L. J. 415=A.I.R. 1927 Lah. 808.

**—S. 300, Excep. (4)—Sudden quarrel—Single dang blow on head—Death—Offence.**

Where in a sudden quarrel, the accused deals a single blow with a dang on the head of his antagonist an old man whose weakness and enlarged spleen might have hastened his death which ensues, the accused is guilty not of murder but of culpable homicide not amounting to murder. A.I.R. 1934 Lah. 467=35 P.L.R. 371=36 Cr.L.J. 629=155 Ind. Cas. 77. (1).

**—S. 300, Excep. (4)—Unpremeditated assault—No intention to cause death—Offence.**

Where the assault was committed by an impulsive young man as a result of sudden excitement, and though he gave two blows to his victim, neither of the blows was aimed at a vital part of the body, and it appeared that it could not have been present to the mind of the accused that a stab on the frontal prominence of the hip would penetrate the abdominal cavity:

**Held,** that the accused had no intention to cause death or such bodily injury as was likely to cause death, that at the most he could be burdened with knowledge that his act was likely to cause death and that he should be convicted under S. 304, Part II and not S. 302. A.I.R. 1934 Lah. 332=35 Cr.L.J. 1319=151 Ind. Cas. 469.

**—S. 300, Excep. (4)—Splitting skull of an unarmed man with hatchet—No apprehension of injury to accused—Excep. 4 does not apply.**

Although culpable homicide is committed without premeditation and in a sudden fight, and also in the heat of passion upon a sudden quarrel, when a man uses a hatchet on another unarmed man and strikes him a blow on the head with that hatchet splitting his skull while he was under no reasonable apprehension of injury to himself, he cannot claim the protection of Exception 4. 94 Ind. Cas. 134=8 L.L.J. 188=27 Cr.L.J. 566=27 P.L.R. 244=A.I.R. 1926 Lah. 361.

**—S. 300, Excep. (4)—One member in a brawl striking with hatchet—Victim unarmed and taking no active part—Excep. 4 does not apply.**

When a brawl is taking place in which the assailants on both sides are using sticks a member of one side, who intervenes with a hatchet and strikes over the head of a member of the other side, who is empty-handed and is taking no active part in the fight and kills him in consequence commits murder and nothing less. Excep. 4, S. 300 I.P.C. has no application. 107 Ind. Cas. 177=5 O.W.N. 29=29 Cr.L.J. 230=9 A.I.Cr.R. 488=A.I.R. 1928 Oudh 221.

**—S. 300, Excep. (4)—Undue advantage when can be deemed to be taken.**

When Excep. IV to S. 300 is applicable at the beginning of a fight, it cannot be held that one of the participants has taken an undue advantage over the other, because the latter has acknowledged defeat and has turned tail, and thereupon the former combatant pursues the advantage which he has



obtained. A.I.R. 1937 Rang. 2=38 Cr.L.J. 321=167 Ind. Cas. 114 (D.B.).

—S. 300, Exception 4—Absence of premeditation—Accused stabbing deceased in heat of passion—Offence.

Where there is no premeditation on the part of the accused who stabs the deceased fatally in heat of passion upon a sudden quarrel and no undue advantage is taken of the deceased, the offence is one of culpable homicide not amounting to murder and Excep. 4 to S. 300, applies. A.I.R. 1937 Rang. 2=38 Cr.L.J. 321=167 Ind. Cas. 114.

—S. 300. Excep. (4) — Injury resulting in death—Offence,

Where there was in fact a sudden fight and everyone was trying to hit one of the opposite side and no body thought about the private right of self-defence and one person from the opposite side received blows during the fight which resulted in his death:

**Held**, that the offence committed was culpable homicide. A.I.R. 1935 All. 428=36 Cr.L.J. 1145=1935 A.W.R. 340=157 Ind. Cas. 422.

—Ss. 300 and 304—Skewer for breaking ice, picked up and plunged into stomach of victim in heat of passion—Offence.

The deceased was instrumental in raiding a house, where the accused and some others were gambling. The raid, however, was unsuccessful. Some days afterwards, the deceased and the accused met in a hotel where an altercation started, the accused saying that if the deceased took steps to have him captured again, he would kill him outright. The deceased got up and said that he could not kill him and he could try whether he could. Thereupon the accused who had picked up a long skewer-like instrument for breaking ice in his hand, thrust it into the stomach of the deceased and the deceased died of those wounds:

**Held**, the crime was unpremeditated, that there was a sudden altercation and fight and that the accused picked up a skewer for breaking ice in the heat of passion and plunged it into the stomach of his victim. It was not a weapon which he was carrying himself and everything pointed to the suddenness of the fight. Consequently, the offence he committed was culpable homicide not amounting to murder punishable under the first part of S. 304, Penal Code. A.I.R. 1935 Lah. 149=36 Cr.L.J. 190=152 Ind. Cas. 860.

—S. 300, Excep. (4)—Exchange of abuses and sudden fight—Accused stabbing deceased—Absence of motive—Offence.

The deceased and his brother while coming home in the evening came to a dry water course where the accused was sitting. The deceased and he commenced to exchange abuses and grappled with each other. During the struggle, the accused suddenly took out his knife and stabbed the deceased piercing the lung and causing his death. Motive was not established:

**Held**, that in the district where the incident took place, knives were commonly carried and the accused suddenly, without realising the consequences, in the heat of passion, thrust the knife into the side of the deceased during the fight and that Excep. (4) to

S. 300, applied to the case and the offence was that of culpable homicide not amounting to murder punishable under the first part of S. 304. A.I.R. 1934 Lah. 818=35 Cr.L.J. 1165=150 Ind. Cas. 640.

—S. 300, Exception 4, when available.

The latter part of the exception provides that the offender must not have taken undue advantage or acted in a cruel and unusual manner. 1934 M.W.N. 47.

—S. 300, Excep. (4).

Where the accused and the deceased simultaneously made preparation to assault each other with deadly weapons and they immediately fought:

**Held**, that the accused could not be held to have succeeded in the plea of self-defence, but that the case fell under Excep. 4 to S. 300. A.I.R. 1933 Rang. 142=34 Cr.L.J. 783=144 Ind. Cas. 420.

—S. 300, Exception (4) — Application of.

Whether there is premeditation or not, Excep. 4 to S. 300 cannot apply even if the accused stabbed in the heat of passion upon a sudden quarrel when the stab cannot be said to have been given without the offender having taken undue advantage. A.I.R. 1933 Pat. 508=14 P.L.T. 464=35 Cr.L.J. 725=148 Ind. Cas. 574.

—S. 300, Exception (4)—When applicable,

The fact that an offence was committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel, is not alone sufficient for the application of Excep. 4 to S. 300. It must also be found that the offender did not take any undue advantage or did not act in a cruel or unusual manner. A.I.R. 1933 Oudh 438=10 O.W.N. 986=35 Cr.L.J. 115=146 Ind. Cas. 563.

—S. 300—Exception (4)—When applies.

In order to take advantage of Excep. 4 to S. 300, it must be shown that the offender did not take undue advantage or act in a cruel or unusual manner. A.I.R. 1932 Lah. 606=33 P.L.R. 718=34 Cr.L.J. 462=142 Ind. Cas. 901.

—Ss. 300 and 304—Sudden altercation—Single blow on head—Offence.

The accused and his uncle lived in adjacent houses. One day the accused found his uncle digging some earth in a land leading to his house; an altercation arose and the accused struck his uncle on the head with a lathi with the result that the latter fell down unconscious and died soon after:

**Held**, on the facts that the offence amounted only to culpable homicide not amounting to murder within S. 304, Part II of the I. P. C. 137 Ind. Cas. 267=33 Cr.L.J. 446=33 P.L.R. 546.

—S. 300, Excep. (4)—Six injuries on head—Exception (4) not applicable.

In a case under S. 302, where it was found that the deceased who was unarmed and who had not assaulted the accused had as many as six injuries on his head:



**Held**, that it was difficult to hold that the case fell within Excep. (4) to S. 300, because even assuming that the quarrel was sudden, the accused must have acted in a cruel manner in so assaulting and causing so many injuries to a man who was unarmed. A.I.R. 1931 Lah. 280=32 Cr. L. J. 1254=134 Ind. Cas. 829.

—Ss. 300 and 304—Offence under.

A sudden dispute arose between the accused and another person. The deceased, who was a friend and partisan of the other party, came upon the scene and the accused thinking that he came to help his opponent, gave only one blow to him with a kasi with which he was scraping grass. The blow resulted in the death of the deceased.

**Held**, that as the culpable homicide was caused without premeditation and only one single blow was given, the offence was punishable only under S. 304. 115 Ind. Cas. 144=1929 A.L.J. 508=10 L.R.A.Cr. 78=11 A.I.Cr.R. 537=30 Cr. L. J. 410=1929 Cr.C. 77=A.I.R. 1929 All. 535.

—S. 300, Excep. (4) — Sudden quarrel—A blow on the head and another on the leg not cruel and unusual act.

Where the accused struck with lathi only one blow on the head and one on the leg in a sudden and unpremeditated quarrel, such blows with a lathi do not amount to acting in a cruel and unusual manner and the accused is entitled to the benefit of the Exception 4. 121 Ind. Cas. 724=30 P.L.R. 487=1929 Cr.C. 311=31 Cr.L.J. 289=A.I.R. 1929 Lah. 719.

—Ss. 300 and 304 — Sudden quarrel — Both parties armed and receiving injuries—Proper section is 304.

Where there was a sudden quarrel and a fight, in the course of which the deceased was stabbed by the accused and the accused himself received an injury from some weapon such as a knife:

**Held**, that the accused cannot be said to have taken undue advantage of the deceased since he himself was attacked and wounded also by a knife, and the more appropriate section under which the accused should have been convicted is S. 304. 97 Ind. Cas. 952=27 Cr.L.J. 1192 (Mad.).

—Ss. 300 and 304 —Fracturing of skull with a lathi in sudden anger—Death caused—Intention to kill cannot be inferred.

Where the wife of the accused and the deceased woman were quarrelling and the accused being provoked by the abuse given to his wife, in sudden anger struck the deceased a heavy blow on the head with a heavy lathi and fractured her skull and caused her death:

**Held**, that the circumstances of the case did not lead to the inference of an intention to kill and it could not be inferred on the evidence that the accused had the knowledge that the act was so imminently dangerous that it must in all probability cause death. 102 Ind. Cas. 349=8 A.I.Cr.R. 189=8 P.L.T. 591=28 Cr. L. J. 541=A.I.R. 1927 Pat. 406.

—S. 300, Excep. (4)—Subsequent conduct.

Exception 4 to S. 300 is meant to apply to cases wherein, in whatsoever way the quarrel originated, the subsequent conduct of both the parties put them upon an equal footing. 93 Ind. Cas. 251=8 L.L.J. 93=27 Cr.L.J. 459=27 P.L.R. 132=A.I.R. 1926 Lah. 219.

—Ss. 300 and 304.

Where the accused had a pistol upon him but he did not come with the intention of using it out, and he used it in the course of a sudden fight:

**Held**: that he is guilty only of culpable homicide, not amounting to murder under the first part of S. 304. 93 Ind. Cas. 251=8 L.L.J. 93=27 Cr.L.J. 459=27 P.L.R. 132=A.I.R. 1926 Lah. 219.

—S. 300, Excep. (4) — Only one out of four injuries serious — Accused received twelve injuries, some serious—Offence committed without premeditation—Excep. 4, applies.

Where the accused was found to have caused four injuries to the deceased with a clasp knife and the only serious injury was one in the abdomen of the deceased and the accused to save himself received presumably at the hand of the deceased no less than twelve injuries including a contused wound on the front of his head and a fracture of metacarpal bone of the index finger of the right hand.

**Held**: that the offence was committed without premeditation in a sudden fight and the accused was entitled to the benefit of the 4th exception to S. 300. 91 Ind. Cas. 58=7 L.L.J. 538=26 P.L.R. 620=27 Cr.L.J. 26=A.I.R. 1925 Lah. 633.

—Ss. 300 and 304 — Death caused by knife stabbed in sudden fight—Offence falls under section.

A sudden fight arose between accused and another person about drawing water at a tap. They abused each other and in the heat of the moment accused drew out his knife and stabbed his opponent in the chest. This resulted in the latter's death.

**Held**: that the knife though it had a blade of only three or four inches was a dangerous weapon as it had actually caused a fatal injury, and that the accused, though, he did not intend to cause death or to cause such injury as was likely to cause death yet he must have known that he was likely to cause death and that he was therefore guilty of an offence under Section 304 (2). 82 Ind. Cas. 361=25 Cr. L. J. 1289=A.I.R. 1925 Lah. 148.

—Ss. 300 and 304.

Because the fight is a sudden one, it cannot be said that each accused must be held responsible only for the part played by him individually. 40 All. 686 Foll. 24 P.R. 1919, Foll. Where it is proved that each of the two accused used kulhari or axe, and their intention when they attacked the deceased, was a common one:

**Held**, the intention must be presumed to have been to inflict injuries likely to cause death. It is not necessary to make out premeditation in order to establish a common intention at the moment of



action. 76 Ind. Cas. 692=25 Cr.L.J. 228=A.I.R. 1923 Lah. 336.

—S. 300, Excep. (4)—Fatal assault—Sudden fight.

Owing to a dispute about payment of rent three men attacked two others with lathis. A free fight took place. Considerable injuries were inflicted on both sides. One of the persons attacked received several injuries which culminated in his death, some of which were inflicted after the deceased had been felled to the ground. It did not appear, however, which of the injuries had been caused by which of the assailants. **Held**, that the accused were guilty of culpable homicide not amounting to murder under S. 304, I.P.C. as the assault was sudden and the injuries had been inflicted in the heat of passion. 40 All. 686=16 A.L.J. 751=19 Cr.L.J. 953=47 Ind. Cas. 805.

—S. 300, Excep. (4)—Sudden fight—‘Using knife when no danger to body.’

Mere use of knife by accused, where there is no danger, even of serious hurt to his person, deprives him of the protection under exception. 4 of S. 300, I.P.C. 4 Cr.L. Rev. 373, Foll. 16 Cr.L.J. 747=31 Ind. Cas. 347. (Mad.).

—S. 300, Excep. (4)—Sudden fight—Culpable homicide—Scope.

It is not culpable homicide where an accused on a sudden quarrel without premeditation and on the spur of the moment causes the death of a human being by striking a blow on his head with Chhavi. 3 P.L.R. 1914=4 P.W.R. 1914 Cr.=15 Cr.L.J. 178=22 Ind. Cas. 754.

—Ss. 300, Excep. (4) 323 and 325—Sudden fight Death—Absence of conclusive proof.

Where one of several persons engaged in a sudden fight died by a severe blow and it was not proved conclusively as to who caused the blow or as to whether accused or any member of his party intended or knew that he is likely that such would be the result the accused should not be convicted under S. 304 or 325; but only under S. 323 of the Code. 1 P.W.R. 1913 Cr.=14 Cr.L.J. 104=162 P.L.R. 1913=18 Ind. Cas. 664.

—S. 300 Excep. 4—Sudden fight.

Where it is proved that there was a fight between the accused and the deceased in the course of which the latter received the injuries and died, but there was not sufficient cause of the motive for the murder. **Held**, that the accused might properly be given the benefit of Excep. 4 of S. 300 and convicted of culpable homicide not amounting to murder. 5 M.L.T. 207=11 Cr.L.J. 191=4 Ind. Cas. 1116.

—S. 300, Excep. (4)—Murder sudden fight—Private defence.

Where the accused's party pursued the complainants in three boats for a long distance and then when they had them in their power landed and attacked them with spears and killed three of them, their action does not come within Exception 4 to S. 300, but certainly amounts to murder. There is no right of private defence against persons who are merely taking refuge in the offender's land from other persons trying to take their lives. 29 C. 306, Foll. (1907) 8 C.L.J. 561.

21. Sufficient or likely to cause death.

—Ss. 299 and 300—Offence under—Bodily injury intended to be inflicted sufficient to cause death—Injury to vital part—If necessary.

Per Puranik, J.—Injury to a vital part of the body is not necessarily an ingredient to determine whether the case falls under S. 300, I. P. Code, or not. If the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death the offence falls under S. 300. I.L.R. (1945) Nag. 931=222 Ind. Cas. 389=47 Cr. L. J. 441=A.I.R. 1946 Nag. 120=1945 N.L.J. 612.

—Ss. 299 and 300—Offence, held fell under S. 300.

Where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death, the offence falls under S. 300.

An accused giving several blows with a fairly heavy lathi on the body of the deceased causing fracture of two ribs, injury to pleura and laceration and puncture of one of the lungs was guilty of murder. A.I.R. 1946 Nag. 120=47 Cr.L.J. 441=I.L.R. (1945) Nag. 931=222 Ind. Cas. 389.

—Ss. 299 and 300—Injury in ordinary course of nature sufficient to cause death, what is—Probability of death very great.

An injury sufficient in the ordinary course of nature to cause death need not be an injury which inevitably and in all circumstances must cause death. If the probability of death is very great, then the requirements of thirdly, under S. 300, are satisfied, and the fact that a particular individual may by the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution have survived an injury which would prove fatal to the majority of persons subjected to it is not enough to prove that such an injury is not sufficient “in the ordinary course of nature” to cause death. A.I.R. 1944 Mad. 223=57 L.W. 13=(1944) 1 M.L.J. 25=1944 M.W.N. 29=45 Cr.L.J. 729=I.L.R. (1944) Mad. 763=214 Ind. Cas. 113.

—Ss. 299 and 300.

It is not correct to say that the words “sufficient in the ordinary course of nature” in cl. 3 of S. 300, can only be applied when death must be an almost certain result. A.I.R. 1942 Lah. 255=43 Cr.L.J. 812=I.L.R. (1942) Lah. 145=202 Ind. Cas. 315.

—Ss. 299 and 300—Sufficient in the ordinary course of nature to cause death—What is.

Whether an injury is or is not sufficient in the ordinary course of nature to cause death, is a question of fact and it does not cease to be sufficient merely because the person who inflicts the injury does not know that it is sufficient. A.I.R. 1939 Lah. 245=I.L.R. (1939) Lah. 77=41 P.L.R. 443=40 Cr.L.J. 712=182 Ind. Cas. 900.

—Ss. 299 and 300—Sufficient to cause death—What is.

Where a wound inflicted is not necessarily fatal but the injury is sufficient in the ordinary course of nature to cause death and the actual death is caused by an infection setting in the wound, the fact makes no dif-



ference to the criminal responsibility of the person charged. A.I.R. 1938 Rang. 56=39 Cr.L.J. 412=174 Ind. Cas. 338. (D.B.).

—**Ss. 299 and 300—Distinction between, whether bodily injury is likely to cause death and whether such injury is sufficient in ordinary course of nature to cause death.**

The distinction between whether a bodily injury intended to be inflicted is likely to cause death and whether such injury is sufficient in the ordinary course of nature to cause death is fine but appreciable, and it is a question of degree of probability. The matter would generally resolve itself into a consideration of the nature of the weapon used. Although such consideration may give rise to much anxious consideration and difficulty when the weapon used is the one so frequently employed in this country, namely, a lathi, there is no such difficulty when the weapon used is a rifle, and a rifle aimed at the head at a distance of about 2 feet. The injury intended to be inflicted, if there be intention, is one which transcends the possibility of a likelihood of death, and must come within the category of an "injury sufficient in the ordinary course of nature to cause death." A.I.R. 1937 Nag. 274=39 Cr. L. J. 92=172 Ind. Cas. 204.

—**S. 300—Striking with dah at skull.**

A man who strikes another on the head with dah with such force as to divide the skull right through and expose the brain, must be held to know that he will inflict an injury that may be sufficient in the ordinary course of nature to cause death and, therefore, must be held to intend the natural consequences of his act. A.I.R. 1937 Rang. 429=39 Cr.L.J. 217=172 Ind. Cas. 926.

—**Ss. 299 and 300—Stab in abdomen with force.**

A person who stabs another in the abdomen with sufficient force to penetrate the abdominal walls must undoubtedly be held to have intended to cause injury sufficient in the ordinary course of nature to cause death. But it must be understood that that means that it is his intention in the ordinary way, because all presumptions with regard to intention are rebuttable. A.I.R. 1936 Rang. 421=37 Cr.L.J. 1050=14 R. 716=164 Ind. Cas. 884. (F.B.).

—**Ss. 299 and 300.**

Dacoity—Gunners having lightmen to spot out person—Shot fired only on lower part of body—Injury on stomach—Death:

**Held**, that the intention of the dacoits was not to kill but only to cause some injury as would disable the deceased from offering resistance either by his acts or his shouts and the bodily injury was not sufficient in the ordinary course of nature to cause death and the first two clauses of S. 300, were excluded. A.I.R. 1935 Cal. 580=39 C.W.N. 188=36 Cr.L.J. 1322=158 Ind. Cas. 176 (S.B.).

—**Ss. 300 and 302—Stab wound penetrating walls of abdominal cavity.**

A stab wound which penetrates the wall of the abdominal cavity ought to be held to be one which is sufficient to cause death in the ordinary course of nature. A.I.R. 1935 Rang. 408=37 Cr.L.J. 214=159 Ind. Cas. 1058.

—**Ss. 299 and 300—Datura administered to make the patient come for treatment—Intended to cause injury sufficient in the ordinary course to cause death.**

Datura was administered in sharbat on a boy 10 years old in order that according to accused's explanation the victim might become mad and his mother might seek accused's assistance for medical treatment of her son and so come under his influence. The boy died within three or four hours after drinking sharbat. The assessors were of opinion that there was no intention to cause death.

**Held:** (1) That the fact that the accused had no intention to cause death does not take the case out of the purview of S. 300. The act by which the death was caused was done with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death and the case satisfied the requirements of S. 300 so as to sustain conviction under S. 302. (2) That the explanation was reasonable and so case did not call for extreme penalty. 120 Ind. Cas. 534=1930 Cr.C. 106=31 Cr.L.J. 140=A.I.R. 1930 Lah. 90.

—**Ss. 300 and 302—Datura poisoning—Large quantity—Intention not to kill—Effect of death.**

Where a man gives datura to another in such a large quantity as to result in his death within 3 or 4 hours although he may not have had any intention to kill, he must be held to have known that his act in giving a dangerous substance in such a quantity was likely to cause death. (1908) 6 A.L.J. 129=31 A. 148=1 Ind. Cas. 765=9 Cr.L.J. 383.

—**Ss. 299 & 300—Likely to cause death—Depends on weapon, part of the body struck and violence of the blow—Intention to cause death—Immaterial.**

Where the weapon used, the part of the body aimed at and pierced and the violence with which the blow was inflicted lead to the inference that the accused intended to cause such bodily injury as was likely to cause death even though the accused did not intend to cause death, the accused can be rightly convicted of murder.

But the fact that the assault followed sudden quarrel without pre-meditation is an extenuating circumstance as also the fact that accused belongs to a peaceful trading class and extreme penalty of law should not be inflicted and sentence should be reduced to transportation for life. 1930 Cr.C. 162=A.I.R. 1930 Lah. 154.

—**Ss. 299 and 300—Sufficient or likely to cause death—Murder—Intention—Death by thrashing.**

Where the accused caused the death of the deceased by giving a sound thrashing with sticks which smashed both bones of each forearm, the right elbow and the right knee cap and the skull, the act amounts to murder. 3 P.R. 1919 Cr.=5 P.W.R. 1919 Cr.=20 Cr.L.J. 157=49 Ind. Cas. 349.

—**Ss. 299 and 300—Sufficient or likely to cause death—Death caused by arsenic.**

Where the accused administered arsenic to a boy with the object of preventing his father from giving evidence against the accused and the boy subsequently died, **Held**, that the accused was guilty of murder as he knew that the act was so dangerous that in all probability it must cause such bodily injury as was likely to cause death. 40 All. 360=16 A.L.J. 178=19 Cr.L.J. 382=44 Ind. Cas. 686.



—Ss. 299 and 300 (1) to (4)—Knowledge or intention—Murder—Brutal assault with lathis.

A brutal assault with lathis which results in the death of the person assaulted does not ordinarily amount to murder unless the accused intended to cause death or to cause such bodily injury as is sufficient in the ordinary course of nature to cause death. 7 S.L.R. 29, Foll. 9 S.L.R. 99=16 Cr.L.J. 710=30 Ind. Cas. 998.

—Ss. 299 and 300—Sufficient or likely to cause death.

Causing eight severe wounds on the face of the deceased with a hatchet indicated causing something more than a disfigurement and when death occurs, the accused must be taken to have intended to cause death or to cause bodily injuries likely to cause death. 14 P.R. 1911 Cr.=42 P.W.R. Cr. 1911=12 Cr.L.J. 597=12 Ind. Cas. 973.

## 22. Miscellaneous.

—Ss. 299 and 300—Culpable homicide and grievous hurt—Distinction.

The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death; in the other, the injuries must be such as to endanger life. A.I.R. 1946 Bom. 38=47 Bom. L.R. 998=223 Ind. Cas. 195 (F.B.).

—S. 300—Case inadvertently transferred to Assistant Sessions Judge—Procedure.

The Law prescribes only two possible punishments for murder—death or transportation for life. It is the duty of the Sessions Judge to examine every commitment order bearing this in mind, and if there is any possibility that murder has been committed, he must either try the case himself, or send it to an Additional Sessions Judge, if one is available. Should a Court, not empowered to impose the legal sentence, find that a case of this type has been inadvertently transferred to it, it should not proceed to try it, but should return the case at once to the transferring authority for necessary orders. A.I.R. 1944 Pat. 92=22 Pat. 607=10 B.R. 388=45 Cr. L. J. 409=211 Ind. Cas. 532.

—S. 300—Illus. (c) to S. 300, applies to revolver.

Illustration (c) to S. 300, applies as much to a revolver as to a sword or club. A.L.R. 1941 Sind 117=42 Cr.L.J. 786=195 Ind. Cas. 833.

—S. 300—Defence of ungovernable fury—Proof that it amounted to insanity—Necessity of.

There is no rule of law which enables a person to set up a defence of ungovernable fury unless that defence is proved affirmatively to amount to a defence of insanity so that the accused either did not know what he was doing or did not know that what he was doing was wrong. A.I.R. 1937 Rang. 26=38 Cr.L.J. 278=166 Ind. Cas. 527.

—S. 300—Divine influence or inspiration.

Divine influence or inspiration is no defence to what is otherwise a murder or any other offence, so long as the non-responsibility is not due to any disease or infirmity of the mind. 1937 M.W.N. 93.

—Ss. 300, 84—Insanity induced by taking intoxicating drugs.

12—F. Y. D.—16.

A person who, though of unsound mind, knows that in killing another he is committing a wrongful act is not entitled to the benefit of S. 84. Persons who are in fact insane, whether they have become so from persistent indulgence in intoxicating drugs or from brain disease must be judged by the ordinary rules of law affecting insane persons. (1906) A.W.N. 193=3 A.L.J. 463.

—Ss. 301, 302 and 307 and 34—Charge of murder—Procuring poison to be administered to a particular person—Another accused administering poison to wrong person—Death of that person due to the poison—Offence made out.

Two accused were charged under S. 302 read with S. 34 of the I.P. Code for the murder of A, by the second accused procuring cleander seeds and giving them to the first accused so that the latter might administer the poison to B in order to kill her in furtherance of a common intention. It was found that the first accused crushed an oleander seed and mixed it with arsenic in buttermilk and gave the buttermilk to B but the buttermilk was drunk by A and he died as a result thereof. They were found not guilty under S. 302 but guilty under S. 307. On appeal by the accused.

Held, on the findings arrived at, the case clearly fell within the provisions of S. 301, I. P. Code. As there was no appeal against the acquittal of the accused, it was not necessary to interfere. So far as S. 307 is concerned, there was no such charge which the accused were called upon to meet. The case would have to go back for retrial and a proper charge under S. 307 read with S. 34, I.P. Code would have to be framed for the attempt to murder B. 1947 M.W.N. 771=49 Cr.L.J. 360=A.I.R. 1948 Mad. 293=(1948) 1 M.L.J. 1.

—S. 301—Scope.

Under S. 301, where a person who wishes to kill A by mistake kills B, he is as much guilty of murder as if he had killed A himself. A.I.R. 1935 Pesh. 74=37 Cr. L.J. 25=158 Ind. Cas. 648.

—S. 301—Scope.

When the accused intended to kill A, but by mistake killed B, he is guilty of the offence of murder. 1934 M.W.N. 99.

—S. 301—Aimed at one, another killed—Offence, the same.

Where a blow aimed at one person alights upon another and kills him the offence committed by the assailant is the same as it would have been if blow had struck the intended victim. 8 W.R.Cr. 78, Foll. 107 Ind. Cas. 764=29 Cr.L.J. 280=A.I.R. 1928 Lah. 344.

—S. 302.

See also Penal Code, Ss. 34, 84, 299-300 and 304.

### Synopsis.

1. Applicability and Scope
2. Abetment
3. Benefit of doubt
4. Duty of Court
5. Jury



6. Powers and duties of High Court.
7. Procedure
8. Sentence
9. Miscellaneous.

### 1. Applicability and scope.

—Ss. 302 and 364—Applicability and relative scope—Murder committed in consequence of abduction—Murder or abetment of murder by three persons who were found holding deceased as captive—Offence.

S. 302, I.P. Code, is not inapplicable to a case of murder committed in consequence of an abduction. Where it is found that three persons were found holding the deceased as a captive, and that his dead body was discovered the next day under a heap of straw and the case for the prosecution is that the three accused either themselves murdered the deceased or abetted his murder and that the murder was committed in consequence of the abduction, the offence is one under S. 302 or 302/109, I. P. Code, the punishment in each case being the capital sentence. Only a Sessions Judge can try the case, and it is not permissible to proceed under S. 364, I.P. Code and thereby give jurisdiction to an Assistant Sessions Judge. S. 364 is mainly a special case of enhanced punishment for a particular type of abetment of murder; and such enhanced punishment will be applicable even though the murder is not committed in consequence of abduction. S. 364 cannot legally be resorted to in a case of murder by three persons or abetment of murder committed in consequence of abduction. 224 Ind. Cas. 435=47 Cr.L.J. 680=A.I.R. 1947 Cal. 35.

—Ss. 302, 109 and 364—Murder committed in consequence of abduction—Proper charge.

A charge under S. 364, I.P. Code, where murder has been committed in consequence of an alleged abduction, must amount to a charge of abetment of murder under Ss. 302, 109, I.P. Code, I.L.R. (1946) 1 Cal. 15.

—Ss. 302, 304 and 460.

If a person causes the death of another at the time of committing lurking house-trespass by night or house-breaking by night, it does not mean that he escapes being tried under S. 302 or S. 304, as the case may be, and that he can only be tried under S. 460. A.I.R. 1940 Lah. 281=42 P.L.R. 229=41 Cr.L.J. 779=189 Ind. Cas. 672.

—Ss. 302 and 304.

Accused believing in good faith that object of assault was not human being but evil spirit—He cannot be convicted under S. 302 or S. 304. A.I.R. 1943 Pat. 64=8 B.R. 829=43 Cr.L.J. 787=23 P.L.T. 670=202 Ind. Cas. 20.

—S. 302—Hallucination.

Where accused assaulted a man believing him to be a ghost and the assault proved fatal:

**Held**, that he was neither guilty under S. 302 nor S. 304, nor S. 304-A. 99 Ind. Cas. 71=28 Cr.L.J. 39=A.I.R. 1926 Lah. 554.

—S. 302—Supervening illness—Grievous injuries—Pneumonia supervening as a result—Guilty of murder.

If a person receives grievous injuries and is detained in hospital and as a result of those injuries pneumonia supervenes and the victim dies, the perpetrators of the attack upon him are guilty of murder: 7 S.L.R. 83, Foll. 110 Ind. Cas. 230=10 A.I.Cr.R. 517=29 Cr.L.J. 678=A.I.R. 1928 Lah. 851.

### 2. Abetment

See also Note 1.

—Ss. 302, 325, 109 and 147—Intention of two accused only to give beating to deceased—Third accused committing murder—Offence.

Where the intention of the two accused was to give the deceased a beating with lathis, they abetted the offence under S. 325, read with S. 109 and not under S. 302 read with S. 149 and though the Act of murder committed by the third accused was done with their aid, it could not be said that it was the probable consequence of the abetment on their part. A.I.R. 1939 Oudh 33=1938 O.W.N. 1103=40 Cr.L.J. 38=1938 A.W.R. 108=178 Ind. Cas. 348.

—S. 302—Deadly weapon—Fetching of evidence.

Mere fetching of a spear by one of the accused is not sufficient evidence to hold him guilty for abetment of murder. The intention to see the chief accused killing the deceased must be proved. 1941 M.W.N. 872.

—S. 302.

A person who instigates others to beat the deceased and they inflict several injuries on him resulting in his death, cannot escape responsibility for abetment of murder and he should be convicted under S. 302. A.I.R. 1933 Lah. 928=35 Cr. L. J. 301=147 Ind. Cas. 109.

—Ss. 302, 115 and 117.

Where the accused, in a speech addressed to a large audience, incites the audience to murder Englishmen and Government Officials, the accused is liable under S. 117 read with S. 302 or S. 115 read with S. 302 in the alternative. A.I.R. 1933 Lah. 660=34 Cr.L.J. 1207=146 Ind. Cas. 222.

—Ss. 302, 109 and 115—Giving aconite to wife to be administered to husband—Other relations killed—Offence.

The accused gave aconite to a girl for being administered to her husband with the object of gaining his love. The girl mixed the powder in cooked food and served the same to her husband, father-in-law and brother-in-law. The husband did not die but the others died. The accused was prosecuted and convicted under Ss. 302 and 109:

(ii) That though the conviction of the accused under Ss. 302 and 109, was unsustainable a conviction under Ss. 302 and 115 should be substituted. A.I.R. 1931 Cal. 757=58 C. 1228=35 C.W.N. 573=33 Cr.L.J. 79=34 Ind. Cas. 896 (2).

—S. 302—Abettor—Accused ordering to beat—Death caused—Guilty of murder.

Where a person orders his men to beat the other party and in consequence of that order the people of that party are beaten and as a result some men are killed, that person is guilty of abetment of murder: A.I.R. 1928 Pat. 100, Foll. 116 Ind. Cas.



372=13 A.I.Cr.R. 61=30 Cr.L.J. 621=A.I.R. 1928 Cal. 752.

—S. 302—Presence and support.

Persons who are present at a murder and support the same are as much guilty of murder as the murderer himself. 85 Ind. Cas. 130=47 All. 276=21 A.L.J. 1075=26 Cr.L.J. 450=6 L.R.A.Cr. 33=A.I.R. 1925 All. 185.

3. Benefit of doubt.

—S. 302—B member of unlawful assembly charged with murder of A—At trial evidence given to show that bhala wounds of which A died were caused by B—No such allegation made in first information report—Accused held entitled to benefit of doubt.

The accused who were members of an unlawful assembly were charged with murder of A, a member of the other party. There was no doubt that A had died of bhala blows inflicted by some members of the unlawful assembly. At the trial evidence was led to show that the accused had inflicted the bhala blows resulting in A's death. In the first information report the names of 13 persons were mentioned and it was stated that they began to attack A and his party with lathi, bhala and pharsa. The question was whether in view of the fact that the first information report did not state that the accused inflicted the bhala blows resulting in A's death the accused could be found guilty under S. 302:

Held, that the accused could not be found guilty of the offence under S. 302 as they were entitled to benefit of doubt as the first information report did not state that the accused had given the bhala blows. A.I.R. 1946 Pat. 84=24 Pat. 578.

—S. 302.

Where the chief culprit had secreted a knife in his waist and this fact was not proved to be within the knowledge and intention of the other co-accused and also where the co-accused did not in any manner facilitate the murder, they were given the benefit of doubt so far as S. 302 was concerned 1941 M.W.N. 815.

—S. 302.

A woman was murdered shortly after taking her night meal. Accused, the husband of the deceased, was with her that night on his own admission. At midnight a cry was heard from the house and the accused's sister who lived nearby went to investigate. She was told by the accused that there was nothing wrong. Later that night, others summoned by accused's sister went to the scene and they found not only the deceased but her husband absent. The next morning the body of the deceased was found in the well suffocated. At the Magistrate's Court the accused reserved his defence. At the Sessions, he stated that the next morning, he woke up and saw her missing. He denied that he ever saw his sister:

Held, that the facts undoubtedly cast the utmost suspicion on accused; but did not contain that element of certainty so essential to a conviction in a criminal case. There was, therefore, a doubt

and the accused must be given the benefit of doubt. A.I.R. 1941 Mad. 238=52 M.L.W. 420 (2)=1940 M.W.N. 1045=42 Cr.L.J. 654=195 Ind. Cas. 53. \*

—S. 302.

In a case where a man is on trial for his life every ambiguity in the law of procedure should be resolved in his favour. A.I.R. 1941 Nag. 94=1940 N.L.J. 565=42 Cr. L. J. 154=I. L. R. (1941) Nag. 157=191 Ind. Cas. 371.

—S. 302—Facts consistent both with intention to kill and exercise of private defence—Effect.

The deceased had contracted an illicit intimacy with the wife of the accused. When the accused had remonstrated with the deceased, there had been an altercation and the deceased had given him a beating. He had told the deceased to desist from the intrigue with his wife and had warned him not to come near his house. Nevertheless one evening the deceased had gone past the accused's house. On his return the accused saw the deceased and with the intention of remonstrating he took a kulhari with him and the quarrel ensued resulting in death:

Held, that the facts were clearly just consistent with the hypothesis that the only object of the accused was to remonstrate with the deceased for his conduct in coming past his house again. It was true that the accused took a kulhari with him, but it was also equally true that the deceased used to go about armed with a dang and had on a previous occasion beaten the accused. Therefore, he could quite well think that the result of his remonstrating might be that he would be attacked and therefore, might have taken the kulhari to protect himself in the case of attack and not necessarily as a weapon of offence. The facts were equally consistent with that there was a deliberate intention to attack. The accused, therefore, was entitled to the benefit of doubt and the case came under Excep. 4 to S. 300 and the offence fell under the first part of S. 304. A.I.R. 1939 Lah. 426=41 P.L.R. 315=40 Cr.L.J. 928=184 Ind. Cas. 325.

—S. 302.

Held, on facts of the case, after discussing the prosecution evidence that there was sufficient amount of doubt in the case and the accused who were charged under Ss. 302 and 307 read with S. 149, were entitled to the benefit of doubt. A. I. R. 1938 Lah. 787=40 P.L.R. 697=40 Cr.L.J. 435=180 Ind. Cas. 507.

—S. 302.

Where death can be explained on the hypothesis of murder as well as of an accident, the accused is entitled to the benefit of hypothesis and the part of his absconding makes no difference. (38) 40 P.L.R. 542.

—S. 302.

Where it is doubtful whether the accused had the intention of causing injury sufficient in the ordinary course of nature to cause death, he must be given the benefit of this doubt. A.I.R. 1938 Rang. 156=39 Cr.L.J. 561=175 Ind. Cas. 345.



## —S. 302.

When it is reasonably doubtful upon the evidence of the prosecution the accused is entitled to the benefit of that reasonable doubt, and he must be acquitted of the charge of murder, even if he is to be convicted of the charge of culpable homicide not amounting to murder. A.I.R. 1938 Sind 63=31 S.L.R. 480=39 Cr.L.J. 460=174 Ind. Cas. 497.

## —S. 302—Tampered evidence.

Where there are strong reasons for suspecting that evidence had been tampered with and there are grave reasons for suspecting that the accused was the man who committed the murder but on the record as it stands it is impossible to say that his guilt has been proved beyond all reasonable doubt and there is a support given to the dying declaration of the deceased by an incredible witness the conviction of the accused is not warranted. A.I.R. 1937 Rang. 431=39 Cr.L.J. 70=172 Ind. Cas. 110.

## —S. 302—Benefit of doubt.

It is for the prosecution to prove their case of murder and if upon a review of all the available evidence a doubt arises as to whether appellant committed murder or whether he committed culpable homicide by reason of exceeding the right of private self-defence, he is entitled to be found guilty of the lesser offence only. A.I.R. 1937 Rang. 343=38 Cr.L.J. 1095=171 Ind. Cas. 586.

## —S. 302—Benefit of doubt—Case on border-line between murder and culpable homicide not amounting to murder—Doubt as to intention—Accused should be given benefit of this doubt.

Where the injury results in death and the case is on the border-line between an intention to cause injury merely likely to cause death and an intention to cause injury such as is sufficient in the ordinary course of nature to cause death and it is not free from doubt that the accused had the latter of these two intentions in attacking the deceased, he must be given the benefit of this doubt and he must be held to have intended merely to cause injury likely to cause death. The offence committed by him is, therefore, culpable homicide not amounting to murder. A.I.R. 1937 Rang. 443=10 R. Rang. 230=39 Cr.L.J. 114=172 Ind. Cas. 179 (D.B.).

## —S. 302—Benefit of doubt, when given.

Where it appeared that out of spite and because of old-standing enmity which existed between the deceased and the accused, the latter were falsely implicated in a murder and for this reason two persons named in the first information report were not prepared to support the prosecution story:

Held, that the charge against the accused was not proved beyond all reasonable doubt and they could be given the benefit of the doubt and acquitted. (36) 164 Ind. Cas. 422=1936 O.W.N. 838=37 Cr.L.J. 986.

## —S. 302—Conduct of accused suspicious—Motive lacking—Evidence not convincing.

In a charge for murder by poisoning, the accused's conduct on the day of the crime was

suspicious, but motive was lacking. The evidence of the poison-vendor was also not convincing. In the Sessions Court, witnesses to prove threats of the accused to the deceased—a point of vital importance—were not examined, but the Judge convicted the accused of murder:

Held, that the circumstantial evidence, as it was presented to the Court, was not such as to make it clear beyond doubt that the accused murdered the deceased. There was not even actually a weak link in each chain and there was ground for doubt of which the benefit must go to the accused. A.I.R. 1936 Pat. 486=2 B.R. 791=37 Cr.L.J. 106=164 Ind. Cas. 1079.

## —S. 302—Benefit of doubt.

Where the case is on the border line between murder and culpable homicide not amounting to murder, the accused is entitled to the benefit of any reasonable doubt and he can be convicted only under S. 304, Penal Code. A.I.R. 1934 Rang. 110=33 Cr.L.J. 1112=150 Ind. Cas. 599.

## —Ss. 302, 304, Part II—Death caused by strangulation—Ignorance as to effect of applying pressure on neck—Doubt whether death was not accidental—Benefit of doubt.

Knowledge that pressure applied to the neck is likely to cause death must be attributed to every adult. When the accused is a man of thirty he cannot plead ignorance on the ground of youth or inexperience. It, however, remains with the Court to determine whether the circumstances show that the accused intended to cause death.

Where it appears that a dispute must have taken place before the accused became violent and though it is evident that the accused was violent and intended to be so, a doubt must remain whether so far as his intention went, the deceased's death was not accidental; of this doubt he is entitled to the benefit:

Held, that the conviction should be altered from one of murder under S. 302, to one of culpable homicide under S. 304, Part II. A.I.R. 1935 Lah. 511=34 Cr.L.J. 1213=146 Ind. Cas. 224.

## —S. 302—Student distributing sweets containing arsenic—Motive not made out—Accused himself ate—No evidence who prepared them—Benefit given.

The accused, a student, aged 17 was alleged to have distributed certain sweets containing arsenic among his fellow students. All who had received it ate it then and there except one person who took it home and gave it to his young niece and father. All the persons showed signs of arsenic poisoning and all of them recovered except the niece who died. It appeared that the accused himself had eaten a portion of the sweets and there was no motive for the crime. There was no evidence that the accused prepared the sweets.

Held, that the whole case was doubtful and that the accused could not be convicted of murder. 115 Ind. Cas. 469=30 P.L.R. 424=10 Lah. L.J. 555=30 Cr.L.J. 478.



—S. 302—Poisoned sweets given—Knowledge not proved, no motive—Accused partook—Case very doubtful—Benefit given.

An accused distributed poisoned sweets to several friends of his but it was not satisfactorily proved that the accused knew that the sweets contained poison. No motive was alleged. The accused had also partaken some of the sweets. Some arsenic was found in the room occupied by the accused after six days from his arrest and there was no evidence to show as to who had the control and custody of the room during those six days.

Held, that the case against the accused was very doubtful and the accused should be given the benefit of doubt. 115 Ind. Cas. 469=10 L.L.J. 555=30 P.L.R. 424=30 Cr.L.J. 478=12 A.I.Cr.R. 354.

—S. 302—Fight—Gun went off during struggle—Doubtful if anybody fired—Benefit given.

Where there was a fight in the course of which one J. died owing to a shot from T's gun but whether the shot which killed him was fired by S as the prosecution alleged or by T or whether it was the result of an accident due to the gun going off of itself during the struggle for its possession was doubtful and the probability was that the gun went off during the struggle.

Held, benefit of doubt must be given to the accused. 88 Ind. Cas. 711=26 Cr.L.J. 1191=6 L.L.J. 271=A.I.R. 1924 Lah. 720.

—S. 302—Body not identified—Prosecution evidence inconsistent with medical—Benefit given.

Where the body of the deceased was not identified when it was discovered and the prosecution evidence was inconsistent with the medical evidence, the accused was given the benefit of doubt. 18 P. R. 1917 distinguished mainly on the ground that the parties in the present case were not shown to be on bad terms. 76 Ind. Cas. 307=5 L.L.J. 417=25 Cr.L.J. 173=A.I.R. 1924 Lah. 168.

—S. 302—Poisoning—Doubtful if wife or any body else had done—Benefit given.

Where it was doubtful whether accused poisoned her husband and from the circumstances it was equally possible that some one else had done the foul deed, benefit of doubt was given to the accused. The mere recovery of utensils with particles of arsenic adhering does not necessarily fix the guilt upon the wife in the absence of clear proof. 77 Ind. Cas. 600=25 Cr.L.J. 421=A.I.R. 1923 Lah. 537.

—S. 302—No opportunity to cross-examine expert witness—Subsequent modification of opinion by expert—Benefit given.

Where the prosecution theory in a murder case was presumably built on the opinion first expressed by an expert witness (civil surgeon) whom the accused had no proper opportunity to cross-examine but who subsequently modified his opinion, and there were other informative circumstances in the prosecution case, the benefit of doubt was given to the accused. A.I.R. 1923 Lah. 189.

—Ss. 302 and 304—Strangulation by twisting hair round throat—Deed suggestive of provocation—No evidence—Benefit of doubt.

Where facts showed that the crime was not a premeditated one and death took place by strangulation effected by twisting deceased's hair round her throat:

Held, the accused must have acted on a sudden impulse; some sudden provocation must have arisen to impel the accused to do this deed and in the absence of any evidence on this point the accused was entitled to the benefit of the doubt as to whether sudden and grave provocation did not arise which temporarily deprived him of self-control. 77 Ind. Cas. 983=25 Cr.L.J. 519=5 L.L.J. 528=A.I.R. 1923 Lah. 691.

—S. 302—Wife administering arsenic—Believed by her to be a charm to work on husband—Reasonable doubt.

The appellant was convicted of murder of her husband by administering arsenic in halwa. There being reason to believe that she did not know that it contained arsenic and that she gave it to her husband (as also to her father-in-law) believing it to be charmed, like other charmed things, to induce him to divorce her, held, as there was reasonable doubt as to her guilty, she was entitled to the benefit thereof. 4 L.L.J. 445=A.I.R. 1922 Lah. 55.

—S. 302—Sentence.

A person accused of murder should not be sentenced to transportation for life instead of to death merely on the ground that the evidence is not strong enough to justify an irrevocable sentence. If the Court has any doubt as to the guilt of the accused, he should be acquitted. A.I.R. 1933 Pat. 100=13 P.L.T. 702=11 Pat. 807=33 Cr.L.J. 427=142 Ind. Cas. 841 (2).

—S. 302—Benefit of doubt in matter of sentence.

The accused, a youth of 17 or 18, had been insulted and provoked and as a result of the fighting which ensued, the deceased met with his death. It was also possible that the accused in order to live up to his reputation of being a bully wantonly attacked the deceased who was unarmed.

Held, that as an accused person is entitled to the benefit of reasonable doubt in the matter of sentence as in the matter of conviction and as there was doubt about the cause of the quarrel and the accused was only a lad of 17 or 18, the extreme penalty of the law was not called for. A.I.R. 1936 Rang. 71=37 Cr.L.J. 463=161 Ind. Cas. 574.

#### 4. Duty of Court.

—S. 302—Points to be considered.

It is the duty of the Judge to consider first of all on a charge under S. 302, whether the case is not murder as defined in S. 300, and if he considers that it does not fall within the definition, to give his reasons. Knowledge in a case like this is a matter of presumption and a person must be presumed to know the natural consequences of his act.



If the accused intended to cause such injuries as were likely to result in the victim's death it must be presumed that they knew that such injuries were likely to cause his death. A.I.R. 1942 Oudh 368 = 1942 O.W.N. 316 = 1942 A.W.R. 211 = 43 Cr. L. J. 634 = 18 Luck. 235 = 200 Ind. Cas. 500.

—S. 302—Weight to be attached to assessor's opinion.

The opinion of assessors is of course entitled to due consideration especially of intelligent assessor and especially when they consider a man guilty for it is so seldom that that happens in capital cases. A.I.R. 1938 Nag. 52 = 39 Cr. L. J. 105 = 172 Ind. Cas. 213.

—Ss. 302 and 304.

It is the duty of a Judge to make up his mind upon the fact of the case before him, and if there is any real doubt as to the facts, then he must give the accused the benefit of that doubt, not by finding him guilty, even in the alternative, of the offence in respect of which the reasonable doubt exists, but by acquitting him of that offence. In other words, he should remember that the burden lies on the prosecution to prove the guilt of the accused, and if the prosecution fail to prove the intention which is necessary in order that an accused should be convicted of murder, then they fail to prove that accused is guilty of murder, and the accused should not be convicted of murder even in the alternative. If the prosecution can prove the knowledge which is necessary for the conviction of an offence under S. 304, Part 2, the proper course is to convict the accused of an offence under S. 304, Part 2, and not in the alternative. A.I.R. 1938 Sind 63 = 31 S.L.R. 480 = 39 Cr. L. J. 460 = 174 Ind. Cas. 497.

—S. 302—Finding as to intention.

In a case of murder, where "intention" is one of the essential elements of the offence, it is always necessary that there should be a definite finding as to whether the necessary guilty intention is or is not present. A.I.R. 1938 Sind 63 = 31 S.L.R. 480 = 39 Cr. L. J. 460 = 174 Ind. Cas. 497.

—S. 302—Prosecution case based on circumstantial evidence establishing guilt of accused—Procedure.

In a case of murder where the prosecution case is based on circumstantial evidence, the cumulative effect of which establishes the guilt of the accused, having settled the legal criterion applicable to the case, viz., whether the evidence led would satisfy the jury beyond reasonable doubt of the guilt of the accused—it is then for the jury, or for the Judge, if there is no jury, to say, whether, applying that criterion to the facts proved, the verdict should or should not be one of guilty. This is the law in England and the Courts in India have held the same view. A.I.R. 1937 P. C. 179 = 1937 O. W. N. 540 = 3 B. R. 501 = 38 Cr. L. J. 573 = 41 C.W.N. 805 = 39 P.L.R. 426 = 1937 M.W.N. 633(2) = 46 L.W. 33 = 31 S.L.R. 300 = I.L.R. (1937) Lah. 371 = 39 Bom. L.R. 960 = 64 I.A. 134 = (1937) 2 M.L.J. 684 = 1937 A.W.R. 1014 = 168 Ind. Cas. 432 (P.C.).

—S. 302—Murder by poisoning.

In cases of murder by poisoning, the Judge should minutely analyse evidence before jury. A.I.R. 1937 Cal. 756 = 39 Cr. L. J. 182 = I.L.R. (1937) 2 Cal. 315 = 172 Ind. Cas. 891.

—S. 302.

The proper way in which to decide whether an offence has or has not been committed under S. 300 read with S. 302, is to apply the words of the section to the facts and to see how the facts satisfy the essentials of the section. But it is obvious that the nature of the material object used and the force used must be useful guides to the trial Court in arriving at a decision as to whether the intention and knowledge referred to in S. 300, can be attributed to the accused. A.I.R. 1937 Mad. 634 = 1937 M.W.N. 456 = (1937) 1 M.L.J. 743 = 45 L.W. 698 = 38 Cr. L. J. 1109 = I.L.R. (1937) Mad. 684 = 171 Ind. Cas. 694.

—S. 302—Court should act on evidence and not on moral conviction.

A conviction under S. 302, should not be made when the Court is morally convinced of the guilt of the accused but only when there is good and sufficient evidence to support such conviction. And the responsibility for a conviction (or acquittal) must rest principally upon the Sessions Judge, because he has the advantage of seeing and hearing the witnesses face to face; where as the High Court has perforce to be content with seeing the Judge's record only. If the Sessions Judge feels quiam about the case, he should give the accused the benefit of doubt and acquit him. A.I.R. 1935 Pat. 19 = 1 B.R. 119 = 36 Cr. L. J. 195 = 152 Ind. Cas. 832.

—Ss. 302 and 304.

If a prima facie case of murder under S. 302 or of culpable homicide punishable under S. 304 has been made out by the evidence of the prosecution witnesses, then it is the duty of the Judge to examine carefully the version of the occurrence set up by the accused and to see how far they could legally plead the right of private defence of person. A.I.R. 1934 Oudh 427 = 11 O.W.N. 1117 = 35 Cr. L. J. 1347 = 151 Ind. Cas. 559.

—S. 302—Arsenic poisoning—Questions to be determined by Court.

In cases of alleged arsenical poisoning the two material questions requiring determination are, firstly did the deceased die of arisenic posion and secondly had the posion been administered to the deceased by the accused. A.I.R. 1934 Oudh 62 = 11 O.W.N. 312 = 35 Cr. L. J. 700 = 148 Ind. Cas. 600.

—S. 302—Duty of Court—Jury finding accused did not know that injury was likely to cause death—Judge differing as to intention and knowledge—Conviction not warranted.

The only question, in case of an alleged homicide, that the Judge has to see is, first, what degree of injury did the man intend, and secondly what did he know as to the consequences of such injury. Where the jury found the accused did not know the amount of injury caused by him



would be such as would be likely to cause death the judge is not warranted in differing from them as to the intention or knowledge of the accused, based upon the reasoning of 'post hoc ergo propter hoc'. In such a case the conviction should be under the second clause of S. 304. 34 C.W.N. 1127=1931 Cr.C. 293=32 Cr.L.J. 187=128 Ind. Cas. 808=A.I.R. 1931 Cal. 261.

—S. 302—Sufficiently certain of guilt—Not sufficiently certain of sentence.

It is not permissible for Judge to sentence a prisoner to transportation for life on the ground that he is sufficiently certain of the guilt for that purpose but not sufficiently certain to sentence him to death. 124 Ind.Cas. 841=11 P.L.T. 166=A.I.R. 1930 Pat. 252.

—S. 302—Trial for murder—Every procedure must be strictly followed.

It is imperative in cases where accused is being tried for his life that the provisions of the law should be strictly adhered to and that the accused should not have any manner of grievance with regard to the procedure adopted at the trial. 103 Ind. Cas. 790=46 C.L.J. 31=31 C.W.N. 881=8 A. I. Cr. R. 316=28 Cr. L. J. 742=A. I. R. 1927 Cal. 631.

—S. 302 — Finding of murder — Inadequate sentence—Reference to High Court.

If a Judge accepts a finding of murder there are only two penalties. He has no right to pass inadequate sentence. If he does not believe the verdict to be right it is his duty to refer the case to the High Court. 98 Ind. Cas. 102=30 C.W.N. 376=27 Cr.L.J. 1254.

—S. 302—Murder — Accused the culprit—Gravity of the offence—Sentence.

In order to convict an accused for murder the Court must be satisfied first that the murder had been committed; then it must be satisfied that the accused has committed the murder. At the third stage the question of sentence should be determined upon the gravity of the offence quite irrespective of the circumstances whether the body has or has not been discovered. A.I.R. 1925 All. 627 (F.B.), Foll. 93 Ind. Cas. 252=1 Luck. 327=13 O.L.J. 484=3 O.W.N. 204=27 Cr.L.J. 460=A.I.R. 1926 Oudh 234.

—S. 302 — Mitigation of death sentence—Reasons to be recorded.

The extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death. If the Judge does not pass the sentence of death, he is bound to record the reasons why death sentence was not passed, i. e., he must find, that there are really extenuating circumstances and not merely an absence of aggravating circumstances. 1 L.B.R. 216, foll. 67 Ind. Cas 613=11 L.B.R. 323=1 Bur. L. J. 66=23 Cr.L.J. 437=A.I.R. 1922 L.B. 32.

—S. 302—Duty of committing Magistrate—Prosecution evidence not disbelieved—Commitment to sessions.

A Magistrate not disbelieving the evidence for the prosecution, which tends to show that an offence under S. 302, Penal Code, has been committed, should better commit the accused to the sessions and leave the Sessions Judge to decide upon the value of the evidence led. 114 Ind. Cas. 58=30 P.L.R. 36=30 Cr. L. J. 234=12 A. I. Cr. R. 116=A. I. R. 1929 Lah. 403.

—S. 302—Murder trial—Identification of things containing poison.

Judges who try cases of murder by poisoning should invariably put beyond the possibility of doubt the identification of every single thing that is suspected to contain any poison. The evidence should be complete as to the history of such articles, and it should be shown that they have been kept in proper custody throughout if they are to be relied on as supporting a conviction. (1905) 7 Bom.L.R. 640=2 Cr.L.J. 585.

## 5. Jury.

—S. 302—Number of jurymen.

It is quite clear from proviso to sub-s. (2) of S. 274, Criminal P. C., that whenever it is practicable the jury must consist of nine members in a trial for murder. A.I.R. 1943 Cal. 515=I. L. R. (1943) 1 Cal. 522=47 C.W.N. 345=44 Cr.L.J. 483=77 C.L.J. 120=206 Ind. Cas. 26.

—S. 302.

Murder case—18 jurors summoned—8 present—7 selected and trial with their aid—Trial held valid. A.I.R. 1934 Cal. 10=61 C. 190=36 Cr. L. J. 803=155 Ind. Cas. 599 (D. B.).

—S. 302—Failure to summon full number of jurors—Effect.

Assuming that it is incumbent on Judge under S. 326, Criminal P. C., to summon a minimum of 18 jurors for a murder trial mere failure on the part of Judge to summon the full number will not by itself vitiate the trial. A.I.R. 1931 Pat. 152=32 Cr. L. J. 797=12 P.L.T. 798=10 Pat. 107=131 Ind. Cas. 801.

—S. 302—Judge's failure to consider number of jurymen—Effect.

Where the Judge never applies his mind to the question whether it is practicable to have nine jurors, there is an illegality which vitiates the whole trial even in respect of persons not charged under S. 302, I.P.C., but who are jointly tried with person charged under S. 302; I. P. C. A. I. R. 1931 Cal. 793=58 Cal. 1272=35 C.W.N. 711=54 C.L.J. 307=33 Cr.L.J. 129=135 Ind. Cas. 435.

—Ss. 302, 326, 324 and 149—Charge under S. 302—149 includes minor charge under S. 326-149 or S. 324—149.

Charge under S. 302-149, includes the minor charge under S. 326-149 or S. 324-149. Hence, where the accused are charged under S. 302-149, the mere fact that the jury return a verdict of guilty under S. 326-149 and under S. 324-149 is no ground for interfering with the verdict of the



jury. A.I.R. 1942 Pat. 446=8 B.R. 237=43 Cr.L.J. 205=21 Pat. 138=23 P.L.T. 707=197 Ind. Cas. 504.

—S. 302—Charge to jury—Procedure.

The death of the deceased was due to the effect of all the injuries inflicted by several accused combined. The common object specified in the charges under Ss. 148 and 147 was not to kill the deceased but merely to assault him, yet all the accused were charged with the substantive offence of murder under S. 302. The judge explained to the jury the provisions of Ss. 300 and 299 and endeavoured to make them understand the exact difference between murder and culpable homicide not amounting to murder. The jury ultimately convicted all the accused under S. 302.

Held, that the conviction was illegal and the whole procedure amounted to misdirection and non-direction to the jury inasmuch as no alternative charges for lesser offences under Ss. 301, 326, or 325 were framed nor were the principles of S. 34 or S. 149, explained to the jury and particularly because the charge was put before the jury in such a way that they might have thought that they could only convict or acquit wholesale under S. 302. A.I.R. 1940 Pat. 417=21 P.L.T. 349=6 B.R. 805=41 Cr.L.J. 738=189 Ind. Cas. 426.

—S. 302—Misdirection to jury—What is.

Attack by armed men on unarmed men—Death of some—Direction to jury to consider accused's cases under S. 304-109, I.P.C., instead of directing trial for murder:

Held, that there was misdirection. A.I.R. 1937 Cal. 309=I.L.R. (1937) 2 Cal. 308=38 Cr.L.J. 1067=171 Ind. Cas. 269.

—S. 302—Jury—Failure to point out all matters in evidence—Non-direction as to facts constituting a lesser offence—If misdirections.

A mere failure on the part of the Sessions Judge to point out to the Jury all the matters which may be considered by them in evidence, does not necessarily amount to a misdirection. Where the facts disclose a case to be either of murder or nothing else, the non-direction by a Sessions Judge of the attention of the Jury to the fact that even if an offence under S. 302 of the Penal Code has not been made out the facts established might constitute a minor offence, does not amount to a misdirection. 64 Ind. Cas. 671=23 Cr.L.J. 47= A.I.R. 1922 Pat. 321.

—Ss. 302, 304 and 326—Charge to jury—Defective charge—Intention how to be inferred.

In trials under Ss. 302, 304 and 326 the charge to the jury is defective if the jury is not asked to consider the intention of the accused. The considerations for arriving at the intention are the accused's frame of mind, nature of weapon used, number of wounds inflicted and the testimony of the eye-witness as to how the accused acted. 8 L.B.R. 125=17 Cr.L.J. 154=33 Ind. Cas. 634.

**Powers and duties of High Court.**

See also Note 8 (f).

—S. 302.

The intention of the law is that a man should not be condemned to death unless at least two High Court Judges have had the opportunity of scrutinising the case on facts as well as on law and unless they are satisfied that he is guilty. The law quite definitely does not intend that the final result in such cases should depend upon the opinion of the jury. A.I.R. 1941 Nag. 94=1940 N.L.I. 565=42 Cr.L.J. 154=I.L.R. (1941) Nag. 157=191 Ind. Cas. 371.

—S. 302.

The High Court will always set its face against private individuals, whether they be Baluchis or members of any other tribe, executing their own sentences of death. A.I.R. 1937 Sind 239=30 S.L.R. 354=38 Cr.L.J. 953=170 Ind. Cas. 605.

—S. 302—Delay in confirming death sentence—When to be considered.

Per Wild, A.J.C.—In the case of an ordinary murder the delay in confirming sentence of death may be taken into consideration but not so when the murder is not ordinary. 1930 Cr. C. 865=A.I.R. 1930 Sind 225.

—S. 302—Murder—Death sentence—When should be confirmed.

In the case of alternative sentences of death or transportation, the High Court ought not to confirm the death sentence except where it thinks that it should be carried into effect. In an appeal from a capital sentence, if a High Court Judge is for acquittal and there is some delay in hearing the appeal, there was sufficient reason for not imposing the extreme penalty. 17 C.W.N. 1213=14 Cr.L.J. 642=21 Ind. Cas. 882.

**7. Procedure**

- (a) Charge and conviction
- (b) Joint trial
- (c) Plea of guilty
- (d) Separate sentences on all charges.

**7 (a). Procedure—Charge and conviction.**

—Ss. 302, 302/109, 364—Facts establishing offence of murder or abetment of murder.

Where the facts relied upon by the prosecution to prove an offence under S. 364, Penal Code, are such that if believed they are sufficient to establish an offence of murder under S. 302 or abetment of murder under S. 302/109 and if not believed the case under S. 364 would fail, the Court should frame a charge under S. 302 or S. 302/109. A.I.R. 1945 Cal. 42=I.L.R. (1944) 1 Cal. 280=46 Cr.L.J. 557=219 Ind. Cas. 285.

—S. 302.

Where a person is to be tried for murder it is improper to try him on a charge of attempt to murder and then for murder. A.I.R. 1944 Pat. 247=23 Pat. 95=11 B.R. 55=45 Cr.L.J. 809=215 Ind. Cas. 112.



—Ss. 302, 201—While convicting accused of murder it is not desirable to convict him for concealing evidence.

Where the whole question is whether the accused was guilty of murder and it is not suggested, that the murder was committed by anybody else, it is highly unusual and undesirable to convict the accused for concealing the evidence while convicting him of murder though as a strict question of law it may not be wrong to do so. A.I.R. 1942 Mad. 275=1941 M.W.N. 874=54 L.W. 561=43 Cr. L. J. 543=199 Ind. Cas. 310.

—Ss. 302 and 201—Trial of accused under Ss. 302 and 201 in one trial, legality.

An accused may be tried at one trial both for murder under S. 302, and for causing the disappearance of evidence of it under S. 201. It is not necessary that only a person completely innocent of the murder can be convicted under S. 201. A.I.R. 1940 Pat. 289=19 Pat. 369=7 B.R. 59=41 Cr.L.J. 910=22 P.L.T. 98=190 Ind. Cas. 457.

—Ss. 302, 201, 72—Charge in alternative under S. 302 and S. 201—Position may arise for punishment under S. 72.

Where the charge is framed in the alternative in respect of offences under Ss. 302 and 201, the position may arise as contemplated by S. 72. It may be open to the Court to give judgment that a person is guilty of one of several offences specified in the judgment, but it is doubtful of which of these offences he is guilty. Such a finding is in accordance with S. 367 (3), Criminal P. C., and will have the consequence that under S. 72, the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all. A.I.R. 1940 Pat. 289=19 Pat. 369=7 B.R. 59=41 Cr. L. J. 910=22 P.L.T. 98=190 Ind. Cas. 457.

—Ss. 302 and 201—Trial under S. 302, conviction under S. 201.

The accused can in certain cases be tried for murder and convicted of causing evidence to disappear. A.I.R. 1939 Sind 130=40 Cr. L. J. 661=182 Ind. Cas. 464.

—Ss. 302 and 201—Charge for murder—Accused found guilty under S. 201 also—Proper avenue of approach.

Where the accused is charged with murder but he is also found guilty of an offence under S. 201, the proper avenue of approach is, first and foremost, to consider whether the case under S. 302 has been made out. If so, that is an end of the matter. If, on the other hand, it is thought that the case under that section was not proved then, and only then would it be proper to consider whether an offence under S. 201 had been established. A.I.R. 1937 P.C. 179=3 B.R. 501=1937 O.W.N. 540=38 Cr. L. J. 573=41 C.W.N. 805=39 P.L.R. 426=46 L.W. 33=(1937) M.W.N. 633 (2)=I.L.R. (1937) Lah. 371=31 S.L.R. 300=30 Bom L.R. 960=64 I.A. 134=(1937) 2 M.L.J. 684=1937 A.W.R. 1014=168 Ind. Cas. 432 (P.C.).

—Ss. 302 and 201—Trial by jury—Judge acquitting under S. 302 and convicting under S. 201—Legality.

Accused charged with Ss. 302, 201, Penal Code—Judge accepting jury's verdict on murder charge and acquitting accused—On charge under S. 201 Judge disagreeing and convicting;

Held, his action was right. A.I.R. 1935 Bom. 165=37 Bom. L.R. 109=37 Cr. L. J. 26=158 Ind. Cas. 1000.

—Ss. 302, 201—Charge for murder—Conviction for causing evidence of murder to disappear—Legality.

Where notwithstanding the circumstances of grave suspicion it is impossible on the record, as it stands, to hold that a person is the murderer or one of the murderers his conviction under Ss. 201 and 203, is not vitiated by the existence of such circumstances.

**Quaere**—Whether the decision which lay down that when a person is charged under S. 302 he cannot also be charged and convicted under S. 201 would apply in a case, where a number of people are charged with carrying out a massacre in the course of a riot, and not with any individual act, or throwing live persons into a river in the course of a transaction which otherwise amounted to an offence under S. 201. A.I.R. 1933 All. 178=(1932) A.L.J. 801=34 Cr.L.J. 107=54 A. 792=141 Ind. Cas. 116.

—Ss. 302 and 201.

Charges under Ss. 302 and 201, I. P. C.—Acquittal under S. 302 and conviction under S. 201.

Held, there was no misjoinder of charges and conviction was legal. A.I.R. 1932 All. 71=32 Cr.L.J. 283=136 Ind. Cas. 376.

—Ss. 302 and 201—Conviction for lesser offence—No charge under that offence—Legality.

A person charged with an offence of murder can be convicted under S. 201, Penal Code, with out a further charge being made against him under that section, and such a conviction is warranted by S. 237 of the Cr. P. Code. A.I.R. 1925 P.C. 130, Foll. 94 Ind. Cas. 601=7 Lah. 84=27 Cr.L.J. 709=27 P.L.R. 583=A.I.R. 1926 Lah. 88.

—Ss. 302, 404—Joint charges for murder and misappropriation.

In a case of murder, it is not a desirable procedure to charge the accused under S. 404 for misappropriating the articles of the deceased. A.I.R. 1941 Mad. 306=52 L.W. 898=1040 M.W.N. 1238=42 Cr.L.J. 424=193 Ind. Cas. 465.

—Ss. 302, 318.

Prosecution seeking to prove offence under both S. 302 and S. 318—Charges should be framed under two heads—Accused found guilty under both charges—Conviction should be under both charges and not in alternative. A.I.R. 1941 Pesh. 22=42 Cr.L.J. 381=193 Ind. Cas. 284.

—Ss. 302, 364.

Murder of abducted girl alleged by prosecution—Accused should be charged with murder and not under S. 364. A.I.R. 1940 Cal. 561=71 C.L.J. 597=13 R.C. 329=42 Cr.L.J. 285=192 Ind. Cas. 352.

—Ss. 302, 396 and 449—Various charges framed—Duty of Court.

Charges framed under Ss. 302, 396 and 449, Penal Code—Sessions Judge neither cancelling nor



taking up trial of charges under Ss. 396 and 449 not giving reasons for so doing:

**Held**, he ought to have recorded some order in respect of these charges on conviction of murder. A.I.R. 1939 Pat. 35=19 P.L.T. 801=18 Pat. 82=39 Cr.L.J. 997=5 B.R. 53=178 Ind. Cas. 130.

—Ss. 302 and 149—Charge under S. 302 and S. 149.

Charge under S. 302 and S. 149 is not permissible. 1936 M.W.N. 525.

—Ss. 302, 392 and 396—Splitting up of charge under S. 396 to charges under Ss. 302 and 392.

Where on a charge under S. 396, the jury find that the persons who had taken part in the offence are not shown to be five or more in number, the charge under S. 396 cannot be split up and treated as a charge under S. 302 together with a charge under S. 392.

A charge under S. 302 is not a minor charge to a charge under S. 396. A.I.R. 1933 Cal. 294=36 C.W.N. 880=34 Cr.L.J. 524 (2)=143 Ind. Cas. 14 (S.B.).

—Ss. 302 and 114—Proper charge.

In a criminal trial, whether the charge is framed in terms of S. 302 read with S. 114 or in terms of S. 302 alone, the offence denoted is substantially the same. As the two charges overlap each other they cannot be regarded as implying two separate offences. A.I.R. 1933 Nag. 136=34 Cr.L.J. 505=29 N.L.R. 251=143 Ind. Cas. 17.

—Ss. 302, 411—Alteration of conviction from under S. 302 to one under S. 411.

A charge under S. 302, I. P. C., comes under Chap. XVI, I. P. C., in respect of offences affecting the human body, whereas an offence under S. 411 comes under Chap. XVII in respect of offences against property. Sections 236 and 237, Criminal P. C., would not apply to a case where the accused have been charged with an offence of murder only. A conviction under S. 411 cannot be substituted for it, that being entirely a separate offence with which the accused are not charged. A.I.R. 1933 Oudh 315=10 O.W.N. 466=8 Luck. 518=35 Cr.L.J. 10=146 Ind. Cas. 465.

—Ss. 302, 395 and 436—Murder and dacoity—Separate charges for.

Where dacoits who murdered several persons in the commission of the dacoity and set houses on fire were sentenced to death for the offences under S. 302, Indian Penal Code and to ten years' imprisonment for each of the offences under Ss. 395 and 436.

**Held**: that it would have been proper to charge the accused persons with an offence under S. 396, I. P. C., rather than with the two offences of murder and dacoity. 88 Ind. Cas. 513=6 Lah. 24=26 Cr.L.J. 1153=26 P.L.R. 139=A.I.R. 1925 Lah. 337.

—Ss. 302, 114 and 34—Part of jury's verdict accepted by Judge—Part differed from—Reference to High Court—No interference with part accepted—Applicability of S. 34 doubtful—

**Alternative charge under S. 302 and 114 should have been framed.**

The jury were unanimous that there was not sufficient evidence to find accused guilty under Section 302 without the aid of Section 34. The jury also found unanimously that there was a doubt that accused was guilty under Section 302 with S. 34. Sessions Judge himself was satisfied that accused was the man who struck the blow, the Jury evidently had a doubt on the matter, and he was not able to say that the doubt was unreasonable; consequently, he could accept the verdict of the Jury as to that part of the case. But the Jury also held that there was a reasonable doubt that the two youths (Petitioner, and the other who was acquitted) acted in furtherance of a common intention. But the Judge thought admitted circumstances were wholly inconsistent with the view that either of the two youths could be ignorant of his companion's intention, and referred the case under Section 307 of the Cr. P. C.

**Held**: that as the Jury found that there was a doubt whether accused struck the blow and the Judge has clearly accepted the verdict of the Jury on that part of the case, the High Court ought not to enter upon the consideration of the question involved in that part of the case. Assuming that High Court had to approach the case on the basis that it was not proved which of the two men stabbed the deceased man and that one of them only undoubtedly did, it was doubtful whether the provisions of Section 34 are applicable. Section 34 does not create an offence. The provisions thereof merely lay down a rule of law. The charge which should have been preferred against the accused as an alternative to the main charge under Section 302 of the Indian Penal Code was a charge under Section 302 read with Section 114 of the Indian Penal Code. But the accused was not charged under Section 114 with abetment and he could not be convicted by High Court under Section 114 inasmuch as the charge was not framed against him in the trial Court. 74 Ind. Cas. 267=50 Cal. 41=24 Cr.L.J. 763=A.I.R. 1923 Cal. 453.

—Ss. 302 and 326—Trial for murder with conviction under S. 326 which offence is triable by jury—Conviction right.

Where the accused was tried for murder by the Sessions Judge with the aid of assessors and found, at the close of the trial and after the opinions of the assessors were recorded, guilty of the minor offence under S. 326, I. P. C. and in the same trial convicted the accused of the minor offence, though it was triable in that District only by a jury.

**Held**, that the accused was rightly convicted of an offence punishable under S. 326, even though it was triable by a jury. 59 Ind. Cas. 195=45 Bom. 619=22 Cr.L.J. 51=A.I.R. 1921 Bom. 39.

7 (b). Procedure—Joint trial.

—Ss. 302, 34—Joint trial.

The word 'transaction' is not to be interpreted in any special or artificial or conventional or technical sense, but as it is ordinarily understood by men of education and common sense. The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, community of purpose or design and continuity of action. It is not possible to enunciate any comprehensive formula



of universal applicability for the purpose of determining whether two or more acts constitute the same transaction, but circumstances which bear on the determination of the question in any individual case can be indicated by saying that proximity of time, unity or proximity of place, continuity of action and community of purpose or design are the principal criteria for deciding whether certain acts form parts of the same transaction or not. The real and substantial test for determination whether several offences are so connected together as to form one transaction is to see upon whether they are related together in point of purpose, or as cause and effect, or as principal and subsidiary acts so as to constitute one continuous action. Where A is murdered and left for dead by the assailants and thereafter they go and commit a fresh act of murder of his brother B in another place, although a common identity of purpose may be said to run through both the transactions, the murder of A is a transaction complete in itself and does not need the murder of B to complete it. In such circumstances two separate trials are proper. But when there has been no failure of justice and the accused have not been prejudiced in their defence on the merits, the irregularity, in the circumstances, may be condoned under S. 537, Criminal P. C.

In a case tried with the aid of assessors, the assessors form an integral part of the Court and any proceedings taken by the Judge in the absence of the jurors or assessors are necessarily void and illegal. Where the Judge alone inspects the spot under S. 539-B, Criminal P. C., the inspection note must be ruled out and when it has been utilised by the Sessions Judge, all reference to it must be excluded from consideration. A.I.R. 1904 Oudh 499=35 Cr. L. J. 1496=11 O.W.N. 1309=152 Ind. Cas. 103.

### 7 (c). Procedure—Plea of guilty.

#### —S. 302—Plea of guilty in murder case.

It is a settled practice not to accept the plea of guilty in a murder case, unless the Court is satisfied that the accused knew exactly what was implied by his plea of guilty and its effect. 217 Ind. Cas. 370=1944 N. L. J. 409=46 Cr. L. J. 357.

#### —S. 302—Plea of guilty in murder case.

Under S. 271, Criminal P. C., accused may be convicted on his pleading guilty. But where the crime on the face of it appears to be murder evidence should be taken. A.I.R. 1934 Sind 204=36 Cr. L. J. 324=28 S.L.R. 327=153 Ind. Cas. 288.

#### —S. 302—Pleading guilty—Trial not ended—Evidence must be taken and case decided ignoring the plea.

The trial of an accused person does not necessarily end if he pleads guilty but evidence may and should be taken in cases of murder as if the plea had been one of not guilty and case decided upon the whole of the evidence including the accused's plea. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death. 115 Ind. Cas. 582=30 Cr. L. J. 508=12 A.I.Cr.R. 320=A.I.R. 1928 Cal. 775.

—S. 302—Accused giving unequivocal statement of facts admitting guilt—Stated his reason to be jealousy—Conviction on the statement—Retrial ordered directing his plea of jealousy to be gone into.

The accused was undoubtedly a man of very considerable intelligence, and having beyond question killed a woman, made a few hours later, on the same day, a perfectly clear statement about the facts, and later, on the day after the crime, gave to a Magistrate of the first class the most clear and convincing account of the whole occurrence, and stated as a preliminary to it that he knew that he could be convicted on his own statement. Before the S. J. he agreed that he had made the two statements referred to above, and he pleaded guilty and said he killed the woman with the chopper produced and the reason for killing her was jealousy. The accused elaborated in his petition of appeal to the High Court, the statement he had made before the S. J. to the effect that he killed the woman out of jealousy. That document gave rise to the bare possibility that the accused might be able to put forward some ground for the application of S. 304 of the I. P. C.

**Held:** that though there was before the S. J. enough material to make him perfectly confident as to the guilt of the accused, yet in view of the contents of his petition of appeal to the High Court, the safer and better course would be to return the case to the S. J. with a direction to him to put accused up for trial again, to take his plea and whether that be guilty or not guilty to hear the whole of the evidence in relation to the case. 89=Ind. Cas. 260=23 A. L. J. 587=26 Cr. L. J. 1316=6 L.R.A. Cr. 152=A. I. R. 1925 All. 647.

#### —S. 302—Accused pleading guilty—Trial must proceed.

In a case of murder it has long been the practice not to accept the plea of guilty. After all murder is a mixed question of fact and law and unless the Court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried. 66 Ind. Cas. 427=20 A. L. J. 326=23 Cr. L. J. 283=A.I.R. 1922 All. 233.

#### —S. 302—Murder—Plea of guilty.

Before a plea of guilty is accepted in a case of murder the record should clearly show that the accused understood and admitted facts bringing the offence within the definition of murder and that he does not plead any of the exceptions set out in the Penal Code. (1919) 3 U.B.R. 137=20 Cr. L. J. 540=51 Ind. Cas. 780.

#### —S. 302—Plea of guilty.

It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death. A man may plead that he hit some one who there by died and that he did it for the purpose of taking away the ornaments of the person injured without necessarily admitting that he committed murder; for murder, under the Penal Code, requires a certain intention or a certain knowledge. (1906) 8 Bom. L.R. 240=3 Cr. L. J. 337.

### 7 (d). Procedure—Separate sentences on all charges.

#### —Ss. 302, 304 and 324—Judge's duty to pass sentences on all charges.

Under S. 309, Criminal P. C., Judge is bound to pass a sentence on each of the charges of which the accused is found by him to be guilty and hence, where the Magistrate had convicted the accused under Ss. 302,



304 (1) and 324, Penal Code, his refusal to prescribe the punishment under Ss. 304 (1) and S. 324, Penal Code is illegal. A.I.R. 1939 Pesh. 23=40 Cr. L. J. 686=182 Ind. Cas. 572.

—Ss. 302 and 392—Conviction under—Separate sentences.

When a person is convicted of murder and also of robbing the ornaments of the murdered, and a conviction under S. 392 is recorded, separate sentences should be imposed on the accused. A.I.R. 1936 Nag. 200=37 Cr. L. J. 1047=I. L. R. (1936) Nag. 78=164 Ind. Cas. 964.

8. Sentence.

Synopsis.

- (a) Abettor
- (b) Age and Sex
- (c) Circumstantial evidence
- (d) Drunkenness
- (e) Duty of court
- (f) Enhancement
- (g) Grace and clemency
- (h) Heat of passion
- (i) Ignorance
- (j) Legal sentence
- (k) Motive
- (l) Part played
- (m) Premeditation
- (n) Premeditation absent
- (o) Provocation
- (p) Several accused
- (q) State of mind
- (r) Weapon used
- (s) Miscellaneous extenuating circumstances.

8 (a). Sentence—Abettor.

—S. 302—Abettor—Confederate armed for eventuality—Liability.

A confederate accompanying the murderer on his murderous errand armed with a weapon to meet all eventualities is just as much responsible for the murder as his associate, though he does not actually inflict any injury on the deceased. 116 Ind. Cas. 613=30 Cr. L. J. 637=1929 Cr. C. 423=13 A. I. Cr. R. 41=A.I.R. 1929 Lah. 791.

—S. 302—Sentence—Abettor—One struck with a hatchet and killed—The other stood by—Full punishment for former and transportation for latter.

Where G and C accused, proceeded to the house of the deceased, G armed with a hatchet and C with a stick and where G admitted and it was also proved that G inflicted a blow with the hatchet on the neck of the deceased which resulted in his death and C did not inflict any injury but was present and acting under the influence of his brother G.

Held: that G and C were guilty of murder and that G deserved the full punishment namely death but that C only deserved transportation for life. 88 Ind. Cas. 66=7 I. L. J. 479=26 Cr. L. J. 1133=26 P.L.R. 405=A.I.R. 1925 Lah. 584.

8 (b). Sentence—Age and sex.

—S. 302—Youth of accused.

Where in a case under S. 302, the accused is aged 20 years, the lesser sentence of transportation for life cannot be said to be justified on the ground of the youth and hot headedness of the accused especially when the attack on the deceased was deliberate. A.I.R. 1943 Lah. 104=45 P.L.R. 140=44 Cr.L.J. 546=206 Ind. Cas. 617 (D.B.).

—S. 302—Youth of accused.

In view of the youth of the accused (19 or 20 years of age) the lesser sentence of transportation is not inappropriate for an offence under S. 302. A.I.R. 1943 Lah. 89=45 P.L.R. 82=44 Cr.L.J. 552=207 Ind. Cas. 32.

—S. 302—Youth of accused whether ground for reducing sentence to transportation for life.

There is no provision of law that sentence of death shall not be passed on a person of or above sixteen but not more than 18 years of age. Youth is not a reason why the Court should not do its duty of awarding a death sentence in a murder case. To commute a sentence of death in the absence of any mitigating circumstances purely on the ground of the age of the accused is in effect to lay it down that persons of a certain age should never be sentenced to death, even though that is not the law. The Court is concerned with the passing of sentence and not with its execution and when it has passed or confirmed a sentence its duty is done. The prerogative of mercy in individual cases lies with the Provincial Government. A.I.R. 1943 Mad. 69=55 L.W. 552=1942 M.W.N. 584=(1942)2 M.L.J. 312=44 Cr.L.J. 299=I.L.R. (1943) Mad. 148=204 Ind. Cas. 545.

—S. 302—Youth of accused.

Held, on facts that the case fell under S. 302, but considering the young age of the accused the sentence of transportation passed by the Sessions Court was maintained. A.I.R. 1942 Pat. 427=23 P.L.T. 763=43 Cr.L.J. 544=8 B.R. 542=199 Ind. Cas. 307.

—S. 302—Youth of accused.

Youth, undoubtedly, in some cases may be a very excellent ground for giving the lower sentence. It is a very rare thing for the High Court to sentence a youth of 17 or below to death. It would only be in a very exceptional case that this would be done. In fact the normal sentence for a youth of this age would be transportation for life. A very strong case, indeed, would have to be made out in order to justify the hanging of a youth of this age. When a youth of this age commits a murder in company with an elder relative that is another excellent reason for giving only transportation for life. A.I.R. 1941 Lah. 220=43 P.L.R. 95=42 Cr. L. J. 614=I.L.R. (1941) Lah. 366=194 Ind. Cas. 719.

—S. 302—Youth as extenuating circumstance.

Although youth alone is not a reason for mitigating punishment in murder cases, it is very rarely that young murderers under 18 are senten-



ced to death. [Accused in this case who was below 18 years was sentenced to transportation for life.] A.I.R. 1941 Mad. 358=42 Cr.L.J. 311=52 L.W. 949=(1941) 1 M.L.J. 34=1941 M.W.N. 58=I.L.R. (1941) Mad. 428=192 Ind. Cas. 579.

—Ss. 302, 299—Youth of accused.

It is quite true that youth by itself is not such an extenuating circumstance as would justify the imposition of the lesser penalty, but regard may be had to the fact that persons of immature age are sometimes more easily provoked and behave in a less responsible manner than their elders.

A cow-herd aged 17 years who was searching for a missing cow-bell, which he had good reason to suspect was in the possession of the deceased, was virtually met with a blank refusal by the deceased a boy two years younger than himself, and in those circumstances he lost his temper and committed a terrible assault with a dah which resulted in the serious injury and subsequent death of the deceased:

Held, that in all the circumstances of the case, the Court would be justified not only in commuting the sentence to one of transportation for life, whilst refusing to confirm the sentence of death passed by the Sessions Judge, but also in drawing the attention of the executive authorities to the provisions of S. 29, Burma Prevention of Crime (Young offenders) Act, 1930. A.I.R. 1941 Rang. 319=43 Cr.L.J. 266=197 Ind. Cas. 786.

—S. 302—Youth of accused.

If the case is not governed by the provisions of S. 83 and the accused is a young man of normal understanding and mature mind, the age by itself will not be sufficient to justify the awarding of the lesser sentence, particularly if the offence is committed in a cold blooded manner and has been the result of a premeditated plan. On the other hand, if in consequence of inexperience and youth the prisoner commits murder in vindication of a supposed wrong, the youth in conjunction with other circumstances may be taken into consideration in favour of the accused and the lesser of the two punishments may be awarded.

Held, on facts of the case that though the offence fell under S. 302, yet there were sufficient extenuating circumstances, apart from the youth of the accused to justify the sentence of transportation for life. A.I.R. 1940 All. 480=1940 A.L.J. 607=42 Cr.L.J. 115=1940 A.W.R. 480=191 Ind. Cas. 303.

—S. 302—Youth as mitigating circumstances.

Youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death especially in the case a cruel of murder. A.I.R. 1940 Mad. 710=1940 M.W.N. 86=I.L.R. (1940) Mad. 254=52 L.W. 981=42 Cr.L.J. 582=194 Ind. Cas. 527.

—S. 302—Youth and provocation.

Where the accused was only sixteen years old and had committed murder by a blow with a dah on the back of the neck of the deceased half an hour after the accused had received some provocation from the deceased.

Held, that the circumstances afforded ample justification for the imposition of the lesser penalty. A.I.R. 1940 Rang. 140=41 Cr.L.J. 706=188 Ind.Cas. 858 (D.B.).

—S. 302—Youth of accused.

Youth of accused convicted under S. 302, Penal Code, is a sufficiently strong reason for not passing a death sentence on him. A.I.R. 1938 Lah. 200=I.L.R. (1937) Lah. 658=40 P.L.R. 401=39 Cr.L.J. 488=174 Ind. Cas. 881.

—S. 302—Youth of accused.

Held, on facts, that under the circumstances of the case the accused being young and drunk and being excited by some incident, the sentence of transportation should be passed with further recommendation to the authorities that the sentence should be further commuted to one of four years' detention in a Borstal Institute. A.I.R. 1938 Rang. 62=39 Cr.L.J. 403=174 Ind. Cas. 442.

—S. 302—Youth of accused.

That the accused in a murder case is only 18 years old is not by itself a sufficient ground for the Court to reduce the sentence. This will be a matter for the Local Government when the case comes before them. A.I.R. 1937 Lah. 399=38 Cr.L.J. 879=I.L.R. (1937) Lah. 481=39 P.L.R. 834=170 Ind. Cas. 5.

—S. 302—Extreme youth of accused.

Where the accused was found to have pledged the bangles belonging to his deceased sister shortly after she was seen alive last and there were marks of blood on his dhoti, he was held guilty of murder. But since he was only just 16, he was given the lesser penalty of transportation for life. 1937 M.W.N. 1133.

—S. 302—Extreme youth of accused.

Where the accused committed murder with a definite motive, the assault being a very brutal one and there was a doubt whether he had completed his 16 years of age:

Held, that the accused was at a time of life when what will not be considered as a circumstance sufficient to upset a man of more mature years may upset him and send him off his balance quite materially, and taking into account the doubt that existed with reference to his having completed his 16th year of age the sentence of death was unsuitable to the case and that sentence of transportation for life would adequately meet the ends of justice. A.I.R. 1937 Rang. 121=38 Cr.L.J. 1022=171 Ind. Cas. 125.

—S. 302—Youth, whether extenuating circumstance.

In every case of murder, youth alone is not such an extenuating circumstance as to justify awarding of lesser punishment, but it should be taken into consideration with other facts. A.I.R. 1937 Rang. 121=38 Cr.L.J. 1022=171 Ind. Cas. 125.

—S. 302—Youth of accused.

Youth alone in every case is not such an extenuating circumstance as would justify the imposition



of the lesser penalty in case of murder, but it should be taken into consideration with the other facts. A.I.R. 1936 Rang. 71=37 Cr.L.J. 463=161 Ind. Cas. 574.

—S. 302.

Where the accused is young and inflicted the injuries together with another man in the course of a blind assault in the dark, the sentence of death must be reduced to one of transportation for life although the assault is premeditated and the offence is murder. A.I.R. 1936 Rang. 46=37 Cr.L.J. 290=160 Ind. Cas. 459.

—S. 302—Youth as extenuating circumstance.

Extenuating circumstances are circumstances connected with a particular crime which tend to lessen the amount of guilt attaching to it, and do not include characteristics of the offender unconnected with his crime, even though in some circumstances such characteristics may give the offender the benefit of exceptions mentioned in the Penal Code. The mere youth of the offender is in itself no judicial reason for not inflicting the major penalty in the case of a deliberate murder in which there are no extenuating circumstances. Youth, however, does affect the extent to which a person may be affected by outside influences and thus where there is reason to believe that a youthful offender has acted under the direct or indirect influence of his elders or those who can exert any form of influence over him, the fact of his youth associated with the effect that he may have come under such influence may create such extenuation as can be considered when imposing sentence. A.I.R. 1935 Pesh. 170=37 Cr.L.J. 201=159 Ind. Cas. 830.

—S. 302—Extreme youth.

When the accused is a boy of 15 or 16, it is not proper that he should be hanged, however horrible the crime be. At the age of 15 or 16 when a boy has just come to the age of puberty, he may do many things then which he would never dream of doing when he was older. It is even possible that he may become a useful citizen. A.I.R. 1934 All. 132=35 Cr.L.J. 448=1934 A.L.J. 143=3 A.W.R. 419=147 Ind. Cas. 630.

—S. 302—Youth as extenuating circumstance.

Where a man of seventeen years of age is engaged in a murder under the influence of people very much older than himself, he may be awarded the lesser penalty, i.e., transportation for life instead of death, although he is involved in the conspiracy to commit the murder and has taken an actual part in the crime. A.I.R. 1934 Lah. 786=36 P.L.R. 40=36 Cr.L.J. 313=153 Ind. Cas. 228.

—S. 302—Youth as extenuating circumstance.

The accused, a young man of 18 or 19 years of age, a month before the occurrence made indecent overtures to the deceased and asked him to have unnatural intercourse with him. He refused to do so and complained to his mother. In spite of being rebuked by the mother of the deceased and his own grandfather, the accused

wanted to play with the deceased and on the latter's refusal, he got a churri and gave the deceased several stabs causing serious injuries:

Held, that in view of the most objectionable motive which the accused had for causing injuries to the deceased and on account of the number and nature of the serious injuries caused with a sharp-edged and pointed weapon of a formidable nature, no sentence less than that of a death could be passed on the accused whose youth was no extenuating circumstance. A.I.R. 1934 Lah. 20 (21)=35 Cr.L.J. 619=148 Ind. Cas. 191.

—S. 302—Youth as extenuating circumstance.

There is no law which justifies a Court in not passing a sentence of death on any person merely because of his youth, and all persons who could understand the nature of their act are liable to the extreme penalty of the law, and although youth might be a circumstance to be taken into consideration in offences where the accused person was not fully able to understand the nature of his act or had been influenced by other persons, yet it was not so in a case where a youth deliberately murdered a small boy for motives of greed, being actuated to the crime by his own base nature. A.I.R. 1934 Oudh 405=35 Cr.L.J. 1113=11 O.W.N. 851=150 Ind. Cas. 819.

—S. 302—Youth as extenuating circumstance.

Where a young man 22 years of age is convicted under S. 302, Penal Code, and he is found to have acted with deliberation, the mere fact of his youth is no circumstance for reducing the sentence of death passed on him. A.I.R. 1933 All. 939=35 Cr.L.J. 464=147 Ind. Cas. 676.

—S. 302—Youth as extenuating circumstance.

There is no hard and fast rule that because the murderer is of what is called tender age he must necessarily escape the normal penalty prescribed by the law. Age is no doubt a circumstance to be taken into consideration, but this has got to be taken into consideration along with various other circumstances present on the record and to which attention may be drawn either by the prosecution or by the defence. A.I.R. 1933 Cal. 1 (2)=33 Cr.L.J. 837=140 Ind. Cas. 80 (F.B.).

—S. 302—Youth of accused.

Where a heinous crime has been carefully planned and carried out in a treacherous and cruel manner, the accused's youth alone cannot be considered to be an adequate ground for mitigation of punishment. A.I.R. 1933 Lah. 956=35 Cr.L.J. 288=35 P.L.R. 115=146 Ind. Cas. 1061.

—S. 302.

Youth alone does not constitute an extenuating circumstance such as would justify the lesser penalty prescribed by the law. A.I.R. 1933 Lah. 305=34 Cr.L.J. 720=34 P.L.R. 691=144 Ind. Cas. 294.

—S. 302.

Where a boy of 17 committed murder without premeditation under a sudden impulse:



Held, that he should be given a 'locus paenitentiae' and the irrevocable sentence of death should not be passed upon him.

Per Agha Haidar J. It is true that in older times boys of tender years used to be executed very often for petty crimes, but we are well on into the twentieth century and live under its humanitarian influences. A.I.R. 1933 Lah. 229=34 P.L.R. 414=34 Cr.L.J. 375=142 Ind. Cas. 654.

—S. 302—Youth as extenuating circumstance.

There is no law which justifies a Court in not passing a sentence of death on any person merely because he is young. All persons who can understand the nature of their act are liable to the extreme penalty of the law. Youth may be a circumstance to be taken into consideration in offences where the accused person is not fully able to understand the nature of his act or has been influenced by older persons, but not in a case where a youth deliberately murders a small boy for motive of greed, being prompted to the crime by his own base nature. Sentence of transportation for life is imposed only where there are some extenuating circumstances and where sentence of death is not necessary in the interests of the public at large. A.I.R. 1933 Oudh 52=9 O.W.N. 1161=34 Cr.L.J. 250 (1)=141 Ind. Cas. 747 (1).

—S. 302 — Boy of 18 acting under elder brother's compulsion.

Where a boy of 18 is convicted almost entirely on his own confession, and according to that confession he was acting under instructions from and semi-compulsion by his elder brother, who was the prime mover in the affair and who alone would benefit from the murder, the extreme penalty of the law is not called for. A.I.R. 1933 Rang. 134=34 Cr.L.J. 835=144 Ind. Cas. 829.

—S. 302—Youth of offender.

The proposition that youth is not in itself a sufficient ground for reducing the punishment for murder from death to transportation for life is correct where a youth deliberately by himself sets out to kill another man. But where a youth is associated with older persons, it may be proper in certain cases to infer that he was influenced by the older and more mature persons and to inflict the lesser sentence. A.I.R. 1931 Lah. 536=32 Cr.L.J. 645=32 P.L.R. 414=131 Ind. Cas. 122.

—S. 302.

Though mere youth may not in itself be a reason for not hanging a murderer, extreme youth may be such a reason. A.I.R. 1931 Lah. 177=32 Cr.L.J. 682=131 Ind. Cas. 276.

—S. 302—Youth, how far an extenuating circumstance.

Youth alone is not in every case such an extenuating circumstance as would justify the imposition of the lesser penalty in cases of murder, but it should be taken into consideration with the other facts of the case.

Where, though the accused was aged only about 18, his attack on the deceased was obviously

premeditated, and the murder was perpetrated in a cold-blooded manner while the deceased was peacefully engaged in his daily occupation of ploughing the fields and was unarmed.

Held, that under the circumstances, his youth was no sufficient ground to mitigate the sentence of death. A.I.R. 1931 Rang. 171=9 Rang. 81=32 Cr.L.J. 941=132 Ind. Cas. 716.

—S. 302—Sentence—Youth—No ground for lenience—Murder not wholly deliberate and cold blooded—Some provocation—Capital sentence not appropriate.

In cases where the murder has been deliberately planned and is essentially of a cold blooded and contemptible nature, the death sentence is appropriate whatever be the age of the accused provided his case does not come under S. 22, Madras Children Act 4 of 1920. But where the murder by a juvenile cannot be said to be wholly deliberate and cold blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, the capital sentence might assume as in certain cases not be the appropriate one. 1930 M.W.N. 681=32 M.L.W. 220=129 Ind. Cas. 228=53 Mad. 861= A. I. R. 1930 Mad. 972=59 M.L.J. 939.

—S. 302—Youth and promptings of veneration for founder of religion.

The mere fact that the murderer is only 19 or 20 years of age and that the act was prompted by feelings of veneration for the founder of his religion and anger at one who had scurrilously attacked him, is a wholly insufficient reason for not imposing the appropriate sentence provided by law. 120 Ind. Cas. 1=1930 Cr.C. 165=30 Cr.L.J. 1125=11 L.L.J. 533=A.I.R. 1930 Lah. 157.

—S. 302—Youth of the offender.

A particularly cruel and cowardly murder was committed by a lad of about 19 or 20 without any apparent motive and the capital sentence was sought to be reduced:

Held, that the mere youth of the murderer was insufficient for not imposing the capital punishment and that the absence of an apparent motive could not be construed as indicating the existence of a provoking cause, which would amount to a mitigating circumstance. 120 Ind. Cas. 276=31 Cr.L.J. 81=1930 Cr.C. 18=A.I.R. 1930 Lah. 50.

—S. 302—No ground for mitigation—Inability to understand nature of the act—Influenced by older persons—Extenuating circumstances.

There is no law which justifies a court in not passing a sentence of death on any person merely because he is young. All persons who can understand their acts are liable to the extreme penalty of the law. Youth may be a circumstance to be taken into consideration in offences where the accused person is not fully able to understand the nature of his act or has been influenced by older persons. The sentence of transportation



for life is imposed in cases where there are in the opinion of the court some extenuating circumstances. 7 O. W. N. 767=1930 Cr. C. 965=32 Cr.L.J. 83=128 Ind. Cas. 80=A.I.R. 1931 Oudh 89.

—S. 302—Youth—A mere tool.

Youth alone does not constitute such an extenuating circumstance as would justify the imposition of the lesser penalty prescribed by the law.

But where a youth charged under S. 302 had no personal enmity with the victim, and he was found to be only a tool in the hands of the enemies of the victims:

Held: the extreme penalty of the law should not be exacted in the case. 110 Ind. Cas. 234=10 A.I.Cr.R. 501=29 Cr.L.J. 682=A.I.R. 1928 Lah. 855.

—S. 302—No reason for not giving death sentence.

The mere fact that the murderer is 19 or 20 years of age is a wholly insufficient reason for not imposing the extreme penalty. 112 Ind. Cas. 345=29 Cr.L.J. 1017=A.I.R. 1928 Lah. 531.

—S. 302—Brutal crime—No reason for mitigation.

Murder resulting in death is a particularly ruthless and brutal crime and therefore, the mere fact that the murderer is 18 years of age is a wholly insufficient reason for not imposing the appropriate sentence provided by law. A.I.R. 1928 Lah. 531, Foll. 107 Ind. Cas. 99=29 Cr.L.J. 211=9 A.I.Cr.R. 525 (Lah.).

—S. 302—Sentence—Youth of the offender—Some though not adequate provocation—Extreme penalty.

Where the accused had some provocation though not sudden and grave provocation, so as to reduce the offence to one of culpable homicide not amounting to murder and where he was only nineteen years old:

Held, that the extreme penalty of the law was not necessary and that transportation for life was enough. 99 Ind. Cas. 1017=27 P. L. R. 15=28 Cr.L.J. 217 (Lah.).

—S. 302—No reason for mitigation.

Although ordinarily in cases of deliberate murder the major sentence allowed by the law should be imposed, yet it cannot be affirmed that the tender age of an accused is not of itself a sufficient reason for passing the lesser sentence, i.e., transportation for life. Any definite standard as to the limit of age in this connexion cannot be laid down, as circumstances must vary with the particular case. A.I.R. 1922 Nag. 65, Diss. from. 96 Ind. Cas. 507=22 N.L.R. 104=27 Cr. L.J. 955=7 A.I.Cr.R. 37=A.I.R. 1926 Nag. 461.

—S. 302—Extreme youth.

Extreme youth of the offender was taken into consideration along with the absence of circumstance as to how murder took place as an extenuating circumstance for reducing the sentence of

death under S. 302 to one of transportation for life. 88 Ind. Cas. 353=7 N.L.J. 144=26 Cr.L.J. 1121=A.I.R. 1924 Nag. 115.

—S. 302—Motive for premeditated murder absent—Capital sentence not to be passed.

Where there was no motive for a premeditated murder and the probability was that there was a violent quarrel when the accused, a young man of 20 was taking his wife and child from a neighbouring village to his own village and he killed them on the way.

Held, that capital sentence in such a case should not be passed. 84 Ind. Cas. 653=26 Cr. L.J. 349=6 L.L.J. 323=A.I.R. 1924 Lah. 654.

—S. 302—Youth—Lack of motive.

It is impossible to lay down that youth alone in every case would be such an extenuating circumstance as would justify the imposition of lesser penalty, but it must be taken into consideration with other facts of the case. It would be dangerous for the Court to hold that an inadequate reason for inflicting a severe blow on a vital part causing instantaneous death would be sufficient when taken with the accused's age to justify the lesser penalty. 1 Bur. L.J. 70=A.I.R. 1922 L.B. 34.

—S. 302—Offender's youth—Sentence.

In murder cases offender's youth is not generally extenuating but Court should use its discretion under S. 302, I.P.C. 9 L.B.R. 165=19 Cr.L.J. 648=11 Bur. L.T. 100=45 Ind. Cas. 840.

—S. 302—Extenuating circumstances—Youth—Ordinarily.

Youth is an extenuating circumstance but it does not mean that in every case of murder by a person under a certain age, the lesser penalty ought to be awarded. U.B.R. (1914) 11; 28=16 Cr.L.J. 95=26 Ind. Cas. 1007.

—S. 302—Youth—Sentence—Practice.

Youth is a ground to be taken into consideration in determining the punishment to be awarded for murder. 1 L.B.R. 359, Diss. 11 C.W.N. 904 Foll. The penal Code leaves it discretionary with judges, even in cases of murder to consider mitigating circumstances in awarding punishment. Punishment should be as moderate as is consistent with the object aimed at. The law indicates the gravity of an act by the maximum penalty and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, to what extent. (1911) 1 U.B.R. 87=12 Cr.L.J. 443=11 Ind. Cas. 792.

—S. 302—Old age of accused.

Old age is a point to be considered in awarding a sentence. But standing alone it is not enough to entitle the accused to the lesser penalty of transportation in a case of murder. 1937 M.W.N. 728.

—S. 302—Sex and age—Extenuating circumstance.

The age and sex of the accused convicted of murder and the fact that she has recently been



delivered in jail may be taken into account by the Local Government, but these circumstances will not have any weight with Court and the revolting crime of murdering a child for the sake of its ornaments should be punished by the penalty of death. A.I.R. 1936 Nag. 200=37 Cr.L.J. 1047=I.L.R. (1936) Nag. 78=164 Ind. Cas. 964.

—S. 302—Sentence—Age or sex—No reason for leniency—When may be considered.

The age or sex of a murderer cannot generally, of itself, be a sufficient reason for a leniency in sentence. If there are other reasons which very nearly justify the passing of a lesser sentence, but do not quite do so or when it is doubtful whether they do so or not, then the youth or sex of the criminal may certainly tip the scale to the side of mercy. 64 Ind. Cas. 277=18 N.L.R. 101=A.I.R. 1922 Nag. 65.

—S. 302.

It is undesirable that a girl of ten or eleven years of age should be sent to prison even for an offence of murder. In such a case S. 31 of the Reformatory Schools Act should be applied. 65 Ind. Cas. 609=23 Cr.L.J. 145=24 O.C. 305=A.I.R. 1921 Oudh 190.

—S. 302—Sex or age—No ground for altering a sentence.

Comparative lenity to a woman is a commonly accepted rule of practice, but in atrocious crimes the mere sex should not bar the imposition of a maximum sentence. Per Seshagiri Aiyar, J.—Where a conviction is based merely on circumstantial evidence the age of the accused is an element to be taken into consideration in awarding sentence. 16 Cr.L.J. 20=26 Ind. Cas. 324 (Mad.)

—S. 302—Sentence for murder—Age of accused.

Where the accused, a girl of 16, was held guilty of deliberately killing her husband by means of arsenic poison which she mixed up with the food cooked and served up by herself to the husband: Held.—That in consideration of her age she should be transported for life instead of suffering the extreme penalty of death. (1907) 11 C.W.N. 904=6 Cr.L.J. 154.

8 (c). Sentence—Circumstantial evidence.

—S. 302.

It matters not how an accused's guilt is established whether by the testimony of eye-witnesses or by the testimony of combined circumstances provided that it is established beyond all reasonable doubt and the measure of proof must be the same in either case. Hence, the fact that the conviction is based on circumstantial evidence is no reason for not awarding capital punishment. A.I.R. 1941 Mad. 120=(1940) 2 M.L.J. 895=1940 M.W.N. 1229=52 L.W. 853=I.L.R. (1941) Mad. 340=42 Cr.L.J. 770=195 Ind. Cas. 679.

—S. 302.

It is wrong to say that an accused convicted of murder merely upon circumstantial evidence

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should not be visited with extreme penalty. A.I.R. 1939 Pesh. 47=41 Cr.L.J. 132=185 Ind. Cas. 208.

[Overrules 76 Ind. Cas. 97=25 Cr. L.J. 97.]

—S. 302.

There is no rule of law that if there be no eye-witnesses to a murder, the accused should not be sentenced to death. A.I.R. 1933 Pat. 180=14 P.L.T. 96=34 Cr.L.J. 395=142 Ind. Cas. 613 (2).

—S. 302—Sentence—Circumstantial evidence—Case clearly proved—No reason for lesser sentence.

In a case of murder the mere fact that the conviction is based on circumstantial evidence is no reason why a lesser sentence should be passed. If the case though depending on circumstantial evidence, is perfectly clear and conclusive and excludes all other reasonable hypotheses except the guilt of the accused, death sentence can be passed: 76 Ind. Cas. 97, not Foll. 1930 Cr.C. 865=A.I.R. 1930 Sind 225.

—S. 302—No ground for not passing death sentence.

The fact, that the conviction of a deliberate wife-murderer rests entirely on circumstantial evidence, is no ground whatever for not passing a sentence of death on him. 118 Ind. Cas. 817=1929 M.W.N. 270=2 M.Cr.C. 158=30 Cr.L.J. 971=1929 Cr.C. 138=A.I.R. 1929 Mad. 667.

—S. 302—Sentence—Circumstantial evidence.

Provided the court is satisfied beyond reasonable doubt that the accused is guilty of murder and that the circumstances of the case require the imposition of a death sentence, it is absolutely immaterial whether the conviction is based on direct or circumstantial evidence. It is only where the evidence leaves room for reasonable doubt on either point that the accused is entitled to the benefit of it. 61 Ind. Cas. 524=44 Mad. 443=13 M.L.W. 377=22 Cr.L.J. 396=A.I.R. 1921 Mad. 423=40 M.L.J. 464.

—S. 302—Sentence—Jury's verdict overruled—Evidence circumstantial—Transportation sufficient.

Where in a reference under S. 307, Cr.P. C., the High Court held, overruling the verdict of the jury, that the accused was guilty of murder:

Held, that in view of the verdict of the jury and the circumstantial nature of the evidence, the death sentence should not be awarded but that transportation for life was enough. 85 Ind. Cas. 833=26 Cr.L.J. 609=16 S.L.R. 143=A.I.R. 1921 Sind. 145.

—S. 302—Circumstantial evidence—Considerations of.

There is no principle of law which prohibits the imposition of a death sentence in cases where the evidence is purely circumstantial. 11 C.W.N. 904 Foll. 16 M.L.T. 535=1 L.W. 1007=(1915) M.W.N. 34=16 Cr.L.J. 38=26 Ind. Cas. 332.



## 8 (d). Sentence—Drunkenness.

—S. 302.

The mere fact that the accused was drinking before the occurrence took place does not minimise the nature of the offence especially when it is found that he ran to his house to fetch a balua and gave a severe blow with it on the head of the deceased. A.I.R. 1942 Pat. 427=23 P.L.T. 763=43 Cr. L.J. 544=8 B.R. 542=199 Ind. Cas. 307.

—S. 302.

The law gives a discretion to Courts to impose the lesser penalty of transportation for the offence of murder, and the discretion must be exercised with due regard to the circumstances of each case. The discretion of Courts cannot be fettered by any hard and fast rule in this respect. The mere fact that a man was drunk would be no justification whatever for not imposing the capital sentence. But all the circumstances of the case have to be taken into consideration. A.I.R. 1941 Lah. 454=43 P.L.R. 698=43 Cr.L.J. 332=I.L.R. (1943) Lah. 39=198 Ind. Cas. 252.

—S. 302.

Where an offence committed is undoubtedly murder, the drunkenness of the accused is not sufficient to reduce the crime to anything below that of murder. But a drunken man may be provoked by a taunt which could not, in any way, ruffle the temper of a man who is in his sober senses. Where, therefore, an accused commits murder while drunk as a result of a provocation, however slight, it is a case in which maximum punishment should not be given.

[In this case the sentence of death was reduced to one of transportation for life.] A.I.R. 1938 Rang. 448=40 Cr.L.J. 67=178 Ind. Cas. 431.

—S. 302.

No general rule can be laid down that voluntary drunkenness is in all or even in the majority of cases, a reason for not passing the death sentence. A.I.R. 1936 Rang. 477=31 Cr.L.J. 52=165 Ind. Cas. 762.

—S. 302.

Where the parties were drunk and the first blow was struck by the deceased, the lesser penalty should be imposed. A.I.R. 1934 Rang. 10=35 Cr.L.J. 1065=149 Ind. Cas. 1176.

—S. 302.

Where there was evidence that the accused had been drinking shortly before the occurrence, the attack was entirely unpremeditated and committed without reason and the weapons used were not such weapons as any man would use who had formed a prior intention of killing his enemy, the sentence might be reduced to one of transportation for life. A.I.R. 1933 Rang. 278=34 Cr.L.J. 1245=146 Ind. Cas. 216.

## 8 (e). Sentence—Duty of court.

—S. 302—Sentence—Lesser penalty—Grounds—Discretion and Duty of court.

The question whether on a conviction of murder the sentence of death or the lesser sentence of transportation for life should be passed is essentially a matter in the discretion of the convicting judge, but while exercising this discretion he must bear in mind the position that the usual sentence on such conviction is death unless there be any extenuating circumstance. The law requires the Judge to give reasons when he imposes the lesser penalty but the reasons given by him are not conclusive and are open to revision. It is only when any well-recognised ground is found to exist that the Judge is justified in withholding the capital sentence. It is impossible to lay down any general rule defining the classes of cases in which the lesser sentence may be imposed though from time to time certain circumstances have been recognised by the judges who had to consider this question as valid grounds for imposing such sentence. One of these is the extreme youth of the offender, however brutal or premeditated the offence; but there is no precedent for the proposition that a youth of 19 or 20 comes within this exception. Another ground for the lesser penalty is to be found in those cases where an offender, who does not come within the first exception, is young and acts at the instigation or under the influence of his elders. There are several cases in which young men of 20 and above have been awarded the lesser penalty because they joined their elders in the murder. Where the murder is committed in the course of a sudden quarrel and without premeditation or on the impulse of the moment it is usual not to pass the death sentence unless the circumstances be exceptional. In cases of premeditated murder, however, the usual sentence is death unless the conduct of the deceased furnishes grave though not sudden provocation for the murder, as for instance, where an aggrieved husband or other near relation of a woman murders a man who persists in offending the feelings of the aggrieved relative by publicly carrying on an immoral intrigue with the woman. There is still another class of cases where the usual sentence may be withheld. These are cases where a man is convicted of murder by reason of vicarious liability. Where death is intended and the murder is premeditated the offender should usually be sentenced to death irrespective of whether the vicarious liability arises by reason of S. 34 or S. 149, I. P. Code. But where the common object of an unlawful assembly is the beating of a person and death is not intended but is a likely consequence of the riot, the death sentence is withheld from those who are only constructively liable, but is imposed on the particular member of the unlawful assembly who brought about the death. These are some of the well-recognised cases where the lesser penalty may be awarded on a conviction of murder, but the classification is neither exhaustive nor absolute and many a case may arise which is not covered either by the rule or by the exception. In such cases the matter rests in the discretion of the convicting Judge which cannot be fettered by any hard and fast rule. 49 P.L.R. 137=A. I. R. 1948 Lah. 58=49 Cr.L.J. 26.

—S. 302.

A Judge is bound to pass a sentence of death on a person convicted of murder unless there are substantial reasons for not doing so. The reasons for passing the lesser sentence must be adequate and



express. Too much leniency should not be exercised in favour of persons whose participation alone makes it possible that the crime could be committed, even if their participation was not due to any direct motive, but only to oblige a friend. A.I.R. 1945 Oudh 140=1944 A.W.R. 275=1944 O.W.N. 419=219 Ind. Cas. 183=46 Cr.L.J. 532.

—S. 302.

The law gives the Sessions Judge the option of sentencing a person convicted of murder either to death or to transportation for life. Where there are extenuating circumstances, it is the duty of the Sessions Judge to award the lesser sentence and not to pass the sentence of death. A.I.R. 1941 Mad. 50=52 L.W. 472=1940 M.W.N. 943=(1940) 2 M.L.J. 492=42 Cr.L.J. 270=192 Ind. Cas. 278.

—S. 302.

Section 302 provides two punishments. In the absence of any extenuating circumstances, the sentence of death is the only appropriate sentence. The Court whose duty it is to award punishment must exercise its own discretion. The discretion is to be exercised in a judicial manner and not arbitrarily. A.I.R. 1940 All. 480=1940 A.L.J. 607=42 Cr.L.J. 115=1940 A.W.R. 480=191 Ind. Cas. 303.

—S. 302.

In the case of a cold-blooded and brutal murder carried out by the accused with considerable amount of determination, the only appropriate sentence for an offence is one of death. The fact that the sentence of death passed on the co-accused was commuted by the executive Government is no judicial consideration for not passing the sentence of death on the accused. A.I.R. 1940 Lah. 494=42 Cr.L.J. 156=191 Ind. Cas. 376.

—S. 302.

It is no part of the duty of a Judge to be influenced by public feeling. His duty is to administer the law. The law says that the proper sentence for murder is death and whenever a person is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall, in its judgment, state the reasons why the sentence of death was not passed. The state of public feeling is not an admissible reason for refraining from passing the sentence of death. Nor is it permissible to refrain from sentencing the murderers to death merely because their numbers exceed the numbers of their victims. When a number of persons have together planned and executed the murder of a single person, each of them must be sentenced to death unless there are some legal reasons for not doing so. A.I.R. 1939 Mad. 109=48 L.W. 730=1938 M.W.N. 1166=(1938) 2 M.L.J. 1028=40 Cr.L.J. 249=179 Ind. Cas. 682.

—S. 302.

The judge is either satisfied that the accused is guilty or he is not. There can be only two positions. If he is satisfied, the accused must get the normal punishment; if he is not, the accused must be acquitted. There is no middle course at all in judging the guilt of the accused. A.I.R. 1939 Pesh. 47=41 Cr.L.J. 132=185 Ind. Cas. 208.

—S. 302—Doubt in guilt of accused—Duty of Court.

The I.P.C. provides two penalties for murder, namely death and the lesser penalty of transportation. The lesser sentence was never intended to be imposed in a case where there appears to be some doubt. If the Court at the end of a case is left in any reasonable doubt about the matter, it must acquit, but on the other hand if it is left in no reasonable doubt concerning the guilt of the accused, the appropriate penalty must in all cases be imposed. Where there is a doubt in a murder case the Court should not and cannot pass a sentence of transportation for life. A.I.R. 1935 All. 919=1935 A.W.R. 806=36 Cr.L.J. 1496=158 Ind. Cas. 1041.

—S. 302.

Where the assault is of a murderous and brutal nature and the injuries are inflicted deliberately on a vital part of the body, namely the head, and death has ensued, the accused should be sentenced to capital punishment. A.I.R. 1935 Oudh 110=36 Cr.L.J. 249=11 O.W.N. 1543=153 Ind. Cas. 81.

—S. 302.

The fact that the assessors gave their opinion that the accused was not guilty is no reason for passing the lesser sentence. Responsibility for the sentence rests with the Judge. A.I.R. 1933 Nag. 307=34 Cr.L.J. 1168=30 N.L.R. 9=146 Ind. Cas. 118.

—S. 302.

Per Agha Haider, J. The extenuating circumstances which would justify a Court in inflicting the lesser penalty upon a person convicted of a murder are well understood and a Court cannot make a departure and introduce an entirely novel extenuating circumstance which has not so far occurred to another Court. A.I.R. 1932 Lah. 500=33 P.L.R. 580=33 Cr.L.J. 497 (2)=137 Ind. Cas. 691.

—S. 302—Sentence—Death.

Unless extenuating circumstances can be found a murderer must be sentenced to death. 124 Ind. Cas. 841=11 P.L.T. 166=A.I.R. 1930 Pat. 252.

—S. 302—Sentence—Crime to absolve crime.

Per Percival, J. C. and Wild, A. J. C.—Where an accused commits one criminal offence, it is no palliation of his guilt that to absolve himself from punishment he commits another and more grievous offence, namely murder.

Per Rupchand, A. J. C.—It is not improper to inflict a lesser sentence where there are circumstances demanding the exercise of such discretion as for instance the absence of strong motive coupled with the possibility of the murder having been committed without premeditation and under temporary derangement of the mind due to the fear of being prosecuted and convicted for a criminal offence. But the exercise of such discretionary powers under S. 302, Penal Code, in any particular case must depend on its own facts considered in the light of various circumstances such as the



magnitude of the mischief which the crime has a tendency to produce, the effect of the punishment in preventing similar crimes the motive or inducement to the crime, aggravating or instigating circumstances and the like. When murder is committed for lust or for rape perhaps it is necessary to take the life of the murderer not so much as to prevent him from committing similar offences but to serve as a deterrent to others for committing similar offences. Again when a crime of a particular character is rampant in any locality, extreme penalty of law is necessary to serve as a deterrent. 1930 Cr. C. 865=A.I.R. 1930 Sind 225.

#### —S. 302—Death sentence—Mitigation.

Where a person is convicted under S. 302 of murder sentence of death should ordinarily be imposed unless there are mitigating circumstances which would justify a court in awarding a lesser sentence. 75 Ind. Cas. 359=6 L.L.J. 62=24 Cr. L. J. 935=A.I.R. 1923 Lah. 598.

#### 8 (f). Sentence—Enhancement.

##### —S. 302.

Where the lower Court has failed in its duty to impose a sentence of death by passing a lesser sentence, the High Court has power to pass a sentence of death. A.I.R. 1941 Mad. 120=I.L.R. (1941) Mad. 340=52 L.W. 853=(1940) 2 M.L.J. 895=1940 M.W.N. 1229=42 Cr. L. J. 770=195 Ind. Cas. 679 (D.B.).

##### —S. 302—Principles.

Even where a Sessions Judge is lenient in the exercise of his discretion vested in him by law, High Court will not enhance the sentence unless it finds that the sentence of death was the only proper sentence under the circumstances of the case. 1937 M.W.N. 1241.

##### —S. 302.

High Court will be very reluctant to enhance a sentence except upon very strong grounds. 1934 M.W.N. 958.

##### —S. 302.

High Court will not interfere with the discretion of the Sessions Judge with respect to the sentence under S. 302, unless the only sentence in the case is a sentence of death. 1933 M.W.N. 1420.

##### —S. 302—Powers of High Court—Enhancement of sentence.

The High Court should not enhance the sentence unless it is satisfied that the sentence of death was the only possible sentence which could have been passed by the Sessions Judge. 31 M.L.W. 542=A.I.R. 1930 Mad. 446=58 M.L.J. 490.

##### —S. 302—Enhancement of sentence—Acting proprio motu.

It is not the practice of the High Court to issue notice on an accused person 'proprio motu' to show cause why his sentence should not be enhanced; but to leave it to the Local Government

to apply in revision for an enhancement if so advised. 64 Ind. Cas. 277=18 N.L.R. 101=A.I.R. 1922 Nag. 65.

#### 8 (g). Sentence—Grace and clemency.

##### —S. 302.

The fact that a person who actually committed the murder was tendered a pardon and thereby enabled to get off scot-free while the accused who conceived and instigated the murder but did not commit it is in danger of being hanged, is not by itself a reason for mitigating the punishment of the accused. A.I.R. 1941 Mad. 358=42 Cr. L. J. 311=52 L.W. 949=(1941) 1 M.L.J. 34=1941 M.W.N. 58=I.L.R. (1941) Mad. 428=192 Ind. Cas. 579 (D.B.).

##### —S. 302.

Where a woman has committed a murder after deliberation and in a brutal manner, the existence of an extremely young baby born to her since the murder might perhaps be taken into consideration by the Provincial Government, when the accused prefers an application for clemency, but would not be a ground for passing the lesser sentence. A.I.R. 1941 Mad. 27=1940 M.W.N. 961=52 L.W. 549 (2)=(1940) 2 M.L.J. 551=42 Cr. L. J. 257=192 Ind. Cas. 216.

##### —S. 302.

Per Cunliffe, J.—The argument that two lives should not be forfeited for one should not be accepted. When persons are convicted for murder, the only way in which death sentence can be altered is by the exercise of the prerogative by the King-Emperor and it has got nothing to do with law at all. A.I.R. 1936 Cal. 227=63 Cal. 1089=37 Cr. L. J. 676=63 C.L.J. 142=40 C.W.N. 668=162 Ind. Cas. 636.

##### —S. 302.

The Court will not be justified in not inflicting extreme sentence on grounds which are purely matters of grace and clemency. A.I.R. 1935 Rang. 504=37 Cr. L. J. 267=160 Ind. Cas. 234.

##### —S. 302.

If a man has committed murder and is found guilty, the mere fact that he belongs to a community which is singularly free from criminal propensities is no ground for not imposing the capital sentence. A.I.R. 1932 Lah. 500=33 Cr. L. J. 497 (2)=33 P.L.R. 580=137 Ind. Cas. 691.

##### —S. 302.

Where the accused who had contracted illicit relation with a man and was delivered of a child was charged with having put the infant to death and it appeared that she was in possession of opium 4 days before the child's birth and the death of the child was due to opium.

Held, that it was pre-eminently a case where the Local Government should exercise its prerogative in reducing the sentence from transportation for life to one year's rigorous imprisonment. A.I.R. 1932



Lah. 297=33 P.L.R. 223=33 Cr. L. J. 448=137 Ind. Cas. 259.

#### 8 (h). Sentence—Heat of passion.

—S. 302—Sentence—Mitigation—Murder committed in a fit of rage and extreme excitement—Lesser sentence.

That the accused committed the murder in a moment of extreme excitement and in a fit of rage, would be a proper ground for awarding the lesser sentence of transportation for life. 3 A.I.Cr.D. 517=A.J.R. 1949 E. P. 355=51 Cr. L. J. 174=51 P.L.R. 307.

—S. 302—Principles.

If a Court has two alternative sentences, it should take into consideration all the circumstances of the case and award the sentence which seems to it in view those circumstances, the more fitting.

[In view of the evidence showing that the murder was unpremeditated and that the act was committed in sudden anger, the death sentence was changed to one of transportation for life.] A.I.R. 1946 Mad. 83=(1945) 2 M. L. J. 547=1945 M.W.N. 732.

—S. 302—Single blow in heat of passion.

Striking of fatal blow preceded by exchange of abuse and a struggle between the accused and deceased—Accused acted without premeditation in a moment of anger and dealt a single blow—Sentence of death, held, should be reduced to transportation for life. 1936 O.W.N. 597.

—S. 302.

The extreme penalty of the law is not called for where the accused gave only one blow and no more and he gave that blow in the heat of passion aroused at the sight of his brother-in-law being assaulted in public. A.I.R. 1936 Rang. 115=37 Cr. L. J. 467=161 Ind. Cas. 578.

—S. 302.

The extreme penalty of law should not be passed, where the attack is unpremeditated and the accused acts under the impulse of the moment. A.I.R. 1935 Lah. 94=16 Lah. 589=36 Cr. L. J. 1335=37 P.L.R. 705=158 Ind. Cas. 336.

—S. 302.

The deceased, a woman, visited the accused's house and presented a piece of roti to his female child who was about a year old, in the presence of its parents. After the visitor had left, the child, though previously perfectly well and playing about began to be ill after having eaten the bread given to her by the deceased. It suffered from cramps and lock jaw and eventually died in a few hours. The accused believing his only child to have been poisoned by the visitor, took his balua, proceeded to the visitor's house, and dealt her violent blows one at least of which was necessarily fatal.

Held, that the accused was beset himself with grief and having connected his bereavement with the visit and gift of bread by the deceased rushed away before he had any time to think and committed crime and in view of this and in consideration

of the class to which he belonged, the lesser sentence should be passed on the accused. A.I.R. 1934 Pat. 356=35 Cr. L. J. 1128=150 Ind. Cas. 543 (2).

—S. 302—Requisites of Excep. 4 satisfied—Other facts prove murder—Death sentence not called for.

Where the fatal attack was not a premeditated one and the victims were injured in the heat of passion upon a sudden quarrel and the offenders did neither take undue advantage nor acted in a cruel or unusual manner, but from the other facts of the case the case would not come under Excep. 4 to S. 300:

Held, that the offence was one of murder, but that the extreme penalty of the law should not be exacted in the case. 105 Ind. Cas. 678=26 P.L.R. 363=28 Cr. L. J. 966=A.I.R. 1928 Lah. 93.

—S. 302—Sentence—Heat of passion.

Where there has been some provocation and there is no premeditation, and the crime has been committed in the heat of passion, it is not necessary to inflict the death penalty. Transportation for life is enough. 98 Ind. Cas. 608=7 L. R. A. Cr. 186=27 Cr. L. J. 1392=A.I.R. 1927 All. 105.

—S. 302—Deep wrong suffered—Losing head—Massacre not ordered by him—Nor present at the scene.

In this case the Court found that the accused was suffering doubtless under a deep sense of wrong and helplessness and lost his head and acted as he did. And taking all the circumstances into consideration and in view of the facts that he did not order the final massacre in the Chauhundi and that the evidence showed that he did not enter the enclosure till all the killing was over, it was ordered that he should not suffer the extreme penalty of the law, and that the sentence be reduced to one of transportation for life. 68 Ind. Cas. 113=3 Lah. 144=4 L.L.J. 91=9 P.W.R. Cr. 1922=23 Cr.L.J. 513=A.I.R. 1922 Lah. 1.

—S. 302—Sentence for murder under extenuating circumstances and otherwise.

In the absence of extenuating circumstances, death sentence should ordinarily be inflicted in a case of murder and the sentence for transportation for life should not be passed merely because there are no aggravating circumstances in the case. The commission of murder without premeditation, in the heat of passion, upon a sudden quarrel, is not an extenuating circumstance. 18 Cr.L. J. 113=37 Ind. Cas. 465 (L. Bur.).

#### 8 (i). Sentence—Ignorance.

—S. 302.

Sentence of death awarded for the cruel and wanton murder cannot be reduced to one of transportation for life on the ground that the murder was one committed by ignorant men disturbed and excited by the events of those days when communal feeling was extreme. A.I.R.



1941 Sind 129=I.L.R. (1941) Kar. 257=42 Cr.L.J. 741=195 Ind. Cas. 458.

—S. 302.

Where an illiterate young woman living in the midst of environments reminiscent only of the Dark Ages and where gross ignorance and superstition prevailed and throughout whose life, all opportunities of receiving education and enlightenment had been denied, believed that the death of her children was the direct result of the influence of the 'evil shadow' cast upon her by another woman, her husband's brother's wife, and in this superstitious state of mind picked up the latter's child and caused its death.

Held, that under the circumstances it was sufficient that the transportation for life was inflicted on her and in view of the extraordinary circumstances of the case, the Court would invite the attention of the Local Government to take steps for further mitigation of the sentence under S. 401, Criminal P. C. A.I.R. 1933 Lah. 718=34 Cr.L.J. 1251=146 Ind. Cas. 228.

—S. 302.

Where a person is killed by the accused who are of primitive belief and rudimentary intelligence that the victim is a sorcerer, the extreme penalty of death is not necessary to be inflicted. A.I.R. 1932 Cal. 815=33 Cr.L.J. 663=139 Ind. Cas. 81 (F.B).

—S. 302—Sentence—Ignorance played upon—Sufficient reason for passing lesser sentence.

Where the accused were ignorant peasants and were led to commit offences under Ss. 49 and 302 of the Penal Code by misrepresentations and preposterous promises of millennium which was to be brought about by courage and resolution on their part and were some of them believed that the person whose orders they believed they were carrying out was a worker of miracles. Held, that this was a sufficient reason for passing on the accused the lesser sentence of transportation for life. 92 Ind. Cas. 145=4 L.R.A.Cr. 145=27 Cr.L.J. 193=A.I.R. 1924 All. 233.

8 (j). Sentence—Legal sentence.

—Ss. 302 and 396.

Section 396 differs from S. 302 in that whereas a sentence of death should necessarily not follow a conviction under the former, when death has been caused under the latter a sentence of death should follow, unless reasons are shown for giving a lesser sentence. A.I.R. 1938 All. 625=1938 A.L.J. 913=I.L.R. (1938) All. 875=1938 A.W.R. 642=40 Cr.L.J. 132=178 Ind. Cas. 694.

—S. 302.

Where five persons are convicted under S. 302 for the murder of two men, the reasoning that five persons should not be sentenced to death for the murder of two, is not in accordance with law and cannot be sustained. A.I.R. 1937 Pat. 497=18 P.L.T. 416=38 Cr.L.J. 1007=3 B.R. 794=170 Ind. Cas. 785.

—Ss. 302 and 149.

Sentence for an offence under S. 302-149, I.P.C., must be not less than transportation for life. A.I.R. 1937 Pat. 497=18 P.L.T. 416=38 Cr.L.J. 1007=3 B.R. 794=170 Ind. Cas. 785.

—Ss. 302, 109, 115 and 120-B — Imprisonment—Legality.

A person charged with an offence under S. 302, read with S. 120-B, I.P.C., can be convicted either under S. 302, read with S. 109, if the conspiracy to murder is established, or under S. 302, read with S. 115, if such conspiracy is not established. In either case he cannot be sentenced to 10 years' rigorous imprisonment and such punishment is illegal. A.I.R. 1937 Cal. 578=I.L.R. (1937) I Cal. 484=39 Cr.L.J. 31=171 Ind. Cas. 944.

—S. 302.

A sentence of ten years' rigorous imprisonment passed upon an accused person in respect of offence under S. 302-149 is illegal. [The sentence was enhanced to a sentence of transportation for life which is the minimum punishment that can be imposed upon an accused who has been convicted of an offence under S. 302, I.P.C.] A.I.R. 1935 Oudh 190=1935 O.W.N. 145=153 Ind. Cas. 978.

—S. 302.

The sentence of transportation for life is the minimum sentence that can be legally passed for an offence under S. 302. A.I.R. 1933 Oudh 399=10 O.W.N. 835=35 Cr.L.J. 185=146 Ind. Cas. 888.

—Ss. 302 and 149—Conviction.

Sentences on conviction under Ss. 302 and 149 to various terms of imprisonment are illegal as the lowest sentence for an offence under S. 302 is transportation for life. 9 M.L.T. 510=12 Cr. L. J. 145=9 Ind. Cas. 885.

8 (k). Sentence—Motive.

—S. 302—Sentence—Accused taking part to oblige his friend.

Where a murder was of the most brutal kind and there was no extenuating circumstance the fact that one of the accused took part in the murder simply to oblige the other accused who was his thick friend, is an inadequate reason for imposing on him the lesser sentence of transportation for life. 4 A.I.Cr.D. 123=A.I.R. 1950 E.P. 159=52 P.L.R. 73=51 Cr.L.J. 747.

—S. 302—Sentence—Motive not proved—Possibility of cause for quarrel—Proper sentence.

Although the accused is convicted of the offence of murder under S. 302 when the prosecution fails to prove the alleged motive, and there is a possibility of a reasonable cause for a quarrel between the accused and the deceased, the extreme penalty of the law is not called for. 231 Ind. Cas. 400=48 Cr.L.J. 786.



## —S. 302.

Held, that there was sufficient justification for not imposing the capital sentence. In the first place, no motive for the commission of the offence had been proved by any reliable evidence. In the second place, he was being invited by others to inflict injuries and the deceased might have avoided taking unnecessary risk by accepting the challenge. Hence, a sentence of transportation for life was a proper one. A.I.R. 1941 Lah. 454=43 P.L.R. 698=43 Cr.L.J. 332=1.L.R. (1943) Lah. 39=198 Ind. Cas. 252.

## —S. 302.

Per Gentle, J.—The absence of an apparent motive on the part of the accused in committing a murder is material when the question of sentence is considered. A.I.R. 1941 Mad. 326=1940 M.W.N. 963=52 L.W. 689=42 Cr.L.J. 558=194 Ind. Cas. 332.

## —S. 302.

Held, that the unnecessary brutality of the murder, the large number of injuries inflicted not only on the neck, but also on the chest and face, the fact that the accused herself brought the neighbours on the scene by her cries, and her failure to make even a pretence of grief by shedding tears, are, however, features which, together with the want of an intelligible motive, and the full confession made by her, seem to bring this case within the class in which it is not usual to pass the capital sentence. A.I.R. 1936 Pat. 245=2 B.R. 410=37 Cr.L.J. 543=162 Ind. Cas. 25.

## —S. 302—Accused old father and young son—Absence of personal motives—Sentence.

Where it appears that two accused persons, son and father, had really no personal motive for murdering the deceased and the son is a young man of 24 and the father an old man of 60, the sentence of death passed upon them may be reduced to that of transportation for life. A.I.R. 1935 Oudh 281=1935 O.W.N. 311=36 Cr.L.J. 534=10 Luck. 718=154 Ind. Cas. 697.

## —S. 302.

The fact that the accused had no personal grudge against the deceased and was either a hired murderer or one who was ready to kill another to please his master or landlord is no ground for not giving him the capital sentence. A.I.R. 1933 Lah. 623=34 Cr.L.J. 372=34 P.L.R. 427=142 Ind. Cas. 620.

## —S. 302.

The fact that the motive was not personal enmity but merely a desire to injure the head of the Government does not justify a refusal to enforce the ordinary punishment provided by law when a criminal has been convicted. A.I.R. 1933 Lah. 305=34 Cr.L.J. 720=34 P.L.R. 691=144 Ind. Cas. 294.

## —S. 302.

Murder—Plea of insanity—Mere eccentricity and inadequacy of motive—No ground for acquittal or lesser sentence. A.I.R. 1931 Oudh 77=7 O.W.N. 1100=32 Cr.L.J. 327=129 Ind. Cas. 323.

## 8 (1). Sentence—Part played.

## —S. 302—Son acting under father's influence.

Where the son may well have been acting under the influence of his father the death sentence is not called for in his case. A.I.R. 1944 Lah. 206=45 Cr.L.J. 660=46 P.L.R. 69=213 Ind. Cas. 355.

## —S. 302.

The sentence of death is certainly the only proper sentence in a case where a woman has been strangled and suffocated to death by two men in order to steal her jewels, even if, only one of them played the principal part in the actual murder. A.I.R. 1943 Mad. 315=1943 M.W.N. 11=56 L.W. 77=44 Cr.L.J. 489=206 Ind. Cas. 101.

## —S. 302.

In the case of a deliberate murder with deliberate attempt at concealment, sentence of death is appropriate. A.I.R. 1942 Mad. 275=54 L.W. 561 (2)=1491 M.W.N. 874=43 Cr. L. J. 543=199 Ind. Cas. 310.

## —S. 302.

Where one of the accused was mainly responsible for the killing of the deceased and the other accused who were his relatives joined him under his influence, the ends of justice will be met if the other accused are sentenced to transportation for life only and the principal accused sentenced to death. A.I.R. 1942 Oudh 193=1941 O.W.N. 1246=17 Luck. 376=1941 A.W.R. 354=43 Cr.L.J. 243=197 Ind. Cas. 701.

## —S. 302.

Where persons have been found guilty of deliberate intention to murder, there is no justification for refraining from passing the death sentence on all concerned, merely because it cannot be said which of the accused struck the fatal blow. A.I.R. 1941 Lah. 117=1.L.R. (1940) Lah. 554=42 Cr.L.J. 475=193 Ind. Cas. 666.

## —S. 302—Person acting as go-between and procuring murderers—Punishment.

A person who acts as a go-between and procures murderers is just as guilty as the actual murderers or the persons in whose interest the murder is committed, and is, therefore, liable to the same punishment as the murderers. A.I.R. 1939 Lah. 429=41 P.L.R. 333=40 Cr.L.J. 897=184 Ind. Cas. 219.

## —S. 302.

A number of persons were involved in a murder of a woman which was deliberate and premeditated. One of them cut the throat of the woman while others who were under his influence held the woman and facilitated the crime. There was no extenuating circumstance:

Held, that the person cutting the throat should be sentenced to death while the rest to transportation for life. A.I.R. 1938 Cal. 295=66 C.L.J. 351=39 Cr.L.J. 479=174 Ind. Cas. 803.



## —S. 302.

Where in the case of an accused convicted for an offence under S. 302-149, it appeared that he was not the leader of the gang and he was not shown to be directly responsible for murder although constructive criminal liability attached to him:

Held, that the ends of justice would be met by inflicting the lesser of the two punishments which it is permissible for a Court to impose upon an accused on his being convicted of an offence under S. 302. A.I.R. 1935 Oudh 190=1935 O.W.N. 145=153 Ind. Cas. 978.

## —S. 302.

Accused instigating raid or leader of raid in which death is caused—Accused convicted under Ss. 121 and 121-A with murder and with abetment of murder:

Held, that the sentence of death passed on him was proper. A.I.R. 1934 Cal. 221=35 Cr.L.J. 334=147 Ind. Cas. 32 (S.B.).

## —S. 302—Murder deliberately planned and brutally carried out.

Where a murder was deliberately planned and carried out in brutal fashion, an innocent man being done to death for the sake of money, the capital sentence is fully justified. A.I.R. 1933 Nag. 352=16 N.L.J. 186=35 Cr.L.J. 213=146 Ind. Cas. 701.

## —S. 302—Co-accused not actually committing murder—Sentence.

Under S. 71, I.P.C., it is not legal to pass a separate sentence when the accused is charged both under S. 147, and also under S. 325 read with S. 149.

Where some of the accused caused the death of a person by belabouring him with blows while the rest of the accused were only members of the unlawful assembly and attacked other members of the complainant's party but did not take any part in the actual attack on the murdered man:

Held, that some difference ought to be made between the sentences imposed on the two sets of the accused. The former were sentenced to seven years rigorous imprisonment, while the latter were sentenced to five years. A.I.R. 1931 Cal. 606=35 C.W.N. 345=33 Cr.L.J. 1=134 Ind. Cas. 1041.

## —S. 302—Sentence — Minor part — Another's influence.

If a murder is committed by two persons, and if one of them takes some minor part and is acting under the influence of the other, it may sometimes be a case for reduction of sentence in the case of the man who is acting under the influence of the other especially where the evidence against him depends primarily on a confession. 128 Ind. Cas. 684=1930 Cr.C. 1142=A.I.R. 1930 Sind 305.

## 8 (m). Sentence—Premeditation.

—Ss. 302, 149—Premeditated and brutal attack on deceased by several accused—Injuries sufficient to cause death—Offence under Ss. 302/149—Sentence of death on elderly accused, held proper but in case of one who was young, commuted to transportation for life.

Five accused who were armed with lathis made a premeditated and brutal attack upon the two deceased. One of the victims had ten injuries two of which were on the head and had fractured the skull. According to medical evidence, each of these injuries was sufficient to cause death in the ordinary course. The other victim had twenty-five injuries spread on all parts of his body. His right ulna bone and two ribs were fractured. Death was due to shock caused by all the injuries collectively:

Held, that taking into consideration the concerted attack to which the dead men were subjected and the multiple injuries that were inflicted upon them, there could not be any doubt that the intention of their assailants was to kill them or at least to inflict injuries that were sufficient to cause death in the ordinary course. They were, therefore, rightly convicted under Ss. 302 (1) 149, I. P. C.:

Held, further that the sentence of death passed upon the four elderly accused was proper as the offence was premeditated and brutal and there were no extenuating circumstances but as the fifth accused was only twenty years old and was the nephew of the main accused and could, therefore, be said to have acted under the influence of the older members of the family, particularly his uncle, his sentence should be commuted from death to transportation for life. A. I. R. 1946 Lah. 229=47 Cr. L. J. 225=221 Ind. Cas. 629.

## —S. 302—Plea of belief that accused's wife was carrying on intrigue with the deceased.

S, the accused, suspected G, the deceased, of carrying on an intrigue with his wife. On one night, S found that his wife who had been sleeping with him during night was missing. He thought that she must have gone to G and they must be having intercourse. Being provoked by this thought, he went to the place where G and G's wife lived and slept. S picked up a hatchet and when he went to the house of the deceased and saw a woman sleeping with G, he believed that she must be his own wife. He, therefore, inflicted a couple of injuries upon each of them with the result that both of them died.

Held, that the offence was premeditated and brutal and the fact that S committed it under the belief that G was carrying on an intrigue with his wife could not be regarded as an extenuating circumstance. A.I.R. 1945 Lah. 91=47 P.L.R. 11.

## —S. 302.

Where the case is not one where a man and woman were surprised in the act of guilty intercourse, but it is a case where the brother of



the woman, with others deliberately armed themselves with weapons and came and murdered the two with premeditation and in cold blood, even though the custom of karokari among Baluchis is a common custom, the death sentence should be confirmed. A.I.R. 1943 Sind 237=I.L.R. (1943) Kar. 326=45 Cr.L.J. 138=209 Ind. Cas. 335.

—S. 302—Proper sentence—Deliberate action

A band of armed Baluchis, setting out deliberately to execute a sentence of death which they or others had passed, committed a deliberate, audacious and premeditated murder. There was no immediate provocation and hasty action in response but the accused set themselves as executioners:

Held, that the only proper sentence was the sentence of death. But as Government had not moved, for enhancement of sentence of transportation for life and some considerable time had passed, the sentences were confirmed and not enhanced. A.I.R. 1937 Sind 239=30 S.L.R. 354=38 Cr.L.J. 953=170 Ind. Cas. 605.

—S. 302.

Where a brutal crime was premeditated and carried out in a most brutal manner on a defenceless boy who was sound asleep when he was attacked:

Held, that the fact that the accused is a young man of 19 or 20 years cannot support a plea that he should be given the lesser penalty provided for by S. 302. A.I.R. 1934 Oudh 405=35 Cr.L.J. 1113=11 O.W.N. 851=150 Ind. Cas. 819.

—S. 302.

Where a Judge finds that the murder committed was premeditated, cold blooded and brutal in the extreme, and that the accused is liable for the act as if he had committed it alone, and suggests no extenuating circumstance, he is not justified in mitigating the sentence. A.I.R. 1932 Lah. 245=33 P.L.R. 158=33 Cr.L.J. 576 (2)=138 Ind. Cas. 327.

—S. 302—Sentence—Premeditated murder—Death penalty.

Where a person goes to another's house with the intention of killing his enemies and others join him with full knowledge of the intention, no other punishment except death is appropriate in their case. 120 Ind. Cas. 180=11 L.L.J. 20=31 Cr.L.J. 41=A.I.R. 1929 Lah. 292.

8 (n). Sentence—Premeditation absent.

—S. 302.

Where the murder was not premeditated or there were reasons for disagreement which might very well have provoked the quarrel, it is not necessary to make a recommendation for commutation of death penalty to the Government. If, there are circumstances which justify the imposition of the lesser penalty the Sessions Judge can do so. A.I.R. 1941 Mad. 894=1941-2 M.L.J. 399=54 L.W. 312=1941 M.W.N. 847=43 Cr. L.J. 56=196 Ind. Cas. 687.

—S. 302.

Where the offence committed was not premeditated in any way but was the result of impulse and temper, the proper sentence is one of transportation for life, though the assault was a violent one. A.I.R. 1941 Mad. 326=1940 M.W.N. 963=52 L.W. 689=42 Cr.L.J. 558=194 Ind. Cas. 332.

—S. 302.

Transportation for life is a proper sentence in the case of murder which is not premeditated and is committed rather in panic than in defiance. A.I.R. 1941 Sind 168=I.L.R. (1941) Kar. 270=42 Cr.L.J. 850=196 Ind. Cas. 363.

—S. 302.

In view of the unpremeditated nature of the crime the sentence awarded was transportation for life. A.I.R. 1940 Pat. 605=6 B.R. 693=41 Cr.L.J. 587=188 Ind. Cas. 429.

—S. 302.

Held, that although the suddenness of an attack is not necessarily an extenuating circumstance, the High Court would not in this case interfere with the sentence passed. A.I.R. 1936 Sind 31=37 Cr.L.J. 483=161 Ind. Cas. 414.

—S. 302.

The absence of proof of premeditation to commit murder would be a good ground for not passing the sentence of death. A.I.R. 1936 Rang. 28=37 Cr.L.J. 449=161 Ind. Cas. 297.

—S. 302.

Where the murder is not a premeditated one but the result of anger and passions engendered in a sudden quarrel, it is not a case where a sentence of death is necessary in the interest of justice. A.I.R. 1935 All. 346 (2)=1935 A.L.J. 54=57 A. 717=1935 A.W.R. 64=36 Cr.L.J. 438=153 Ind. Cas. 999 (2).

—S. 302—No premeditation—Sudden quarrel and abuse—Sentence.

There was no premeditation; there was a sudden quarrel and abuse, and in the heat of the moment, one blow was struck at the deceased:

Held, that this was the type of case for which the second alternative sentence is provided by S. 302, Penal Code. (1935) 160 Ind. Cas. 606=16 L. 1098=37 Cr.L.J. 307=38 P.L.R. 111.

—S. 302.

Where the crime is unpremeditated and committed in a hot blood in the course of a dispute, the sentence of death is uncalled for. A.I.R. 1935 Rang. 427=37 Cr.L.J. 181=159 Ind. Cas. 902.

—S. 302—Absence of premeditation.

There was a fight going on between two men both unarmed. The weaker one called to the villagers to separate them and the accused came up and stabbed the man who had got the better of the struggle. There was no premeditation at all,



merely an excess of zeal, possibly due, in part at any rate, to the fact that the appellant had been drinking:

Held, that the extreme penalty was not called for though the offence was undoubtedly murder. A.I.R. 1935 Rang. 408=37 Cr.L.J. 214=159 Ind. Cas. 1058.

—S. 302—Sentence—Sudden quarrel—Premeditation absent—Accused of a peaceful trading class.

But the fact that the assault followed sudden quarrel without premeditation is an extenuating circumstance as also the fact that accused belongs to a peaceful trading class and extreme penalty of law should not be inflicted and sentence should be reduced to transportation for life. 1930 Cr.C. 162=A.I.R. 1930 Lah. 154.

—S. 302—Sentence—Premeditation absent—Transportation, not death sentence.

While a wrestling match was going on, the deceased, a Kamin boy, obstructed the sight of an old Jat and consequently there was exchange of abuse. The old man ordered his friends to kill the deceased. Thereupon the appellants, the sons of the old man and his followers assaulted the deceased with lathis and dangs which resulted in the death of the boy and grievous hurt to his father who tried to protect the deceased. The deceased and his father were defenceless, not having even a stick with them.

Held: that the appellants who attacked the deceased with dangs were guilty under S. 302 but as the elements of preparation and premeditation were absent, the sentence to transportation for life should be passed. 106 Ind. Cas. 451=9 L.L.J. 262=28 P.L.R. 674=29 Cr.L.J. 35=A.I.R. 1927 Lah. 516.

—S. 302—Capital sentence may not be passed.

Where the accused using his spear as lathi gives a violent blow over the head which has the result of fracturing the skull of the deceased and killing him on the spot, the offence committed is the offence of murder but where it is not premeditated, the Court may refuse to pass capital sentence. 101 Ind. Cas. 484=4 O.W.N. 445=28 Cr. L.J. 452=8 A.I.Cr.R. 88=A.I.R. 1927 Oudh 174.

#### 8(o). Sentence—Provocation.

—S. 302—Exchange of abuse.

The mere fact that the attack may have been preceded by some exchange of abuse between the assailants and the deceased, is not a mitigating circumstance. A.I.R. 1944 Lah. 206=46 P.L.R. 69=45 Cr.L.J. 660=213 Ind.Cas. 355.

—S. 302.

Where it was not shown how the attack started and it was possible that there was some sort of altercation and the deceased might have been provocative, the capital sentence was not called for even though the accused was the aggressor. A.I.R. 1942 Lah. 301=44 P.L.R. 457=44 Cr.L.J. 117=203 Ind.Cas. 605.

—S. 302.

The fact that the accused found the deceased in a compromising position with his wife, is not sufficient to take the offence outside the category of murder where he had made a murderous attack on him seeing it. It only shows that the affair was a sudden and unpremeditated one calling for transportation for life and not death. A.I.R. 1942 Lah. 37=43 P.L.R. 672=43 Cr.L.J. 370=I.L.R. (1943) Lah. 77=198 Ind. Cas. 441.

—S. 302.

The meeting of the accused and the deceased was a chance meeting. The blow was not struck until there had been some interchange of abuse between the two, only one blow was struck suggesting very strongly that there was no meditation to kill. The blow was a deliberate blow:

Held, that the sentence should be reduced from death to transportation for life. A.I.R. 1942 Sind 11=I.L.R. (1941) Kar. 525=43 Cr.L.J. 308=198 Ind. Cas. 110.

—S. 302.

Where there was some provocation regarding the circumstances surrounding the episode the proper sentence was one of transportation for life and not one of death. A.I.R. 1941 Mad. 251=1940 M.W.N. 811=42 Cr.L.J. 668=195 Ind. Cas. 64.

—S. 302.

Insulting language used by the deceased provides ground for mitigation of sentence. 1941 M.W.N. 872.

—S. 302.

A man who is willing to have casual intercourse with a woman, treating her as a prostitute, may nevertheless justifiably resent any suggestion amounting to importunity that he should instal her as a permanent mistress, which would result in heavy caste penalties. Then if on her insistence, he loses control and gives a lathi blow on her head causing her immediate death, the accused is entitled to a lesser penalty and not that of death. A.I.R. 1941 Nag. 86=1940 N.L.J. 623=I.L.R. (1940) Nag. 679=42 Cr.L.J. 390=193 Ind. Cas. 6.

—S. 302 — Extenuating circumstances — Sentence.

The accused was a tea-garden cooly. His wife left him and went to live with another cooly. After a few days she was brought back and the accused lived with her for a short time, but she again left the accused and resided with her paramour and refused to return back. Thereupon, the accused became angry and stated that he did not want the woman back and returned back to his hut but on the same day he went to the place where his wife was living and murdered her. The accused was a man of humble origin and of limited intelligence. He was 25 years old and his domestic life was extremely trying and unhappy. His character throughout had been exemplary and he stated that his wife had brought shame upon him by her conduct and



it would be difficult for him to face public opinion apart from his relatives:

**Held**, that these were the circumstances which the Court should take into consideration and which could justify the Court in passing the alternative sentence of transportation for life rather than the extreme penalty of death. I.L.R. (1939) 2 Cal. 518.

—S. 302 — Unchastity of wife.

The deceased was a person of loose character and while living in her parents' village, she conceived from a stranger and came to her husband's house in a stage of pregnancy. She then gave birth to an illegitimate child in his house, and he was chafed by his fellow villagers who "congratulated" him on the birth of a son, whereupon he murdered her:

**Held**, that this was not a case in which the extreme penalty of the law should be imposed on him. The ends of justice would be met by imposing a sentence of transportation for life. A.I.R. 1938 Lah. 556=39 Cr.L.J. 769=40 P.L.R. 854=176 Ind. Cas. 666.

—S. 302.

In case of great provocation the lesser punishment of transportation for life should be inflicted instead of death-sentence. (1937) 39 P.L.R. 741.

—S. 302.

Where an accused on refusal by his concubine to go on an errand beats her and after beating her goes to a pig-sty not far away and fetches a heavy rice pounder and hits her on her head thus causing death, he cannot claim the benefit of lighter penalty on the score of sudden provocation. 1937 M.W.N. 549.

—S. 302.

**Held**, however, that in view of the fact that the accused received a certain amount of provocation, and acted without premeditation, there was just sufficient reason to substitute for the sentence of death the sentence of transportation for life. A.I.R. 1937 Oudh 457=38 Cr.L.J. 938=1937 O.W.N. 917=170 Ind. Cas. 341.

—S. 302.

**Held**, that the provocation received, though not sufficient to reduce the crime from that of murder to one of culpable homicide, may nevertheless have been in its cumulative effect so exasperating as to render the crime one which might be punished in a manner similar to that in which the offence of culpable homicide might be punished in somewhat similar circumstances. A.I.R. 1937 Rang. 4=38 Cr.L.J. 366=166 Ind. Cas. 994.

—S. 302 — Intention sudden and impulse momentary—Whether mitigates offence.

That the intention was sudden and the impulse momentary, and even uncontrollable, is no mitigation unless it can be shown that the act was the result of grave and sudden provocation as laid down in Excep. 1 to S. 300. A.I.R. 1936 Nag. 274=39 Cr.L.J. 92=172 Ind. Cas. 204.

—S. 302.

The mere fact that a woman has been unfaithful to her husband is not in itself sufficient ground for substitution of lesser sentence where there has been deliberate premeditation. A.I.R. 1936 Lah. 580=1936 Cr.C. 651.

—S. 302.

Although provocation may not amount to provocation of a nature which would reduce the crime to one of culpable homicide not amounting to murder, yet it is a factor which must be taken into consideration when considering the question of sentence. A.I.R. 1936 Rang. 442=37 Cr.L.J. 1119=14 R. 643=165 Ind. Cas. 245.

—S. 302—Drunken state of accused.

Although a provocation which is not of a kind such as to reduce the offence of the accused to culpable homicide, yet it may be taken into account in deciding whether sentence of death should be passed and in assessing this provocation the Court is entitled to take into account the drunken condition of the accused at the time and the effect of this drunkenness upon his sensibilities. A.I.R. 1936 Rang. 325=37 Cr.L.J. 902=164 Ind. Cas. 206.

—S. 302—Accused suspecting son of deceased of having murdered his brother—Murder of deceased.

The accused's brother had been murdered and the accused had lodged a report at the Police Station charging amongst others the son of the deceased. Finding that the Police had taken no action in the matter, he went out with a *dao* and instead of attacking the son he attacked the deceased:

**Held**, (Per Mosley and Mackney, J.; Baguley, J. *contra*) that the accused's suspicion that the deceased's son had murdered his brother was no palliation of or justification for the accused's conduct in murdering the father and that the sentence of death was proper. A.I.R. 1936 Rang. 38=37 Cr.L.J. 297=160 Ind. Cas. 466.

—S. 302—Extenuating circumstances.

The evidence for the prosecution and the accused's confession showed that the accused was overcome with passion at the insults which his brother had heaped on him in the presence of his friends, and that it was under the influence of a passion almost amounting to insanity that he procured and concealed a *dao*, made his preparation for the crime, and actually committed the crime. The crime was, in a sense premeditated, inasmuch as the accused appeared to have thought it out carefully beforehand, and to have procured and concealed the *dao* for the purpose of killing his brother. At the same time, the period that lapsed from the moment that the idea of killing his brother entered the accused's mind, to the time when he actually carried out his purpose, was very short perhaps only one or two hours, and during this period the accused must still have been smarting under the insults which his brother is said to have heaped upon him in the presence of his friends:

**Held**, that the accused clearly had some provocation although the provocation was not such as could operate to take the offence out of the section, that is to say, to convert the offence from one of murder to



one of culpable homicide not amounting to murder. At the same time, the fact that the accused did commit the murder under the influence of such provocation, is one to which great weight ought to be attached in considering the question of sentence. These facts considered with the age of the accused and the class to which he belonged and the state of mind that he was in at the time of the crime, justified infliction of the lesser penalty for the offence. A.I.R. 1935 Cal. 591=36 Cr.L.J. 1254=39 C.W.N. 262=158 Ind. Cas. 67.

—S. 302—Deceased paramour of accused persisting in carrying on illicit intimacy—Accused getting disgusted with accused—Poisoning—Sentence.

The deceased was the paramour of the accused and she got disgusted with her paramour as he would not allow her to discontinue sexual intercourse with him in spite of the fact that she was suffering from some female complaint. Her husband too coming to know of the liaison began to maltreat her. She tried to get the land-lord of the deceased to turn him out of the village. Failing to achieve this object she decided to get rid of him by poisoning. She was tried, convicted and sentenced to death:

Held, that this was not a fit case in which the extreme penalty permissible under the law should be exacted and that the sentence of death might be commuted to one of transportation for life. A.I.R. 1934 Lah. 673=35 P.L.R. 559=36 Cr. L. J. 247=152 Ind. Cas. 1077.

—S. 302—Intrigue with girl betrothed to accused.

In view of the fact that the deceased was persisting in his intrigues with the girl who was betrothed to one of the accused, the capital sentence was not called for. A.I.R. 1934 Lah. 239=35 Cr. L. J. 1476=151 Ind. Cas. 1012.

—S. 302.

Accused strongly suspecting fidelity of his wife—Summoning of paramour—Accused acting with deliberation—Confession by wife in presence of paramour—Accused stabbing paramour to death—Lesser penalty inflicted. A.I.R. 1934 Mad. 176=39 L.W. 190=1933 M.W.N. 543=65 M.L.J. 213=35 Cr.L.J. 694=148 Ind. Cas. 590.

—S. 302—Jealousy in intrigue.

The mere fact that the accused was suffering the pangs of jealousy, which drove him to commit the murder, does not furnish any ground for saying that he received any provocation at all of any kind. The fact that the deceased fell in love with the same woman the accused was in love with and the fact that the deceased was not prepared to give up his illicit connection with that woman at the bidding of accused, can hardly be said to be conduct which gave grave provocation to the accused and will not mitigate his crime of brutal murder committed after premeditation. A.I.R. 1931 Oudh 222=35 Cr.L.J. 894=11 O.W.N. 636=149 Ind. Cas. 69.

—S. 302—Accused having illicit relations with deceased for long time with husband's connivance—Death of husband—Deceased commencing

intrigue with another man—Accused killing deceased.

Where the accused was having illicit relations with a woman with the connivance of her husband and after the death of the husband the woman was found to have commenced intrigues with another man at which the accused remonstrated with her but on her persisting to go with the new paramour, he killed the woman:

Held, that although the relations between the accused and the deceased were illicit, having regard to human nature, it must be considered natural that after a long period of years, the accused should look on the deceased as his woman and a woman who was bound to render him fidelity, and that in the circumstances the commencement of an intrigue between her and another man being a matter which would cause provocation to the accused, the sentence should be reduced from that of death to one of transportation for life. A.I.R. 1933 All. 533=35 Cr.L.J. 232=146 Ind. Cas. 929.

—S. 302—Provocation.

The fact that the deceased had been carrying on an illicit intrigue with the wife of the accused is sufficient reason for not imposing the extreme penalty on the accused. A.I.R. 1933 Oudh 382=10 O.W.N. 771=35 Cr.L.J. 189 (2)=146 Ind. Cas. 817.

—S. 302.

Although a provocation be not grave and sudden so as to reduce the offence of murder to that of culpable homicide not amounting to murder, yet it may be sufficient ground for not sentencing accused to the extreme penalty of death. A.I.R. 1932 Lah. 302=33 P.L.R. 154=33 Cr.L.J. 577=138 Ind. Cas. 321.

—S. 302.

Provocation though not grave and sudden, e. g., vulgar abuse, may be a sufficient reason for not imposing the capital sentence. A.I.R. 1932 Lah. 369=33 Cr.L.J. 338=33 P.L.R. 382=136 Ind. Cas. 715.

—S. 302.

Where the complainant's side deliberately provoked a conflict and there was no previous intention on the part of the accused to kill anybody the proper sentence would be one of transportation of life. A.I.R. 1932 Lah. 5=32 P.L.R. 810=33 Cr.L.J. 184=135 Ind. Cas. 670.

—S. 302.

Where the provocation is not grave and sudden, the offence committed is murder but the accused may be awarded the lesser penalty. 1931 M.W.N. 134.

—S. 302.

Where a person who was of immoral character, contracted criminal intimacy with the wives of the accused and some other women of the mouza, and the accused conspiring with some others deliberately murdered him by cutting his throat with an axe:

Held, that as there was grave provocation a sentence of transportation for life would sufficiently meet the ends of justice. 131 Ind. Cas. 431=13 N. L. J. 107=32 Cr. L. J. 712.



—Ss. 302 and 300—Provocation—Striking to death with hatchet with knowledge of consequence—Result of foul language—Mitigation.

Where the accused knew what he was doing when he struck the deceased on the head with a hatchet and also knew that his act was imminently dangerous to life he can be rightly convicted under S. 302.

But where there is no premeditation nor any enmity between the accused and the deceased or his relation and the attack on the deceased is the result of foul language used by him, the extreme penalty of law is not called for and sentence of transportation for life is sufficient to meet the case. A.I.R. 1930 Lah. 545.

—Ss. 300 and 302—Improper overtures by step-mother to step-son—Not sufficient provocation—Lesser sentence.

When the deceased makes improper overtures to the accused who is her step-son and the latter in a fit of resentment stabs her with a knife to death, the act of the deceased does not amount to grave and sudden provocation and the accused is guilty of murder. But the act, however, may be taken into consideration and is a sufficient ground for not imposing the maximum penalty of death. 121 Ind. Cas. 185=31 Cr. L. J. 229 =A.I.R. 1930 Lah. 415.

—S. 302—Sentence—Grave provocation.

The deceased was seen talking to her paramour L, who had been following her from place to place, and when reprimanded by the accused she replied that she did not like to live with him but would again elope with L. She persisted in this statement and repeated it shortly before the occurrence which resulted in accused strangulating her to death.

**Held:** that the accused was guilty of murder but under the circumstances the case was a fit one for lesser penalty than death. 11 L.L.J. 461=1930 Cr.C. 179=A.I.R. 1930 Lah. 171.

—Ss. 300 and 302—Provocation—Wife abducted and kept in haveli—Death penalty not proper.

Where the wife of one of the accused appellants is abducted with the help of the deceased and kept in his haveli from time to time, the appellants being all near relatives have cause to be angry with the deceased. Therefore, this is not a proper case to impose death penalty on the murderer. 120 Ind. Cas. 6=11 L.L.J. 299=1929 Cr. C. 420=30 Cr. L. J. 1126=A.I.R. 1929 Lah. 788.

—S. 302—Extreme penalty—Not to be exacted.

The extreme penalty of the law should not be exacted under S. 302, in the case of murder committed on provocation which though not sudden is undoubtedly grave and likely to leave its sting behind. 116 Ind. Cas. 613=30 Cr. L. J. 637=1929 Cr.C. 423=13 A. I. Cr. R. 41=A.I.R. 1929 Lah. 791.

—S. 302—Sentence—Sudden provocation—Death reduced to transportation.

Where the murder was not a deliberate one but occurred suddenly after mutual abuse and the accused who did not belong to a turbulent class took up on the spur of moment the weapon and killed the deceased with it, a sentence of transportation for life was substituted for the death sentence. 116 Ind. Cas. 187=

11 L. L. J. 1=12 A. I. Cr. R. 453=30 Cr. L. J. 571=A.I.R. 1928 Lah. 913.

—S. 302—Wife deserted—Lover killed while asleep—Murder thought out and deliberate—Death, the proper sentence

In a case of murder of the lover of his wife by the accused, where the accused had himself left his wife for a period of several months and thereby subjected her to temptation and he killed her lover while he was asleep and the murder was thought out and deliberate and there was no grave or sudden provocation:

**Held:** that punishment of death was the fit punishment to be inflicted. 109 Ind. Cas. 113=5 O.W.N. 160=29 Cr. L. J. 465=10 A.I.Cr.R. 241=A.I.R. 1928 Oudh 241.

—S. 302—Trust and hospitality returned by seduction of wife—Extreme penalty.

Where deceased, who was trusted and treated with hospitality by the convict, seduced his wife and persisted in remaining in his house after he had been requested to leave, his conduct is certainly provoking and so this is not a case in which the extreme penalty of the law should be inflicted on the convict. 106 Ind. Cas. 457=9 A. I. Cr. R. 311=29 Cr. L. J. 41 (Lab.)

—S. 302—Murder in a fit of fury provoked by persistent abuse.

Where the accused was found to have murdered the deceased in a sudden fit of fury provoked by the deceased's persistent abuse **held**, that a sentence of transportation for life was sufficient. 72 Ind. Cas. 529=16 M.L.W. 239=1922 M.W.N. 506=31 M.L.T. 175=45 Mad. 766=24 Cr.L. J. 417=A.I.R. 1923 Mad. 20=43 M.L.J. 222.

—S. 302—Murder—Provocation—Grave but not sudden—Sentence, measure of.

A capital sentence is not to be passed where murder is committed under very serious though not sudden provocation. 3 O.L.J. 19=17 Cr.L.J. 190=33 Ind. Cas. 830.

—S. 302—Provocation, effect of—Murder—Sentence—Reduction of.

A provocation, though insufficient to bring a charge of murder within the exception to S. 300, may still be sufficient for the reduction of the sentence. 16 Cr.L. J. 611=30 Ind. Cas. 435 (Mad.)

—S. 302—Wife detected in act of adultery and killed—Sentence.

Wife-murder is so common an offence in Sind that deterrent sentences should be passed in all such cases even where the husband has killed his wife in the provocation that he detected her in the act of committing adultery. 5 S.L.R. 256=13 Cr.L. J. 585=15 Ind. Cas. 807.

—S. 302—Unfounded suspicion as to wife's chastity—Murder—Punishment.

Where an accused person was found to have murdered his wife under a mistaken impression that she was unchaste to him, the High Court set aside the sentence of death and passed upon him the sentence of transportation for life. (1903) 8 C.W.N. 218.



## 8 (p). Sentence—Several accused.

## —S. 302—Common intention—Death—Offence—Sentence.

The two accused who were working in field about a furlong away from the spot, on hearing the quarrel came running to the spot to see what the quarrel was about. Even after they arrived, the quarrel continued, and the accused became more angry as they heard and saw what was taking place. The second accused first expressed his annoyance by striking a stone with his pitchfork. That had no effect and after some little time, he became so annoyed that he took his pitchfork and struck the deceased on the head with it. The first accused almost immediately raised a heavy stick taken from the side of a cart and struck the deceased on the head. The deceased fell down immediately and died on the following day. The deceased was found to have an extensive and radiating fracture of the skull, forming a diamond shaped depressed fracture, the side of the diamond being about two inches;

**Held**, that (i) the accused could not be said to have been actuated by a common intention and that each was responsible for his own act;

(ii) that the second accused who struck the first blow was guilty only of causing simple hurt with a dangerous weapon;

(iii) even if the fracture was caused by the blow struck by the second accused, the first accused who struck the second blow would still be guilty of murder for his blow must have accelerated the death of the deceased;

(iv) murder being unpremeditated and committed in a fit of anger, the first accused should be convicted for transportation for life. A.I.R. 1946 Mad. 83= (1945) 2 M.L.J. 547=1945 M.W.N. 732.

## —S. 302—Sentence—Several persons participating in assault—Person giving fatal blow not known.

Where several persons participated in the assault upon the deceased and the beating given by them was merciless, the fact that it is not known which of them gave the fatal blow is no ground for not awarding the sentence of death which is the normal penalty for an offence of murder. 226 Ind. Cas. 84=47 Cr. L.J. 826=48 P.L.R. 176=A.I.R. 1946 Lah. 298.

## —Ss. 302 and 149.

It is not a general rule that under S. 302 read with S. 149 the proper sentence in all cases is transportation for life. The question of sentence must in each case be decided upon the facts of the case. Where it is found that the accused, though they were among the rioters, some of whom in pursuance of the common object of the unlawful assembly, caused the death of the deceased, had themselves taken no part in the assault, the lesser sentence of transportation for life may be passed. But if it is found that the accused were among the seven or eight persons who had inflicted the large number of injuries which the deceased received, the sentence of death will be the appropriate one. A.I.R. 1944 F.C. 35=10 B.R. 603=1944 A.W.R. 20=25 P.L.T. 86=1944 M.W.N. 227=57 L.W. 295=1944-1 M.L.J. 353=48 C.W.N.F.R. 98=1 L.R. (1944) Kar. (F.C.) 72 Sup.=1944 F.C.R. 169=4 Cr.L.J. 305=213 Ind. Cas. 178 (F.C.).

## —S. 302.

In riot cases, the extreme penalty of law i. e., the sentence of death, will not be exacted from any accused when it is impossible to determine what part he had actually played. A.I.R. 1944 Lah. 377=46 P.L.R. 135.

## —Ss. 302, 149.

When a body of heavily armed men set out to take a woman back by force, they must be taken to know that some one was likely to be killed before the day was over. Hence, if in such a case one of the party commits murder, all the members of the party must be held either directly or constructively guilty of murder. A.I.R. 1942 Lah. 89=43 P.L.R. 680=43 Cr.L.J. 588=1 L.R. (1942) Lah. 470=199 Ind. Cas. 870.

## —Ss. 302, 149.

Accused saddled with vicarious liability under S. 149—Intention to cause death not clearly established—Accused should be sentenced to transportation for life and not to death. A.I.R. 1939 Lah. 245=1 L.R. (1939) Lah. 77=41 P.L.R. 443=40 Cr. L.J. 712=182 Ind. Cas. 900.

## —S. 302.

In cases where many persons are involved in a crime under S. 302, the Court should hesitate to pass sentence of death on all of them, and try to discriminate. Infliction of sentences of death on all accused in one and the same case is apt to fail of the effect which such sentences would otherwise have. A.I.R. 1938 Cal. 295=66 C.L.J. 351=39 Cr. L.J. 479=174 Ind. Cas. 803.

## —S. 302—Sentence—Enhancement.

When once the guilt of murder is proved, the proper penalty to be awarded is a matter for the discretion of the Judge and it is by no means true to say that merely because there is doubt as to which of several of the attackers inflicted the fatal blow, this is a sufficient ground for withholding the death sentence in the case of any or all of them. But a person who has even wrongly got the benefit of a lenient sentence at his trial may sometimes be allowed to benefit by his good fortune, provided the sentence passed is one which is legal. A.I.R. 1938 Rang. 331=40 Cr. L.J. 49=178 Ind. Cas. 298.

## —S. 302.

Where several persons join together to murder another and do murder him under such circumstances that there can be no doubt that the intention was to murder, each and everyone of them ought to receive the sentence of death, unless there is any circumstance to distinguish one case from another. 166 Ind. Cas. 1005=17 L. 536=38 P.L.R. 909=38 Cr.L.J. 342.

## —S. 302.

Brutal murder—All accused taking part in beating—Mere fact that it is not known by whom fatal wound is caused is no ground for not awarding death penalty. A.I.R. 1935 Lah. 337=36 Cr. L.J. 1001=16 Lah. 1131=38 P.L.R. 109=156 Ind. Cas. 786.



—S. 302 —Evidence against all accused precisely the same—Sentence on all should be same.

Where the evidence against all the accused is precisely the same and the testimony of the witnesses does not indicate that a more prominent part in the attack was taken by one of them, any the Court will be unjustified in holding that that person was in any degree more responsible for the death of the murdered than the other accused and there should be no difference in the sentence imposed. A.I.R. 1935 All. 362=37 Cr.L.J. 32=1935 A.W.R. 53=159 Ind. Cas. 155(2).

—S. 302—Accused old man of 73—Doubt as to who struck blow.

Where the accused (appellant) is an old man of 73 while his co-accused is a young man of 20 years, and there is nothing on the record to show as to who actually struck the fatal blow on the head of the deceased and the fight was sudden:

Held, that in the circumstances a sentence of four years' rigorous imprisonment would meet the ends of justice. A.I.R. 1934 Oudh 251=11 O.W.N. 698=35 Cr.L.J. 943=149 Ind. Cas. 343.

—Ss. 302, 303, 396 —Murder by one of the dacoits in attempting to carry away stolen property —All dacoits, whether punishable.

Where all the accused conjointly stole property in a railway train and in doing so caused hurt to certain persons and in attempting to carry away the stolen property, one of them murdered a person within a short time of their escape from the train:

Held, that in such circumstances, the murder must be held to have been committed "in the commission of the dacoity" within the meaning of S. 396 and every one of the dacoits is liable to be punished with death or transportation for life or rigorous imprisonment which may extend to ten years. A.I.R. 1933 Lah. 977=15 Lah. 84=35 Cr. L. J. 322=35 P.L.R. 51=147 Ind. Cas. 2.

—Ss. 302 and 149.

Where several persons are convicted of rioting and of murder committed with a view to prosecution of the common object of the rioters, *prima facie* all the persons so convicted should be sentenced to the extreme penalty. It is only when specified circumstances are shown to exist in favour of any individual that the alternative punishment of transportation for life should be substituted for a sentence of death. Each case or class of cases is to be considered on its own facts and what may be admissible upon a conviction under S. 302 read with S. 149 in a village agrarian dispute "where a free and honest fight on equal terms results in death" would be an enormity in a case of gang assassination. A.I.R. 1933 Pat. 100=13 P.L.T. 702=11 Pat. 807=34 Cr.L.J. 427=142 Ind. Cas. 841 (2).

—S. 302.

Where in a murder case, it is not established who inflicted the blow the extreme penalty of law need not be extracted from the accused. A.I.R. 1932 Lah. 189=33 P.L.R. 1=33 Cr.L.J. 457=137 Ind. Cas. 282.

8 (q). Sentence—State of mind.

—S. 302.

Where in committing the offence the accused must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind and he has also been awaiting the execution of his death sentence for over a year, a sentence of transportation for life would be more appropriate than the sentence of death. A.I.R. 1944 F.C. 1=1944 M.W.N. 1=48 C.W.N.F.R. 43=1944 A.W.R. 1=45 Cr.L.J. 413=23 Pat. 159=10 B.R. 444=78 C.L.J. 14=(1944) 1 M.L.J. 305=I.L.R. (1944) Kar (F.C.) 8 Sup.=1944 F.C.R. 61=211 Ind. Cas. 556.

—S. 302.

A woman threw her children into a well and jumped into the well herself, but afterwards, repenting of her intention to take her own life, managed to get out. The reason why she had decided to take her children's life and her own was that she had been very harshly treated by her husband and was living a life of the utmost misery. She was convicted for murdering the children:

Held, that the sentence of transportation for life was proper and not that of death. A.I.R. 1941 Mad. 50=42 Cr.L.J. 270=1940 M.W.N. 943=52 L.W. 472=(1940) 2 M.L.J. 492=192 Ind. Cas. 278.

—S. 302—Young girl of 15 killing her newborn child—Proper sentence.

Where a young girl of 15 kills her newly born illegitimate baby, a sentence of transportation for life is wholly inappropriate. In England it is always assumed that a girl who commits such a murder at such a time is hardly responsible for her actions, it being well known that child birth produces occasionally peculiar reactions in the mother.

[The Government was requested to reduce the sentence of transportation for life to a sentence for a short period.] A.I.R. 1938 Lah. 473=40 P.L.R. 23=39 Cr.L.J. 718=176 Ind. Cas. 272 (2).

—S. 302—Killing under pressure of threats.

Where one assailant amongst others commits the offence of killing by yielding to the threats of others, it is no mitigation of the circumstances. A.I.R. 1938 Pat. 258=4 B.R. 568=39 Cr.L.J. 554=19 P.L.T. 476=175 Ind. Cas. 300 (S.B.).

—S. 302—Accused in abnormal mood.

Where in a charge of murder it is found that although it could not be said that the accused was insane or did not know the nature of his actions, it appeared that he was in an abnormal mood when he committed the offence, there is sufficient reason for not inflicting the extreme sentence. A.I.R. 1936 Rang. 113=37 Cr.L.J. 435=161 Ind. Cas. 250.

—S. 302—Factors to be considered.

In a case of murder of his brother by the accused the circumstance that the accused is the only remaining son of his widowed mother and the circumstance that he afterwards displayed considerable remorse ought not to be taken into consideration at all. What ought to guide the



Court in a question of this character is the ascertainment of the state of mind of the accused at the time when the crime was committed. Whether or not a man who has committed an atrocious crime like this is truly penitent, is a matter which ought not to be taken into consideration in deciding the question of sentence, at any rate so far as the Courts are concerned, though it might perhaps be a circumstance which might induce the Local Government in the exercise of its prerogative, to remit the death penalty. But the question of provocation has to be taken into consideration in inflicting the sentence. A.I.R. 1935 Cal. 591=39 C.W.N. 262=36 Cr.L.J. 1254=158 Ind. Cas. 67.

#### —S. 302—Extenuating circumstance.

Where the accused had undergone protracted sufferings through the obstinacy, viciousness and flagrant immorality of the deceased, his wife whom he pushed into the river there is a mitigating circumstance entitling the accused to a lenient sentence. A.I.R. 1934 Lah. 675 (2)=35 P.L.R. 746=36 Cr.L.J. 683=155 Ind. Cas. 265.

#### —Ss. 302 and 84—Sentence—State of mind.

Where a person was tried for murdering his two children and convicted under S. 302, I.P.C., and it appeared that at or about the time when he made the murderous attack his mind was unsound but it could not be said with any degree of certainty that he did not know that what he was doing was wrong or contrary to law within the meaning of S. 84, and it also appeared upon the evidence that he was a fond and affectionate father:

Held, that the sheer brutality of the assault in the absence of any provocation, was a circumstance which would lead to the inference that the mind of the accused was in fact unhinged and far from normal; and that, therefore, the capital sentence should not be imposed. A.I.R. 1933 Lah. 123=34 Cr.L.J. 909=34 P.L.R. 1044=145 Ind. Cas. 119.

#### —S. 302.

Where a murder is committed by an educated young man of mature years, the fact that he has been impelled to commit the crime fostered by the reading of mischievous literature intended to arouse sympathy with revolutionary crime, is no ground for the exercise of leniency in his favour. A.I.R. 1933 Lah. 305=34 Cr.L.J. 720=34 P.L.R. 691=144 Ind. Cas. 294.

—S. 302 — Death sentence — Extenuating circumstances—Murder committed with inadequate motive—Accused proved to have been eccentric.

Where the accused who was guilty of double murder was shown to have been eccentric in the past and it appeared that the double murder of which he was guilty had been perpetrated with an inadequate motive.

Held, that they were not sufficient grounds for not passing the extreme penalty of death. 7 O.W.N. 1100=129 Ind. Cas. 323=32 Cr.L.J. 327=1931 Cr.C. 133=A.I.R. 1931 Oudh 77.

—S. 302—Sentence—Belief that victim was a witch—Killing woman under conviction that she is witch—Transportation for life enough sentence.

Where the accused killed a woman under the conviction that she was a witch and was responsible for the illness of his wife and daughter.

Held. (per Das and Sultan Ahmed, JJ., Mullick, J., differing) that transportation for life was the proper sentence to pass and not death. 1921 P.H.C.C. 76=A.I.R. 1921 Pat. 63=1 Pat. L.T. 282=57 Ind. Cas. 171.

#### 8 (r). Sentence—Weapon used.

#### —S. 302.

Some accused men of primitive character who were lying in wait with the intention of committing the most violent assault upon the deceased, attacked the deceased and caused injuries with sticks and a deadly weapon. Only one of them had used a deadly weapon:

Held, that in the case of the accused who used the deadly weapon, the sentence of death should be confirmed but in the case of others in view of their primitive character, the sentence of transportation was enough in the interest of justice. A.I.R. 1942 Mad. 237=1941 M.W.N. 956=43 Cr.L.J. 463=199 Ind. Cas. 87.

#### —S. 302.

Where a murder is by a bully, a man armed with deadly weapon against a man who was unarmed, the proper sentence is that of death. A.I.R. 1941 Sind 117=42 Cr.L.J. 786=195 Ind. Cas. 833.

#### —S. 302.

Where the wound inflicted on the deceased was a stab wound penetrating into the abdominal cavity and cutting the small intestines and the deceased died the day after his admission into the hospital, and there is no extenuating circumstance in favour of the accused, the sentence of death should be confirmed. A.I.R. 1936 Rang. 60=37 Cr.L.J. 418=161 Ind. Cas. 113.

#### 8 (s). Sentence—Miscellaneous extenuating circumstances.

—S. 302—Sentence—Deceased found to be the aggressor.

In a case where the deceased is found to have been the aggressor and that the accused inflicted injuries which resulted in the death of the deceased, on his conviction under S. 302, Penal Code, a sentence of transportation for life would be a sentence which would meet the ends of justice. 4 A.I.Cr.D. 143.

#### —S. 302—Sentence—Lapse of time.

The mere fact that a long time had elapsed between the commission of the crime of murder and punishment for it alone is no ground for imposing a lesser sentence. On the contrary, it



would be a dangerous proposition to state that if a murderer succeeds in making himself scarce for a number of years, he may then hope to escape the extreme penalty of the law in a case in which the extreme penalty is clearly called for. There are no extenuating circumstances in this case. A.I.R. 1941 Mad. 258=52 L.W. 634=1940-2 M.L.J. 767=42 Cr.L.J. 265=1940 M.W.N. 1235=I.L.R. (1941) Mad. 172=192 Ind. Cas. 299.

—S. 302 — Sentence — Obedience to illegal order.

Obedience to an illegal order can be used in mitigation of punishment. A.I.R. 1940 Lah. 210=41 Cr.L.J. 639=I.L.R. (1940) Lah. 521=188 Ind. Cas. 440.

—S. 302—Sentence—No intention to kill.

Where the accused attacks a person with a heavy bill book and thereby causes several injuries to him and also one injury to a child who was asleep over his shoulders which results in the death of the child, the accused is guilty of an attempt to murder the father and though guilty of murder of the child, he is entitled to the lesser sentence on account of absence of his intention to kill him. 1937 M.W.N. 723.

—S. 302.

Where the accused has no real intention in the strict sense of the word to kill the deceased, the Court will be justified in awarding the lesser sentence of transportation for life. A.I.R. 1931 Mad. 420=1931 M.W.N. 266=32 Cr.L.J. 623=34 L.W. 631=130 Ind. Cas. 847.

—S. 302—Plea of starvation.

The gravity of an offence of deliberate murder is in no way lessened because the accused was starving. A.I.R. 1935 Rang. 49=12 R. 616=36 Cr.L.J. 336=153 Ind. Cas. 390.

—S. 302.

The Baluchi custom of killing for unchastity is no extenuation of the crime of murder and cannot be taken into consideration in the mitigation of sentence. A.I.R. 1935 Sind 44=28 S.L.R. 279=36 Cr. L. J. 497=153 Ind. Cas. 976.

—S. 302—Custom of killing—Baluchi custom of killing for unchastity.

A so-called Baluchi custom justifying murder for unchastity is no ground for mitigation of sentence. 7 S.L.R. 118=15 Cr.L.J. 501=24 Ind. Cas. 589.

—S. 302—Sentence—Party fight.

Where a person thrusts a knife in the abdomen of another in a party fight in which several men take part and which is not proved to have been started by him, the lesser punishment of transportation for life is sufficient to meet the ends of justice. A.I.R. 1933 Lah. 434=34 P.L.R. 255=34 Cr.L.J. 711=144 Ind. Cas. 292.

—S. 302.

The fact that a murder was committed when the offender was being brought to bay and in his desire

to escape is not an extenuating circumstance. A.I.R. 1932 Cal. 818=33 Cr.L.J. 722=139 Ind. Cas. 213 (F.B.).

—S. 302—Sentence—Dead body not recovered.

In a case of murder, once the Court is satisfied that the murder has been committed and that the accused person has committed it, the question of sentence must be determined upon the gravity of the offence irrespective of the circumstance whether the body has or has not been recovered. A.I.R. 1931 Lah. 25=32 Cr.L.J. 493=130 Ind. Cas. 331.

—S. 302—Sentence—Absence of dead body.

If one is satisfied that murder was committed the appropriate punishment should follow. The discovery of the body is not a material circumstance. It is the murder which is the thing to be regarded, that is to say, the killing of a human being by one or more human beings without just cause or excuse. It is not the finding of the body. The absence of the body is a circumstance which makes it necessary to proceed with the greatest care and caution, and one must never confirm a sentence of death, unless one feels completely satisfied about it. If there is such an element of doubt to render a Judge in the least degree uneasy, the proper course is not to change the nature of sentence from death to transportation for life, but to acquit the man altogether.

Per Mukerji, J.—Where the dead body does not appear and the factum of death is established by nothing but a retracted confession, there is a suitable case where a sentence of transportation may be awarded instead of the heavier sentence. 89 Ind. Cas. 903=23 A.L.J. 821=26 Cr.L.J. 1431=6 L.R.A.Cr. 161=A.I.R. 1925 All. 627 (F.B.).

—S. 302—Sentence—Single blow.

The fact that a murder was caused by a single blow is not a ground for passing the lesser sentence. A.I.R. 1931 Lah. 749=32 P.L.R. 925=12 Lah. 442=32 Cr.L.J. 1219=134 Ind. Cas. 793.

—S. 302—Saving family honour—Murder of erring wife.

The reason for passing a lesser sentence on conviction for murder ought to be express and adequate. Such reasons are sometimes to be found in the order of the mentality to which the person belongs. But the fact that a murder of his wife by a husband was inspired with a view to save his family from dishonour which would sooner or later have fallen upon them by reason of the habits of the wife does not constitute any extenuating circumstance, for lesser sentence of transportation. 124 Ind. Cas. 836=11 P.L.T. 148=9 Pat. 474=A.I.R. 1930 Pat. 247.

—S. 302—Sentence—Minor—Death penalty—Not to be inflicted.

Where a person who was convicted of murder was a minor who had not attained a legal age of discretion, he should not, under ordinary humane principles, be made to pay the death penalty where the law allows an alternative punishment. 113 Ind. Cas. 177=10 L.L.J. 463=30 Cr.L.J. 65=11 A.L.Cr. R. 543=A.I.R. 1929 Lah. 64.



—S. 302—Murder of newly born illegitimate child—By mother—By father.

In the murder of her newly born illegitimate child by a woman there are mitigating circumstances sufficient to reduce the appropriate penalty very much below a sentence of transportation for life; most of these apply though certainly in a less degree to the case of the father of such a child more especially where the mother is his own sister. 75 Ind. Cas. 767=25 Cr.L.J. 63=A.I.R. 1924 Nag. 119.

—S. 302.

Where the appellant constituted himself a tribunal which decided that the making of a charge of paternity against him was an offence punishable with death, he appointed himself the executioner and carried out the sentence:

Held, that the lesser penalty provided for the offence of murder would not be proper in the circumstances. 73 Ind. Cas. 266=24 Cr.L.J. 570=8 N.L.J. 56=A.I.R. 1923 Nag. 251.

### 9. Miscellaneous.

—Ss. 302 and 34—Number of accused—Acquittal of all except two—Conviction of those two on the strength of the action of the others—Legality.

Where seven persons were accused of an offence under S. 302 read with S. 34, I. P. Code and the Court acquits five of them, the part, if any, played by those acquitted cannot be taken into account in determining the guilt of the remaining persons and convicting them. 1944 A.L.J. 447, Followed. 1950 A.L.J. 220=A.I.R. 1950 A. 355=51 Cr.L.J. 993.

—S. 302.

Offence under—Private person—If entitled to insist upon an enquiry. See Cr.P. Code (V of 1898), S. 203. (1947) 2 M.L.J. 460.

—Ss. 302, 84.

Held on facts that plea of insanity was not established and accused was guilty of murder. A.I.R. 1941 Mad. 326=52 L.W. 689=42 Cr.L.J. 558=1940 M.W.N. 963=194 Ind. Cas. 332.

—Ss. 302 and 115—Bail.

Persons accused under Ss. 302, 115, I.P.C., are not entitled to bail as a matter of right. A.I.R. 1940 Oudh 8=1939 O.W.N. 791=1939 A.W.R. 144=40 Cr.L.J. 841=183 Ind. Cas. 713.

—S. 302—Commencement of trial.

Where an accused is charged with an offence punishable with death or transportation for life, his trial really commences when the case is proceeded with in the Sessions Court. A.I.R. 1938 Sind 9=32 S.L.R. 129=39 Cr.L.J. 294=173 Ind. Cas. 325.

—S. 302—Armed gang entering house at night to abduct woman—Scuffle—Death of one and grievous hurt to another—Offence—Sentence.

While abducting a woman, for which purpose a number of persons armed with chhavis and dangs entered a house at night, some of them attacked an inmate of the house with lathis. He died and grievous hurt was caused to another:

Held, that in the circumstances a common intention to commit culpable homicide amounting to murder, or culpable homicide not amounting to murder, could not possibly be imputed to them and in the absence of such an intention the charge under S. 302-34 could not possibly be sustained; but as the crime was particularly heinous and the ends of justice required that the maximum sentence should be imposed on them, the conviction of the accused for the major offence must be altered from one under S. 302-34 to that under S. 460, and the sentence of transportation for life imposed on each accused affirmed. A.I.R. 1936 Lah. 911=38 Cr.L.J. 30=38 P.L.R. 1150=165 Ind. Cas. 874.

—S. 302—First conviction for attempt to murder—Subsequent trial on death of victim for murder not barred.

An accused was tried and convicted on July 22, 1933, of attempted murder of one G and sentenced to imprisonment under S. 307. G died on July 25. The accused was re-tried under the provisions of S. 403, Cl. (3), Criminal P.C., and sentenced to death under S. 302, Penal Code:

Held, that the previous conviction was no bar to subsequent trial and conviction. A.I.R. 1935 Pesh. 18=36 Cr.L.J. 813=155 Ind. Cas. 287.

—S. 302—Committal without weighing evidence.

Murder case—Committal by Magistrate without weighing evidence against accused—Procedure held was in consonance with practice in Punjab and that at any rate no point of law was involved and consequently, High Court cannot quash commitment under S. 215, Criminal P. C. A.I.R. 1933 Lah. 39=34 Cr.L.J. 39 (1)=33 P.L.R. 1068=140 Ind. Cas. 539.

—S. 302—Challan under S. 304—Judge ordering Magistrate to commit under S. 302—Legality.

Accused challaned under S. 304, I.P.C. and charge framed against that section—Application to Sessions Judge under S. 437, Criminal P.C., asking Judge to set aside implied order of discharge under S. 302, I.P.C.—Application accepted by Judge and Judge ordering Magistrate to commit the case to him:

Held, as challan was not under S. 302, no order of discharge under that section could be applied and order directing commitment was illegal. A.I.R. 1931 Lah. 402=32 Cr.L.J. 1029=133 Ind. Cas. 638.

—Ss. 302 and 369—Kidnapping and murder—Distinct offences.

Where the offence of kidnapping was in fact part of the transaction which led to the murder a separate conviction and sentence could not be maintained. 2 Lab. L.J. 653.

—Ss. 302 and 460—Murder—Death caused by accused in breaking house trespass.

An accused was committed under S. 460, I. P. C. on the assessors giving their opinion, that the accused struck a blow on the deceased, and was caught in the



house of the deceased in the act of committing burglary. In the circumstances, Judge altered charge to one under S. 302. The conviction under S. 302 is not according to law in the circumstances. 50 P.W.R. 1916 Cr.=33 P.L.R. 1917=33 P.R. 1916 Cr.=17 Cr. L.J. 454=36 Ind. Cas. 134.

—Ss. 302 and 460—Murder while committing burglary—Punishment.

A person who commits murder while committing burglary should be punished for murder, not merely for burglary. 8 A. L. J. 574=12 Cr. L. J. 395=11 Ind. Cas. 579.

—S. 302—Culpable homicide if amounts to murder—Issue ought to be tried.

When culpable homicide has been committed, *prima facie* the principal issue is whether the culpable homicide does not amount to murder. Generally the issue ought to be tried and not pre-judged by an authority less than the Court of Session. 15 Bom.L.R. 303=14 Cr. L. J. 235=19 Ind. Cas. 331.

—S. 303—Applicability.

When an accused person has been convicted of murder and sentenced to transportation for life and the remainder of that sentence has been remitted without condition by the Provincial Government under S. 401, Criminal P. C., he can no longer be said to be under a sentence of transportation for life, that sentence having, in effect, been served. Hence when such person commits second murder, the provisions of S. 303, Penal Code, cannot apply. A.I.R. 1943 Sind 114 (114)=I.L.R. (1943) Kar. 25=44 Cr. L. J. 530=206 Ind. Cas. 493 (D.B.).

—S. 303—Applicability and scope.

If the sentence of transportation for life passed on a person is conditionally remitted by the Government under S. 401, Criminal P. C. and the prisoner is released, in spite of the fact that the prisoner is not actually in prison or in a penal settlement, he must be deemed to be still "under sentence of transportation for life."

Consequently, where such a person, after his release on remission, breaks the conditions on which remission was granted and commits an offence of murder, his case falls under S. 303 and such person must be sentenced to death. A.I.R. 1939 Rang. 124 (126)=40 Cr. L. J. 490=1939 Rang. L.R. 44=181 Ind. Cas. 144.

—S. 303—Sentence of transportation for life, what is.

A sentence of transportation for life means a sentence of transportation for the whole of the remaining period of the convicted person's natural life. A.I.R. 1939 Rang. 124=1939 Rang. L.R. 44=40 Cr. L. J. 490=181 Ind. Cas. 144.

—Ss. 303, 396—Applicability and scope.

Section 303 has no application to the case of persons (other than the actual murderer) who are liable to enhanced punishment for the act of one of their associates under the special provisions of S. 396, Penal Code. A.I.R. 1933 Lah. 977=35 Cr. L. J. 322=35 P.L.R. 51=15 Lah. 84=147 Ind. Cas. 2.

—S. 304.

See also: Penal Code, Ss. 34, 299—300 and 302.  
Synopsis.

1. Applicability and scope.
2. Common intention.
3. Culpable homicide or hurt.
4. Forum.
5. Knowledge, when presumed.
6. Offence under.
7. Sentence.
8. Miscellaneous.

1. Applicability and scope.

—S. 304, Part II—Applicability and scope.

S. 304 of the Penal Code will not apply if the Court comes to the conclusion that the intention of the person causing death was either to cause death or to cause such bodily injury as will bring the case either under Part I of S. 304 or under S. 302 of the Code. In case the Court comes to the conclusion that there was no intention of any of the kinds mentioned above, but there was knowledge that the act was likely to cause death, the offence will fall under Part II of S. 304 only if the Court finds that the offender did not know that the act was so imminently dangerous that it must, in all probability, cause death or such bodily injury as was likely to cause death and the offender had not committed the act without any excuse for incurring the risk of causing death or the bodily injury. But if the Court is unable to come to such finding, the offence would still be murder unless an exception to S. 300 be applicable. Pak. L.R. (1950) Lah. 349=A.I.R. 1950 Lah. 169=51 Cr. L. J. 1368.

—Ss. 304-II and 109—Offence under—Accused catching hold of deceased permitting principal offender to stab him.

Where the accused thinking that the deceased ought to be punished for abusing one of their dignitary in the village, ran, caught and held the deceased and thus permitted the principal offender to stab him with a dagger, he is guilty of abetment of culpable homicide under S. 304-II read with S. 109, I. P. Code. A.I.R. 1950 Kut. 5=51 Cr. L. J. 392.

—S. 304, Part 2.

Applicability—Accused striking deceased on head with wood and rendering her unconscious—Accused heaping wood and placing body on same and setting fire to it believing victim to be dead—Death caused by burns—Offence—Mistake of fact—Plea of—Availability.

See Penal Code, Ss. 302 and 304, Part 2. 29 P.L.T. 277=27 Pat. 67.

—S. 304, Part II—Exchange of abusive language—Attack with knife on unarmed deceased—No previous enmity—S. 304, Part II, if applies.

A was charged with murder of B. A and B exchanged abusive language of ordinary type. A thrust a knife of ordinary size, which was lying by his side and which was used by him in ordinary course of business, in the abdomen of B who was empty-handed, resulting



in B's death. There was no previous enmity between A and B:

**Held**, that A's offence did not fall under S. 302 but under S. 304, Part II. A.I.R. 1946 Lah. 41=47 Cr. L.J. 234=48 P.L.R. 56=221 Ind. Cas. 675.

—S. 304—Absence of intention to cause death—Section does not necessarily apply.

Section 304, second part, does not apply merely because there has been no intention to cause death or such bodily injury as is likely to cause death, but there has only been knowledge that the injury inflicted was likely to cause death. Where the case comes under any of the clauses of S. 300 and none of the exceptions mentioned in the section applies, the offence is one of murder and S. 304 can have no application to such a case. A.I.R. 1946 Nag. 120=I.L.R. (1945) Nag. 931=222 Ind. Cas. 389.

—Ss. 304, 335—Death caused by two injuries, one on head and other causing rupture of spleen—Self defence—Grave and sudden provocation—Offence.

The accused had given two blows to the deceased, one on the head resulting in the fracture of the skull and second in the rupturing of the enlarged spleen and left kidney. The death was the result of both the injuries but the first injury was protected by the right of private defence:

**Held**, that the offence committed was not one under S. 304 but under S. 335 where the accused had acted under grave and sudden provocation. A.I.R. 1945 Lah. 43=46 P.L.R. 379.

—S. 304.

**Obiter.**—The second part of S. 304 applies (*inter alia*) to those rather rare cases of deliberate assault where the act of assault can be separated from the injury caused with result that knowledge of likelihood to cause death can be proved without intention to cause vital injury being established. Such cases sometimes occur in combined assaults. Where death is not caused, it may of course be very difficult to prove likelihood of causing death or knowledge of such likelihood, but stabs with lethal weapons in the body recklessly delivered may not reasonably in some cases be regarded as likely to cause death, and known to be so for the very reason that the depth of penetration is uncontrolled. A.I.R. 1943 Nag. 145=I.L.R. (1943) Nag. 411=1943 N.L.J. 90=44 Cr. L.J. 512=206 Ind. Cas. 382.

—S. 304.

Section 304, second part, must be read with the last few words of S. 299 and has no reference to S. 300 or to the exceptions mentioned therein and must not be confused with culpable homicide not amounting to murder. A.I.R. 1943 All. 344=1943 A.L.J. 456=45 Cr. L.J. 97=I.L.R. (1943) All. 853=1943 A.W.R. 215=209 Ind. Cas. 205.

—S. 304—Distinction between Part I and Part II.

The first part of S. 304 should be applied only where the offence is not murder by reason of its falling within one of the exceptions in S. 300. Section 304 creates no offence but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted where an intention to

kill or intention to cause such bodily injury as is likely to cause death being present, the act would have amounted to murder but for its having fallen within one of the exceptions to S. 300, and those cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is knowledge that death will be a likely result but intention to cause death or bodily injury likely to cause death is absent. A.I.R. 1942 Oudh 368=1942 O.W.N. 316=43 Cr. L.J. 634=1942 A.W.R. 211=18 Luck. 235=200 Ind. Cas. 500.

—S. 304—Distinction between Part I and Part II.

In considering the scope of S. 304, care must be taken to avoid confusion of thought. First, culpable homicide is defined in S. 299, and then certain classes of culpable homicide are said to be *prima facie* murder, that is, unless any of the mitigating circumstances set out in the exceptions to S. 300 apply. If they do apply, the *prima facie* presumption that the offence is murder is removed and the offence becomes culpable homicide not amounting to murder. But there is another class of offences which amount to culpable homicide, namely, those in which the presumption of murder is never raised at all because the intention ascribed to the offender in S. 300 is not apparent. A.I.R. 1940 Rang. 259=1940 Rang. L.R. 441=42 Cr. L.J. 124=191 Ind. Cas. 306.

—S. 304—Distinction between Part I and Part II.

Whether culpable homicide not amounting to murder is punishable under Part I or whether under Part II of S. 304, depends entirely upon whether the act by which the death was caused was done with one of the two intentions, or whether it was done with the knowledge mentioned in S. 299. Hence, unless that is first ascertained, it is not possible to pass a sentence under second part of S. 304 rather than under the first. A.I.R. 1939 Rang. 225=40 Cr. L.J. 725=183 Ind. Cas. 145.

—S. 304—Degrees of culpable homicide—Distinction from murder.

Section 304 divides the offences of culpable homicide into two degrees of guilt, the graver of which depends on the intention proved or to be inferred from all the circumstances and the less serious of which does not depend on the intention at all. But though the absence or presence of intention is the criterion to be adopted in deciding on which side of the line an offence under S. 304 falls, that is whether on the graver or on the less serious side, there are cases in which there is an intention which makes the offence the graver offence of culpable homicide but which would yet fall short of intention requisite to satisfy S. 300. Where no higher intention can be imputed than to inflict an injury which is, in fact, likely to cause death, there is the graver degree of guilt in culpable homicide, but there are no elements which bring the case under S. 300. A.I.R. 1940 Rang. 259=1940 Rang. L.R. 441=44 Cr. L.J. 124=191 Ind. Cas. 306 (F. B.).

—S. 304—Degrees of culpable homicide.

If the killing comes within the second part of S. 299 that which relates to the intention of causing a bodily injury likely to cause death, it comes under S. 304, Part I, and if there is no intention but only knowledge, that is to say, if there is no intention to cause death or a bodily injury likely to cause death, but only



knowledge that death is likely to be caused, the offence is under S. 304, Part II. Cases under the exceptions to S. 300 will fall under S. 304, Part I. A.I.R. 1939 Sind 57=32 S.L.R. 18=40 Cr.L.J. 375 (2)=180 Ind. Cas. 418.

#### —S. 304.

The second part of S. 304 deals with cases where the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. A.I.R. 1937 Rang. 540=39 Cr.L.J. 255=173 Ind. Cas. 92.

#### —S. 304, Part (2)—Injuries with intention to cause hurt.

When injuries are inflicted with the intention of causing hurt, Cl. (2), S. 304, Penal Code, has no application at all. A.I.R. 1935 Rang. 391=37 Cr.L.J. 186=159 Ind. Cas. 925.

#### —S. 304.

Where it appears that the accused had no intention to cause death or such bodily injury as was likely to cause death, although death has been the consequence the case falls under S. 304, Part II. A.I.R. 1933 Oudh 269=10 O.W.N. 482=35 Cr.L.J. 58=146 Ind. Cas. 452.

#### —S. 304.

Per **Macnair, J. C.**—Section 304 must be interpreted as providing punishment for the offence of culpable homicide in all cases where the accused cannot be convicted of murder. A.I.R. 1932 Nag. 121=28 N.L.R. 233=33 Cr.L.J. 849=140 Ind. Cas. 49.

#### —S. 304.

The first part of S. 304, Penal Code applies where there is guilty intention and the second part applies where there is no such intention but there is guilty knowledge. A.I.R. 1931 Cal. 345=32 Cr.L.J. 598=35 C.W.N. 456=58 Cal. 1138=130 Ind. Cas. 884.

#### —S. 304—Accused intending to cause injury likely to cause death—Punishment should be under Part I of S. 304.

If the act of the accused falls within either of the Cls. 1, 2 and 3, S. 300 but is covered by any of the five Exceptions it will be punishable under the first part of S. 304; and if the act falls within Cl. 4, S. 300 but is covered by any of the Exceptions it will be punishable under the second part of S. 304.

Where there is an intention on the part of the accused to cause some injury which injury is likely to cause death the case comes within the middle part of S. 299 and corresponds with the third part and not the fourth part of S. 300. 103 Ind. Cas. 841=28 Cr.L.J. 761=A.I.R. 1927 Sind 232.

#### —S. 304.

Knowledge that the act is likely to cause death is insufficient for conviction under Clause 4 of S. 300 but is sufficient for conviction under 2nd part of S. 304. 2 Bur. L.J. 99=A.I.R. 1924 Rang. 33.

#### —S. 304, part 2—Application.

The second part of the S. 304, I. P. C., refers only to cases where the offender has no intention of injuring

any one in particular. 17 Cr.L.J. 335=35 Ind. Cas. 511 (L. Bur.)

#### —Ss. 304 and 300—Applicability.

The first part of S. 304 includes only these cases in which the act of the accused would be culpable homicide not amounting to murder unless it was committed in circumstances which render one or other of the exceptions to S. 300 applicable. 9 P.W.R. 1911 Cr.=3 P.R. 1911 Cr.=87 P.L.R. 1911=12 Cr.L.J. 274=10 Ind. Cas. 852.

### 2. Common intention.

#### —S. 304, Parts I and II — Offence under— Application of S. 34.

S. 34, I. P. Code, will in no case apply to an offence falling under S. 304, Part II, I. P. Code, as the element of intention is missing in the case of such an offence. No hard and fast rule, however, can be laid down as regards the application of S. 34 to an offence falling under Part I of S. 304. Every case shall have to be decided on its own merits. Reading the two parts of S. 304, together, the conclusion is irresistible that while the intention to commit the death is missing from the second part, it is very much present in the first, and when a person commits the death of another person even if he may be unavoidably driven to it, can have common intention with another person committing the death under the same compulsion. It is true that in some cases in which a person commits the death of another person, without premeditation in a sudden fight in the heat of passion under a sudden quarrel and without the offender's having taken undue advantage or acted in an unusual manner, he may have same or similar intention with another person, but not the common intention, yet the possibility of his common intention with another person developing during the course of the event cannot altogether be excluded. S. 34, I. P. Code, cannot, however, be applied to a case where the entire incident took a very short time, and the participants in the fight did not come to the spot in a body, but arrived individually and took part in the fight on the spur of the moment. A.I.R. 1950 Pesh. 24=51 Cr.L.J. 1052.

#### —S. 304.

Applicability of S. 34, I. P. Code, to case falling under second part of S. 304. See Penal Code, Ss. 34 and 304. 1947 A.L.J. 277=A.I.R. 1947 A. 434.

#### —S. 304—Common intention, application of.

When five or more accused are found guilty under S. 304, second part, of causing death by doing an act with the knowledge that they were likely by such act to cause the death, they can be convicted under Ss. 304-149, because they knew that death was likely to result from their attack. But when there are only four accused, S. 34 would be involved. For the applicability of S. 34, there must be the furtherance of the common intention. Under S. 304, second part, however, there is no intention of causing death, the essential ingredient being the knowledge that the act done by the accused is likely to cause death. In order to make S. 34 applicable to the second part of S. 304, it will be necessary, therefore, to widen it in terms of S. 149. Until that is done, accused persons cannot be found guilty under S. 304, second part read with



S. 34. A.I.R. 1943 All. 271=1943 A.W.R. 117=1943 A.L.J. 207=44 Cr.L.J. 624=207 Ind. Cas. 158.

—S. 304.

In a case where the offence would be construed as one under S. 304 by the application of the third clause of S. 299, the difficulty arises that in such a case the person who has done the act falls within the scope of that section, not by reason of intention, but by reason of knowledge. In consequence, it is for practical purposes impossible to convict persons under S. 304 read with S. 34 if the case is one which falls within the knowledge of clause S. 299 and the same is true of a case under S. 302 falling within clause fourthly of S. 300. A.I.R. 1939 Oudh 49=1939 O.W.N. 7=40 Cr.L.J. 187=1939 A.W.R. 27=14 Luck. 378=179 Ind. Cas. 338.

—S. 304—Common intention to commit culpable homicide by exceeding right of self-defence.

It is almost impossible to visualise the practical mentality that can conceive a common intention to commit culpable homicide not amounting to murder by exceeding the right of private defence. (1937) 41 C.W.N. 570=I.L.R. (1937) 2 Cal. 250.

—S. 304.

The doing to death of one person at the hands of several by blows or stabs under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result, is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. There is an equal impossibility of doing justice if the offence is always reduced to either simple or grievous hurt; there is no doubt about the law, and the difficulty lies in determining the extent to which the common intention and the common contemplation of the gravest consequences may have gone. The question, therefore, always resolves itself into one of fact. To overcome these difficulties and obviate a failure of justice in such cases, the law has spread its net wide. A number of provisions have been enacted and though some of them may, to a certain extent, overlap, they have been designed to prevent loopholes of escape to guilty persons. One of these provisions is S. 34, Penal Code. It applies when there is a common intention to commit a certain act. (1937) 168 Ind. Cas. 748=38 Cr.L.J. 628.

—Ss. 304, 34.

Two persons having common intention to beat the party of which deceased was a member—Deceased dying as a consequence of blows struck in that beating—Offence under S. 304-34, is committed. A.I.R. 1935 All. 504=36 Cr.L.J. 549=1935 A.W.R. 336=154 Ind. Cas. 628.

—S. 304.

The common intention of the accused was to cause grievous hurt and there was only one serious blow on the head and the other blows on the head and on other parts of the body were of a trivial nature:

Held, the accused did not intend to cause death of their victim or to cause such bodily injury as was likely to cause death. The case, therefore,

fell under the second part of S. 304 and not under the first part. A.I.R. 1935 Lah. 80.

—S. 304.

Certain persons without any bona fide right removed paddy sheaves belonging to the accused who attacked the cartmen in whose carts the sheaves were being carried. The cartmen jumped out and ran off, the accused chasing them and the persons at whose instance the sheaves were carted. Injuries were inflicted and the death of one of them was caused by the accused:

Held, that the accused had undoubtedly a right of private defence to their property and were entitled to prevent the paddy sheaves being taken away, but their right of private defence ceased from the moment the cartmen jumped down to make their escape leaving the paddy sheaves in the possession of the accused; that they had no right to chase the cartmen and in so doing, their actions were not covered by any right of private defence at all.

Held also, that the accused were guilty of offences under Cl. 1, S. 304 read with S. 34 in connection with the causing of the death of the deceased, even though the author of the injuries be not known. A.I.R. 1933 Rang. 340=35 Cr.L.J. 267=147 Ind. Cas. 74.

—S. 304.

One member of unlawful assembly was Sikh wearing kirpan which he unsheathed and gave fatal blow to victim—Other members are not constructively liable for causing death. 122 Ind. Cas. 721=31 Cr. L. J. 448=A.I.R. 1930 Lah. 532.

—S. 304.

Two persons joining to assault a third—One assaulting in a manner likely to cause death—Other standing by without interfering or helping deceased—He is liable under Penal Code, S. 304 read with S. 34. 114 Ind. Cas. 222=9 P.L.T. 826=30 Cr. L. J. 276=12 A.I.Cr.R. 150=A.I.R. 1929 Pat. 65.

—S. 34 can apply to a case under S. 304, Part 2.

Although to constitute an offence under S. 304, Part 2, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act, they are jointly doing, is one that is likely to cause death but have no intention of causing death, yet they may certainly have the common intention to do that act and therefore S. 34 can apply to a case under S. 304, Part 2. 100 Ind. Cas. 718=45 C.L.J. 131=31 C.W.N. 314=28 Cr.L.J. 334=7 A.I.Cr.R. 546=A.I.R. 1927 Cal. 324.

—S. 304—Common intention.

S. 34 which is based on a common intention cannot possibly be used with the second part of S. 304 which expressly excludes intention. 86



Ind. Cas. 475=26 Cr. L. J. 827=A.I.R. 1925 Cal. 913.

### 3. Culpable homicide or hurt.

—Ss. 304 and 325 — Culpable homicide and grievous hurt—Distinction between.

The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death; in the other the injuries must be such as endanger life. I.L.R. (1946) Bom. 258=223 Ind. Cas. 195=47 Cr. L. J. 378=47 Bom. L.R. 998=A.I.R. 1946 Bom. 38 (F.B.).

—Ss. 304, 325.

Sudden fight between N, A and H on one side and V and C on other on sudden quarrel—Fight lasting for some time and both sides receiving injuries—No undue advantage taken by any party and no intention to kill—V's rib fractured and fractured rib piercing his lung and causing death—Who gave the blow causing fracture of rib not known—N accompanying accused A and H to thana to help them in making first information report.

Held, that evidence against N was insufficient to prove his participation in fight.

A and H, held could be convicted only under S. 325 and not under S. 304. A.I.R. 1942 All. 400=1942 A.W.R. 259=44 Cr.L.J. 110=203 Ind. Cas. 546.

—Ss. 304 and 326.

The accused struck her daughter with a very heavy piece of wood whereupon she fell down and never stirred, and everybody took her to be dead. She was then hung to a beam to appear that she had committed suicide:

Held, that in the absence of the post mortem certificate, it was not easy to say that accused must have had requisite knowledge and intention for conviction under S. 302. Under the circumstances of the case, there was no reason to think that the deceased did not die immediately. The accused, therefore, committed at least an offence under S. 304. Even if the offence be under S. 323, and the girl might have died subsequent to strangulation, the accused was still guilty under S. 326. A.I.R. 1942 Mad. 415=(1942) 1 M.L.J. 224=55 L.W. 78=1942 M.W.N. 169=43 Cr.L.J. 671=201 Ind. Cas. 444.

—Ss. 304 and 323.

The accused and the deceased (her father-in-law) were not friendly and one day the deceased went to some people with some injuries and stated that he was held by the tuft by the accused and assaulted with stones by her daughters. On the next day, he was found dead. The death was due to congestion of the brain as the result of beating with stones. It was not suggested that there was any common intention to cause death or grievous hurt:

Held, that on these facts the accused could not be convicted under S. 304 (2). As it was not

known who caused the fatal injury and as the deceased had told that the accused had only held him by the tuft, the accused was guilty only under S. 323, Penal Code. A.I.R. 1941 Mad. 746=42 Cr.L.J. 638=54 L.W. 62=1941 M.W.N. 528=195 Ind. Cas. 231.

—Ss. 304 (2) and 323.

The deceased owed one anna to the accused and the latter demanded repayment. The deceased promised to pay later and the accused kicked him twice on the abdomen remarking, "How long am I to wait." The deceased collapsed and died soon after. There was no mark of injury, external or internal:

Held, that it could not be said that the accused intended or knew that by kicking on the abdomen as he did he was likely to endanger life. The conviction under S. 304 (2) was, therefore, unsustainable and the conviction can only be under S. 323. A.I.R. 1941 Mad. 560=1941 M.W.N. 220 (2)=(1941) 1 M.L.J. 364=42 Cr.L.J. 707=53 L.W. 363=195 Ind. Cas. 171.

—Ss. 304, 302, 324.

Injury by accused on deceased's head not of nature to entail serious consequences in man of normal health—Deceased suffering from chronic malaria—Formation of abscess due to lowered vitality—Offence held, fell under S. 324—Use of dangerous weapon held no indication of intention to cause injury likely to cause death—Offence, therefore, held did not amount to culpable homicide. A.I.R. 1941 Rang. 141=1941 Rang. L.R. 138=42 Cr.L.J. 591=194 Ind. Cas. 547.

—Ss. 304 and 325.

The deceased struck the accused a blow with a hockey stick on the thigh and then the accused struck only one blow with a stick on the head of the deceased. Up to that point the accused merely appeared to have wished to give an ordinary beating with stick to the deceased and an ordinary beating was all that seemed to have been required by the motive suggested for the attack:

Held, that it could not be assumed in the circumstances of the case that the accused intentionally struck a blow which he knew was likely to cause death. The offence did not, therefore, fall under S. 304, part II, but one under S. 325. A.I.R. 1938 Lah. 714=40 Cr. L. J. 261=179 Ind. Cas. 880.

—Ss. 304, 335—Sudden provocation—Injury endangering life—Offence.

If the accused, under sudden provocation, caused an injury that endangered life and the deceased died as the result of that injury, the offence committed is certainly culpable homicide.

In very few cases of murder can it be said that the injury caused necessarily resulted in death, but if it is caused with the necessary intention or knowledge and death results from the injury caused, then the offence committed is murder or culpable homicide as the case may be. A.I.R. 1938 Mad. 723=1938 M.W.N. 605=48 L.W. 142=(1938) 2 M.L.J. 225=39 Cr.L.J. 871=177 Ind. Cas. 432.



—Ss. 304, 325, 323—Old man knocked down and killed—Presumption of knowledge.

Where as a result of knocking down by the accused, the death of an old man was caused, it is impossible to hold that this act of knocking him over, though it did result in his death was one that he could reasonably be held to have known to be likely to have caused his death. Therefore, the Part of S. 304, second, Penal Code, has no application. It cannot also be held that merely by knocking the old man down the accused intended or knew himself likely to be causing grievous hurt and a conviction under S. 325, Penal Code, cannot be sustained. (1938) 40 P.L.R. 562.

—Ss. 304, 326—Wound caused by accused not cause of death—No intention of causing death.

Where the wound caused by the accused on the arm of the deceased was not an act done with the intention of causing death nor with the intention of causing such bodily injury as was likely to cause death and death was not the natural result of the act, the post mortem examination having revealed that death was due to gangrene:

Held, that conviction under S. 304, could not be upheld but must be altered to one under S. 326. A.I.R. 1936 Lah. 833=38 P.L.R. 203=37 Cr.L.J. 1079=165 Ind. Cas. 146.

—Ss. 304, 325—Accused hitting one blow on deceased—No enmity—Quarrel over grazing cattle—Death after three weeks due to bad handling of wound.

The deceased was the uncle of the accused. There was no previous ill-feeling between them. The occasion for the assault was an ordinary village quarrel due to the grazing of cattle. Admittedly only one blow was struck with a lathi. Whether or not it was deliberately aimed at the head it was not possible to say, but as stated by the Civil Surgeon "the injury on the top of the head was simple as examined externally. There was no fracture at the seat of the injury". The deceased himself did not regard the injury at all serious, as the complaint was made only under S. 323, Penal Code, and S. 24, Cattle Trespass Act. The deceased did not think it necessary to go to hospital. The deceased died three weeks after the occurrence due to sepsis consequent to the bad handling of the wound and application of wrong village remedies:

Held, that the accused had no intention of causing death or such bodily injury as he knew to be likely to cause death. It could not be held that the accused must have had the knowledge that the blow he was dealing was likely to cause death.

The conviction under S. 304, Penal Code, was set aside and the accused was convicted under S. 325, Penal Code. A.I.R. 1935 Oudh 446=1935 O.W.N. 940=36 Cr.L.J. 1262=11 Luck. 401=157 Ind. Cas. 667.

—Ss. 304, 325 and 149—Seven persons making a deliberate attack on one man and causing his death—Intention of causing such bodily injuries as were likely to cause death or knowledge that they were likely, by such acts, to cause his death, clear—Conviction under S. 325 should be set aside and accused convicted under S. 304.

Seven persons made a deliberate attack upon one man, and ultimately caused his death by fracturing his ribs and rupturing his spleen and inflicting three injuries on his head which left him unconscious and which might, in the opinion of the Medical Officer, have also resulted in his death. They inflicted 24 injuries on the deceased, about 20 of them being inflicted after the deceased had fallen down and was unconscious:

Held, that even if it be assumed that the accused had no intention of committing wilful murder of the deceased, still the fact of the infliction of the injuries showed that they beat him with the intention of causing such bodily injuries as were likely to cause his death, or with the knowledge that they were likely, by such acts, to cause his death, and that in the circumstances of this case, all the accused were clearly guilty of an offence of culpable homicide punishable under S. 304, if not of the offence of wilful murder punishable under S. 302. Both the intention as well as the knowledge that death was likely to ensue could be imputed to the accused.

[Their Lordships set aside the conviction and sentence passed upon the accused for an offence under S. 325, read with S. 149, and in lieu thereof convicted all the seven accused of an offence under S. 304 read with S. 149. A.I.R. 1935 Oudh 381=36 Cr.L.J. 573=1935 O.W.N. 343=11 Luck. 51=154 Ind. Cas. 868.

—Ss. 304, 324.

The thrusting of a lathi into the anus of a man is causing grievous hurt which endangers life and when it is clear from medical evidence that injury to rectum was not the cause of death but that it created a shock which contributed to the cause of death, the offence is one under S. 324, Penal Code, and not under S. 304. A.I.R. 1934 Oudh 87=11 O.W.N. 32=35 Cr. L. J. 467=147 Ind. Cas. 734.

—Ss. 304 and 326.

Where the deceased and his son made an attack on the accused who attacked the deceased though his life was not in danger and it appeared that the accused had no knowledge that the wounds he inflicted were likely to cause death:

Held, that although he was not justified in attacking the accused and his son with such ferocity as he did, the accused must be convicted under S. 326 and not under S. 304, Part II. A.I.R. 1933 Lah. 733=35 Cr.L.J. 90=34 P.L.R. 961=146 Ind. Cas. 420.

—Ss. 304 and 326.

A person acting under the right of self-defence—Right exceeded—Killing a man without any intention or motive is an offence under S. 326, Penal Code, and not under S. 304. 1932 M.W.N. 67.

—Ss. 304, 325—Object of accused only to rescue cattle—Circumstances justifying conviction only under S. 325.

Where the main object of the accused was to rescue the cattle which the deceased had impounded and to give him a beating for refusal to surrender them, and no injury was inflicted on any vital part



of the accused's body, and there was no evidence to show that the accused had any knowledge that the deceased had a badly enlarged heart on account of which he died:

Held, that under the circumstances, the accused could not be presumed to have had an intention to cause such bodily injury as was likely to cause death, and was guilty only of an offence under S. 325 and not under S. 304. A.I.R. 1932 Oudh 279 = 9 O.W.N. 655 = 34 Cr.L.J. 99 = 140 Ind. Cas. 706.

—Ss. 304, Part II, 325—Provocation.

Where the deceased had beaten the accused with a shoe and being overpowered by others, the accused lost self-control and picked up some sort of wooden substance which was lying near by and introduced it into the rectum of the deceased who died in consequence:

Held, that the offence was one under S. 304, Part II and not one under S. 325. A.I.R. 1932 Lah. 199 = 33 P.L.R. 49 = 33 Cr.L.J. 365 = 136 Ind. Cas. 729 (2).

—Ss. 304 and 326—Drunken accused shooting at close range—Injury not fatal—Wound getting septic—Death two months after, dysentery supervening—Liability.

The accused, when he was full drunk, fired at the deceased and caused a wound on the upper portion of his thigh with a shot which was fired at point blank range. The injury was not fatal and was not such as in the ordinary course of nature would cause death. After nearly two months the injured person died, the wound having become septic and dysentery having supervened a few days before his death.

Held: that neither S. 300 (3) nor (4) applied to the case, and the accused was not guilty of murder; he was not also guilty under S. 304. But he was guilty under S. 326 and as the shot was fired at point blank range on the upper portion of the thigh maximum sentence should be passed. 120 Ind. Cas. 183 = 11 L.L.J. 44 = 31 Cr.L.J. 44 = 1929 Cr. C. 4 = A.I.R. 1929 Lah. 433.

—Ss. 304 and 326.

Where the accused struck two lathi blows, one severe and the other slight, on the head of the deceased, which caused death, conviction under S. 326 is safer than under S. 304 (2). 115 Ind. Cas. 66 = 30 Cr.L.J. 378 = A.I.R. 1929 Lah. 37.

—Ss. 304 and 325.

In most instances a man who strikes a person on the head with a heavy weapon such as dang must know that such a blow is likely to cause death. But when the blow is not a very violent one, inasmuch as skull is not fractured and the person assaulted is able to attend the hospital and walk about for at least two days, and offence is committed under S. 325 and not under S. 304, Penal Code. 106 Ind. Cas. 440 = 29 Cr.L.J. 24 = 9 A.I.Cr.R. 285 (Lah.).

—Ss. 304 and 325.

Accused not knowing that injuries were likely to cause death — No intention of causing death or injury likely to cause death—Injuries not directly responsible for death—Conviction under S. 304 is

not proper, but should be under S. 325. 101 Ind. Cas. 177 = 3 Luck. 433 = 28 Cr.L.J. 401 = 8 A.I.Cr.R. 46 = 4 O.W.N. 337 = A.I.R. 1928 Oudh 36.

—Ss. 304 and 323.

Accused hit his brother's wife with a moosal and dragged her inside house. Since then the woman was not to be seen.

Held: as there was no definite evidence about the nature of the wound inflicted and as it was not proved that she had died of the wound accused cannot be held guilty under S. 304. Offence committed fell under S. 323. 92 Ind. Cas. 451 = 26 P.L.R. 642 = 27 Cr.L.J. 275.

—Ss. 304 and 323—Fight over cattle trespass—Accused's party desirous of chastising cattle-owners—Accused holding deceased and his partisans beating him with lathis—Death caused by blows on temple—Accused is guilty only under S. 323.

There was a quarrel and fight over cattle trespass and the party in whose field trespass was committed disposed of the party of the owners of cattle as the supporters of the owners came one by one. When the deceased came up, the accused caught his hands and some of the members of his party hit deceased with lathi. There was no intention on the part of the accused's partisans of causing the death of or grievous injury to the owners of the cattle. The desire was to chastise the owners of the cattle which caused damage. One of the blows was hit on the temple and killed the deceased.

Held, that the accused must have expected that simple injuries would be caused and he could not be held liable for one of his party hitting a blow on the temple and causing the death of the deceased and that the accused was guilty only under S. 323. I.P.C. 88 Ind. Cas. 520 = 2 O.W.N. 465 = 26 Cr.L.J. 1160 = A.I.R. 1925 Oudh 482.

—Ss. 304 and 323—Continual ill-treatment of daughter-in-law by mother-in-law—Beating—Death—No evidence showing intention or knowledge of likelihood of causing death—Mother-in-law was held not guilty under S. 304 but under S. 323.

On the day before the death the deceased spilt some oil and her mother-in-law, the accused gave her a beating. The thing was done openly at 8 a. m. in the view of a number of neighbours. The evidence did not show that the accused either intended or contemplated the death of the deceased as a result of the beating which was inflicted on her. It was clear that the accused had taken a dislike to her daughter-in-law, that she underfed her, kept her short of clothes, and used at times to beat her. The circumstances in which the beating took place formed the strongest evidence that the accused did not realise that it was anything out of the ordinary or might produce serious consequences. There was no evidence, medical or other, to support the view that the ill-treatment by the accused would certainly have terminated in her death from natural causes if the accused had not accelerated it by beating her. The lack of nutrition had not reached a point which was in itself dangerous, or



which suggested a deliberate attempt to starve the girl:

Held, that the evidence did not establish an offence under Section 304, still less under Section 302, against the accused. But that the offence under Section 323 of the Indian Penal Code had been committed and the maximum penalty under that section must be imposed. 85 Ind. Cas. 150=26 Cr.L.J. 470=5 L.R.A.Cr. 161=A.I.R. 1925 All. 126.

—Ss. 304 and 323.

Where death is caused as a result of simple injuries and where it is shown that the accused person had no knowledge that the deceased's spleen was diseased, he could only be convicted of causing simple hurt. 72 Ind. Cas. 533=24 Cr.L.J. 421=A.I.R. 1924 Lah. 218.

—Ss. 304 and 325.

Being enraged at the deceased's report to the headman that the accused had stolen gram from his threshing ground, the accused attacked the deceased and dealt him several blows on the body and he died on account of the only blow received on the head.

Held, the accused who dealt that blow was guilty under S. 304 (2) and under S. 325. A.I.R. 1923 Lah. 416.

—Ss. 304, 325—Grievous hurt—Assault by three persons armed with lathis—Intention—Culpable homicide.

Three persons attacked a fourth with lathis and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt as to which of the three assailants struck that blow. Held, that the offence of which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder. 19 M. 433, Foll. 1907 A.W.N. 51=4 A.L.J. 207=29 A. 282.

—Ss. 304, 323—Hurt—Culpable homicide, facts amounting to.

The accused, believing that a woman had bewitched another gave the former a severe beating and branded her in several places. Four or five days after this her back swelled and fever came on. She finally took to her bed and died on the sixteenth day after the beating. The accused were, on these facts, tried by a Second Class Magistrate, who convicted them of offences under S. 323 and sentenced them each to rigorous imprisonment for six months. Held, reversing the conviction and sentence, that the accused should be committed for trial on a charge of culpable homicide. (1902) 4 Bom. L.R. 879.

4. Forum.

—S. 304—Trial by Magistrate.

An offence under S. 304 which is punishable with transportation for life and which is exclusively triable by the Court of Session cannot be tried by the Magistrate in charge of the Central

Children Court. A.I.R. 1932 Cal. 487=59 Cal. 856=36 C.W.N. 164=33 Cr.L.J. 645=138 Ind. Cas. 626.

—S. 304—Offence prima facie culpable homicide amounting to murder—Case ought to be committed to the Sessions.

Where a person is attacked and killed, it must be decided whether the assailant is guilty of culpable homicide and if so, whether the culpable homicide amounts to murder or not. If it were found that the offence committed is culpable homicide but it does not amount to murder, it must be further made clear whether the offence falls under part 1 or 2, of S. 304. Where the offence committed is prima facie one of murder, the Magistrate empowered under S. 30 has no jurisdiction to try it, but he must commit the accused to the Sessions. 116 Ind. Cas. 190=12 A.I.Cr.R. 446=30 Cr.L.J. 573=A.I.R. 1928 Lah. 868.

—S. 304.

In every case under the first part of S. 304, it is almost invariably proper for the case to be committed to the Sessions, if the evidence is sufficient to establish the charge.

Where the charge is one of murder under S. 302 and there is no question of the first exception to S. 300 being admitted by the prosecution and a magistrate specially empowered under S. 30, Cr. P. Code heard the case and convicted under S. 304, I.P.C., the proceedings were quashed and the accused committed to the Sessions. 69 Ind. Cas. 459=23 Cr.L.J. 731.

5. Knowledge, when presumed.

—S. 304, Part II.—The deceased and the accused were neighbours. One day the accused's father began to dig a water channel close to the wall of the deceased's house. The deceased begged him to dig it a little distance away so as to avert any danger of his wall collapsing. This request led to an altercation and the father of the accused and the deceased grappled with each other. While they were doing so, the accused came up with an iron rod with which the water-course was being dug and seizing it with both hands, struck a blow on the deceased's head. The deceased fell down and died:

Held, that the accused must be credited with the knowledge that this heavy iron rod was likely to cause death. (He could, therefore, be rightly convicted under Part II of S. 304). A.I.R. 1938 Lah. 618=39 Cr.L.J. 927=40 P.L.R. 935=177 Ind. Cas. 642.

—S. 304.—Where the accused struck the deceased two blows on the head with a stick and though he had a right of private defence, he had exceeded it and further neither the accused nor anybody thought that the injury was serious:

Held, that the accused was guilty of culpable homicide not amounting to murder. A.I.R. 1934 Rang. 110=35 Cr.L.J. 1112=150 Ind. Cas. 599.

—S. 304—Accused beating deceased in merciless and determined manner—Bones not broken—Only hands and feet used—Infliction of



**injuries—Knowledge that death was likely—Offence.**

Suspecting the fidelity of the deceased, the wife of the accused, the accused started beating her and it appeared that as a result of the beating which was of a most merciless and determined nature, a large number of injuries was inflicted but no bones were broken and the accused used only his hands and feet for the beating:

Held, that the accused must be held to have known that by administering such a thrashing, he was likely to cause her death and that the offence fell under S. 304, Part II. A.I.R. 1933 Lah. 883=35 Cr.L.J. 65=34 P.L.R. 933=146 Ind. Cas. 326.

—Ss. 304, 357—Dying pagri round neck of boy and dragging him along—Death—Nature of offence.

In order to compel a boy to go in any direction against his will, it is a common practice to put a pagri round his neck and to drag him, and though it may be somewhat dangerous if he resists overmuch, or if the ground over which he is taken is hilly or broken, still, generally speaking, the practice leads to no more evil consequences than a swollen neck; and it cannot be said as a fact that it is imminently dangerous to the life.

The accused put his safa round the neck of a boy on his refusal to accompany him to a certain place and dragged him. When they had gone about 50 or 60 yards, the boy fell down unconscious. He never recovered his consciousness and died:

Held, that although the conduct of the accused was reprehensible and constituted a criminal offence, he could not be saddled with a knowledge necessary to constitute an offence under S. 304, Part II, nor could he be presumed to have intended to cause a grievous hurt inasmuch as such grievous hurt was not the natural consequence of his act, and the accused was, therefore, guilty only of an offence under S. 357, I.P.C. A.I.R. 1931 Lah. 275=32 Cr.L.J. 1248=134 Ind. Cas. 772.

—S. 304—Knowledge, when presumed.

A person who voluntarily inflicts injury such as to endanger life must always, except in the most extraordinary and exceptional circumstances, be taken to know that he is likely to cause death. If the victim is actually killed, the conviction ought ordinarily to be of the offence of culpable homicide. A man who knows he is likely to smash the skull of his victim, knows as well he is likely to cause the death of his victim. 32 Bom.L.R. 1143=A.I.R. 1930 Bom. 483.

—S. 304.

A lathi is a lethal weapon and if a person chooses to lay about with a lethal weapon with all the force at his command, it must be presumed that he knew he was likely to cause death. 94 Ind. Cas. 137=27 Cr.L.J. 569=A.I.R. 1926 Lah. 426.

—S. 304.

Presumably everybody knows that the abdomen is a most delicate and vulnerable part of the hu-

man body, and if a man with that knowledge kicks the abdomen with such violence as to cause fracture of two ribs and rupture of the spleen which was normal he should be presumed to have done so with the knowledge that he, by so kicking, was likely to cause death. 96 Ind. Cas. 641=27 Cr.L.J. 977=A.I.R. 1926 Lah. 313.

—S. 304—Beating severely but not with big lathis—Injuries simple—Knowledge of likelihood of causing death must be attributed to the accused.

Where death was caused by beating a number of blows with a lathi but the injuries inflicted upon the deceased were all simple except one which fractured a finger bone and death was due to shock:

Held, that the assailants did not intend to cause death or such bodily injury as was sufficient in the ordinary course to cause death, but they must be presumed to have known that they were likely to cause death and that they were therefore, guilty of an offence under S. 304 (2). 86 Ind. Cas. 826=26 Cr.L.J. 890=A.I.R. 1925 Lah. 549.

—S. 304—Death, caused by one blow with a lathi—Knowledge that death would be caused was presumed.

The accused struck the deceased, who was sitting with certain enemies of the accused watching an entertainment, on the head with a lathi which resulted in his death:

Held, that the accused must have known that he was likely to cause death and was guilty under S. 304 (2) and five years' rigorous imprisonment was appropriate sentence. 81 Ind. Cas. 143=5 L.L.J. 180=25 Cr.L.J. 655=A.I.R. 1925 Lah. 111.

—S. 304—Kicking a prostrate woman—Knowledge that death would be caused is inferred.

The accused made a confessional statement in which he stated that he and his wife had a quarrel in the forest and that he slapped and then kicked her and unintentionally caused her death. There was nothing to suggest that the wife was suffering from any disease;

Held, that he must have kicked the woman with tremendous force to produce such an effect, and that a man who so kicks a prostrate woman on the side must be credited with the knowledge that he is likely thereby to cause her death, even if he be exonerated from the more definite intention or knowledge required by S. 302, and that in kicking the deceased accused knew that he was likely to cause death and therefore he was guilty of an offence under S. 304, I.P.C. (latter portion). 73 Ind. Cas. 961=18 M.L.W. 188=1923 M.W.N. 796=24 Cr.L.J. 721=A.I.R. 1924 Mad. 41.

—S. 304.

Knowledge is essentially subjective, not objective, and if a man really believes that a certain result will not follow, he cannot be held to know that it is likely to follow. 64 Ind. Cas. 843=11 L.B.R. 56=A.I.R. 1921 L.B. 26.



## —S. 304.

There was no enmity between accused and deceased. The accused's wife and the deceased who were the wives of two brothers were quarrelling about sharing a pumpkin. The accused coming along broke the pumpkin into two against the wishes of the deceased wherefore she abused him. He thereupon struck her with a lump of limestone weighing 3 pounds. This resulted in the injury:

Held, accused acted from impulse of moment and had no intention either to kill her or to fracture her skull; but that as the lump of limestone weighed 3 pounds it must be taken that he knew that there was a probability of fatal injury being inflicted. 81 Ind. Cas. 320=5 L.R.A;Cr. 175 =25 Cr.L.J. 800=A.I.R. 1925 All. 4.

## —Ss. 304 and 304-A—Culpable homicide—Death by suffocation.

An unmarried girl gave birth to a child and for the purpose of concealing the child she wrapped it up in a cloth with the result that the child was suffocated and died. Held, that the mother was guilty of an offence under S. 304 of the I.P.C. and not of an offence under S. 334-A as the accused must be taken to have known that the way in which she tried to conceal the child was likely to result in its death. 7 Cr.L.R. 200 (Mad.)

## 6. Offence under.

## —S. 304—Accused going to deceased's place and picking up quarrel—Free fight—Deceased struck on head with stick dying—Offence under S. 304, Part II.

Where the accused went to the place of the deceased in order to pick up a quarrel and in a free fight which took place between them, the accused struck the deceased on the head with a stick causing thereby his death:

Held, that the accused had no right of private defence. The accused did not intend to commit murder because he used only a stick. He, however, knew that he was striking on a vital part of the body and his act, therefore, fell within the mischief of the second part of S. 304. A.I.R. 1938 Pesh. 10 =39 Cr.L.J. 401=174 Ind. Cas. 137.

## —S. 304.

A blow inflicted with a sharp-edged weapon with such violence as to sever completely the upper arm is one which is intended to cause such bodily injury as is likely to cause death and constitutes an offence of culpable homicide not amounting to murder under Cl. (1) of S. 304. A.I.R. 1938 Rang. 156=39 Cr.L.J. 561=175 Ind. Cas. 345.

## —S. 304, Part II.

Where the attack was directed, not against the head but against the body and the attack was made on the spur of the moment without premeditation and although every participant in the attack was actuated by the intention to inflict injury, it was not expected that he would weigh the violence of his blow and the medical testimony is to the effect that the death was due to shock which was the cumulative effect of the various injuries:

Held, that in an unpremeditated, joint attack when each individual beats with a stick, anything more than the knowledge that their joint act in its cumulative effect is likely to cause death cannot be imputed to them collectively, and that the intention was not to cause death or to cause such bodily injury as is likely to cause death but there was knowledge that the cumulative injuries were likely to cause death and the offence fell within the second part of S. 304. A.I.R. 1936 Nag. 103=37 Cr.L.J. 607=31 N.L.R. 215 Sup.=162 Ind. Cas. 430.

## —Ss. 304, Part II, 302—Affray—Death—Absence of evidence to show that persons armed with sharp-edged weapons intended to cause death—Offence.

During the course of an altercation, A was felled to the ground by a blow by P and thereafter each party was re-inforced by its supporters and a free fight ensued. P's party lived at a neighbouring village and they had come to the village where fight took place in a large body prepared for a fight which was probably anticipated by both the parties. Although seven men of A's party were alleged to be armed with sharp-edged weapons, yet, in spite of this, no grievous incised wound was caused on any vital part of the body of any of the combatants by them. P deceased lost his life as a result of the fracture of the skull caused by a blunt weapon. It was not established that any of the accused was definitely responsible for causing P's death. It could not also be said with any certainty whether any of the appellants was armed with a sharp-edged weapon or whether the sharp-edged weapons were wielded by the absconders, or by those who died during the course of the inquiry. It also appeared that the persons armed with sharp-edged weapons did not intend to cause death or such bodily injury as was likely to cause death. The circumstances indicated that at the utmost the appellants can be burdened with the knowledge that their act was likely to cause death, but that they had no intention to cause death or such bodily injury as was likely to cause death:

Held, that the offence committed by the accused fell under S. 304, Part II. A.I.R. 1934 Lah. 341 =35 Cr. L. J. 1376=151 Ind. Cas. 449.

## —S. 304, I.

The deceased, consequent on some exchange of words, threw a clod of earth at the accused who struck the deceased twice in quick succession on head with a stick that he was carrying, causing two injuries on the front part of the left parietal region and the right temporal region, respectively:

Held, that the accused was guilty under S. 304-I. A.I.R. 1934 Lah. 345=35 Cr. L. J. 1163 (1)=150 Ind. Cas. 656.

## —S. 304—Premeditation, if necessary.

Premeditation is not necessary for the offence under S. 304. Consequently, the mere fact that there is no specific evidence that the accused had come prepared to cause death is no ground for not convicting him under S. 304. A.I.R. 1934 All. 739=35 Cr. L. J. 1302=3 A.W.R. 835=151 Ind. Cas. 364.



—S. 304, Part I—Old man going about drunk causing nuisance — Exchange of words with accused — Accused picking up firewood and striking on head—Death—Offence.

Where the deceased, an old man of 67, went out of his house drunk and made a nuisance of himself to the bazar-sellers, and going to where the accused was standing with whom words were exchanged with the result that the accused picked up a piece of firewood and struck the deceased on his head once, and the deceased fell and died on the way to the hospital without regaining consciousness:

Held, that the accused, when he delivered the blow, should be deemed to have had only the intention of causing such bodily injury as was likely to cause death within the meaning of Part I of S. 304, and the sentence should be reduced accordingly. A.I.R. 1933 Rang. 270=34 Cr.L.J. 1182=146 Ind. Cas. 191.

—S. 304—Attack in the heat of passion—Intention of accused.

Where there was a quarrel between the accused and his father and the former suddenly getting enraged struck the latter in the heat of passion and caused three or four injuries:

Held, that there was no adequate ground for attributing to the assailant the intention contemplated by S. 304, Part I, and the conviction might be altered to one under S. 304, Part II. A.I.R. 1933 Lah. 664=34 P.L.R. 330=34 Cr.L.J. 1173=146 Ind. Cas. 172.

—S. 304.

The fact that the injuries inflicted did in fact result in death, will not justify the court in reasoning backward from the result to an intention to cause death. 34 C.W.N. 1127=32 Cr. L. J. 187=128 Ind. Cas. 808=1931 Cr. C. 293=A.I.R. 1931 Cal. 261 (F.B.).

—S. 304—Knowledge and intention absent.

If a victim of an assault dies of peritonitis due to a rupture which could not be connected with the injuries received in the assault, there is no case of culpable homicide not amounting to murder. 7 O.W.N. 449=A.I.R. 1930 Oudh 252.

—S. 304.

Accused inflicting in fit of provocation two lathi blows causing fracture on head of deceased — Third blow falling on chest — Conviction should be under S. 304, Part 2, and not under S. 304, Part. 1. 120 Ind. Cas. 182=31 Cr.L.J. 43=11 L.L.J. 52=A.I.R. 1929 Lah. 180.

—S. 304—Striking with stick weighing 62 and 1-2 tolas and measuring 28 inches — Injury resulting in death—Intention to commit murder was not presumed.

Where the medical evidence showed that the fractures as the result of blow on the head were severe and the blow at hard one, but the weapon used in the assault was a stick weighing 62 and 1-2 tolas only and measuring 28 inches in length, and the blow was struck suddenly on the spur of the moment:

Held, that the intention necessary for offence must be presumed under the first part of S. 304, I.P.C. As the blow had not been shown to be so severe as to justify a departure from the general rule, that when one blow only is delivered with a stick, the intention requisite for murder cannot be presumed, the assailant was not guilty of murder but was guilty of culpable homicide not amounting to murder. 109 Ind. Cas. 215=5 Rang. 817=29 Cr.L.J. 487=A.I.R. 1928 Rang. 64.

—S. 304.

Where accused ordered two other persons one of whom was armed with a spear and the other was armed with lathi, to beat another person who died subsequently as the result of wounds from the spear and lathi:

Held, that it is a reasonable inference that he intended all the results that followed and he was rightly convicted under Ss. 304-109. 107 Ind. Cas. 305=6 Pat. 627=29 Cr. L. J. 239=9 A.I.Cr.R. 460=A.I.R. 1928 Pat. 100.

—S. 304—Knowledge but not intention.

Where the accused inflicted many blows on the body of the deceased, and also used kicks in order to drive away an evil spirit, and thereby caused the death, the accused is guilty under S. 304 (2). 114 Ind. Cas. 438=30 P.L.R. 611=12 A.I.Cr.R. 21=30 Cr.L.J. 299=A.I.R. 1928 Lah. 917.

—S. 304—Hitting on the temple with lathi—Death caused—Act is offence under S. 304.

Where the accused hit the deceased with a lathi on the temple:

Held, though his intention might not be to cause death or grievous hurt yet he intended to cause such hurt as would in the ordinary course of nature cause death and that he was rightly convicted under S. 304. 88 Ind. Cas. 520=2 O.W.N. 465=26 Cr.L.J. 1160=A.I.R. 1925 Oudh 482.

—S. 304.

Where the accused were not likely to know that the deceased or any one was within a chaupal to which they set fire in a riot:

Held, a conviction under S. 304 was wrong. 82 Ind. Cas. 54=5 L.R.A.Cr. 140=25 Cr.L.J. 1190=A.I.R. 1924 All. 781.

—S. 304—Wound not on vital part—Death due to septic poisoning—Accused is guilty under 1st part of S. 304.

Where it was difficult to hold that the accused intended to inflict bodily injury sufficient in the ordinary course of nature to cause death the injuries being not on vital parts and being apparently intended to maim the victim and the deceased dying owing to septic poisoning:

Held, that the accused must be held to have intended to cause bodily injury which was likely to cause death, the degree of probability as to death ensuing, not being so high as to justify a finding of murder.

Held, further that he was therefore guilty of an offence punishable under the first part of



S. 304. 77 Ind. Cas. 889=2 Bur. L.J. 239=25  
Cr.L.J. 489=A.I.R. 1924 Rang. 212.

—S. 304—Death not natural consequence.

The deceased fell down on account of two serious blows given by the accused and had to be taken away on a charpoy. After being removed to the hospital he left it when he was progressing well. A month and a half after the receipt of the injuries he died of pneumonia. Medical evidence did not show that the death was due to the injury, held, no offence under S. 304, was committed. 81 Ind. Cas. 181=5 L.R.A.Cr. 43=25 Cr.L.J. 693=A.I.R. 1924 All. 441.

—S. 304—Death being not natural consequence of rape, no offence under S. 304 is committed if death occurs after rape.

A boy of about 18 had sexual intercourse without her consent with a well developed girl probably under 12 years of age; there was no ancillary violence but her vagina was ruptured and as a result she died of shock:

Held, that as death is not the natural consequence to be expected from a simple sexual offence, the accused was not guilty under S. 304. 83 Ind. Cas. 651=3 Pat. 410=26 Cr.L.J. 91=A.I.R. 1924 Pat. 553.

—S. 304—Beating severely a very weak person causing her death—Conviction under S. 304 is quite proper.

Khubi the accused had a young wife of 14 or 15. She was physically weak, mentally deficient and excitable, and certain to meet a premature death. Khubi must have known, even if he were a savage, that his wife demanded at his hands exceptional care and kindly treatment and could not stand brutality. For some cause which appears to have been due to her defective health, she irritated him into a savage beating which inflicted upon her frail body injuries which in the ordinary course of events would not cause death to a healthy person, but had caused her death. Instead of going to his friends or her friends or any body in authority to explain this accident, he surreptitiously by night carried what he thought was her dead body and threw it down a dry well 33 feet deep:

Held, that it was unnecessary to consider whether as a matter of law the conviction should not be altered to one under S. 325 and that his conviction under S. 304 was too merciful; he should have been convicted under S. 302. 81 Ind. Cas. 191=4 L.R.A. Cr. 131=25 Cr.L.J. 703=A.I.R. 1923 All. 545.

—S. 304—Parents throwing child to crocodiles in the superstitious belief that it will be ultimately saved are guilty under S. 304, last clause.

The accused were husband and wife. They had had a certain number of children all of whom died in their infancy. They were thus led to believe that there was an evil influence brooding over them and their children and they accordingly made a vow that in order to exercise this evil influence they would offer their next born to the crocodiles in a certain tank. Accordingly, they

gave their next child to the crocodiles in the belief that the child would be ultimately saved. The child was devoured:

Held, that the accused were guilty under S. 304, last clause. 62 Ind. Cas. 414=33 C.L.J. 179=25 C.W.N. 676=22 Cr.L.J. 526=A.I.R. 1921 Cal. 501.

—S. 304—Conviction—Legality.

Where the cause of death of a person was (found to be) either due to concussion of the brain due to head injuries or possibly opium poisoning and the accused were charged with causing violence to the deceased under S. 304, I.P.C., it is bad in law to convict the accused under S. 304, I.P.C. 17 Cr.L.J. 147=16 P.W.R. 1916 Cr.=33 Ind. Cas. 627.

7. Sentence.

—S. 304, Part II—Proper sentence—Husband killing wife on suspicion of unchastity.

In a case of culpable homicide punishable under S. 304, Part II, I.P. Code, a sentence of two year's rigorous imprisonment is grossly inadequate and cannot possibly meet the requirements of a case in which a husband brutally kills his wife on a mere suspicion that she had intimacy with someone or that she had brought about his indisposition by means of some charms. Pak. L.R. (1950) Lah. 304=A.I.R. 1950 Lah. 159=51 Cr.L.J. 975.

—S. 304.

Causing death under grave and sudden provocation—Sentence of three years R.I. is not excessive. Pak. L.R. (1950) Lah. 180=A.I.R. 1950 Lah. 131=51 Cr.L.J. 1132.

—S. 304—Sentence—No intention to kill—Intention only to facilitate theft.

Where there is no intention to kill but what the accused did was only in their attempt to facilitate the theft in which they were engaged, the ends of justice would be sufficiently met by a sentence of 2 years under the second part of S. 304 of the Penal Code. 228 Ind. Cas. 280=1946 A.L.W. 538=1946 A. Cr. C. 152=48 Cr.L.J. 181=1946 A.W.R. (H. C.) 572 (2)=1947 A.L.J. 274=A.I.R. 1947 A. 67.

—S. 304—Murder case falling under Exception to S. 300, reduced to culpable homicide—Only knowledge imputed to accused under S. 299—Maximum sentence.

A case of murder which, owing to the application of one of the Exceptions to S. 300, reduced to culpable homicide not amounting to murder is punishable, so far as imprisonment is concerned, with a maximum term of ten years, if no intention is imputable to the accused under S. 299 but only the knowledge therein mentioned. A.I.R. 1939 Rang. 225=40 Cr. L. J. 725=183 Ind. Cas. 145.

—S. 304—Provocation—Loss of self-control.

It must be a contradiction in terms to concede that a man has been wholly deprived of all power of self-control for a reason which the law recognizes as adequate and at the same time to say that he deserves the most severe punishment that his crime admits of.



And it is a confusion of thought to permit in such circumstances the nature or number of the blows given to count in assessing what punishment should be given. **Ex hypothesi** where the man had no control of himself, the number and nature of the injuries inflicted must necessarily lose their significance and cannot be a ground for an excessive sentence. A.I.R. 1941 All. 310=42 Cr. L. J. 755=1941 A.L.J. 395=1941 A.W.R. 238=I.L.R. (1941) All. 608=195 Ind. Cas. 599.

—S. 304.

**Held**, that the sentence of five years' rigorous imprisonment was unnecessarily severe when there was no antecedent enmity between the parties, and the quarrel arose very suddenly and the choice of weapon was fortuitous and was not one which indicated any real intention to kill or to cause serious injury and the accused who was a young man saw his father grappling with another man and to that extent there was some provocation to him to commit the act he did. These were extenuating circumstances and taking them all into consideration, the sentence of five years' rigorous imprisonment should be reduced to two and a half years. A.I.R. 1938 Lah. 618=39 Cr. L. J. 927=40 P.L.R. 935=177 Ind. Cas. 642.

—S. 304—Provocation.

A Court must not pass the more severe sentence when circumstances of extenuation exist merely because the consequences of the crime have been more serious than in the ordinary case. The reasoning that although there was such provocation as to form a mitigating circumstance, yet that could not be taken into account because more lives than one had been sacrificed was an erroneous view of looking at the way in which circumstances of extenuation could be taken into account. A.I.R. 1937 Rang. 466=39 Cr. L. J. 137=172 Ind. Cas. 395.

—S. 304—Provocation.

When a case under S. 304-I is not a case of deliberate assault, the accused having had some sort of provocation from the deceased, the sentence of transportation for life is excessive and should be reduced to seven years' rigorous imprisonment. A.I.R. 1934 Lah. 345=35 Cr. L. J. 1163 (1)=150 Ind. Cas. 656.

—S. 304.

The language used by the deceased was highly provocative and the murder was in no way premeditated by the accused:

**Held**, that the accused committed an offence under S. 304 and the sentence of five years rigorous imprisonment was sufficient. ('36) 38 Pun. L. R. 43.

—S. 304—Provocation.

Where the accused, seeing the deceased having sexual intercourse with the accused's wife, killed him and was convicted under S. 304-I for transportation or life:

**Held**, that the accused acted under grave and sudden provocation and the offence could not be put on the same terms as an actual murder and hence the sentence of transportation for life should be reduced. A.I.R. 1933 Lah. 165=34 Cr. L. J. 1161 (2)=34 P.L.R. 899=145 Ind. Cas. 1009.

—S. 304.

Where, in a case under S. 304, Part II, it appears that the deceased used abusive and provocative language

and the accused gave only a single blow, which proved fatal, a sentence of 3 years' rigorous imprisonment is sufficient. A.I.R. 1931 Lah. 523=32 P.L.R. 696=133 Ind. Cas. 874 (2).

—S. 304—Deceased sister caught in the act of sexual intercourse with a stranger—Accused giving her blows and causing death—Sentence.

The accused actually caught his sister in the act of sexual intercourse with a stranger. Getting enraged, he gave a number of blows to his sister which caused her death:

**Held**, that considering all the circumstances, a reduction of sentence from five years' rigorous imprisonment to three years was justifiable. A.I.R. 1934 Lah. 428=35 Cr. L. J. 1445 (1)=151 Ind. Cas. 898.

—S. 304—Immorality of wife.

Where an offence under S. 304 (1) was committed in the heat of passion and on the spur of the moment after the accused's patience had been strained to the utmost by the immoral conduct of the deceased, his wife:

**Held**, that the sentence of ten years' rigorous imprisonment might, in the circumstances, be reduced to one of rigorous imprisonment for five years. A.I.R. 1933 Lah. 126=34 Cr. L. J. 1159 (1)=34 P.L.R. 889=145 Ind. Cas. 926.

—S. 304.

Deceased seen in night in accused's field—Accused believing him to be stealing paddy—Lathi blows on vital part of body:

**Held**, that the conviction of the accused under S. 304 was correct and in the circumstances, the sentence of seven years' rigorous imprisonment awarded by the Sessions Judge was excessive and one year's rigorous imprisonment would meet the requirements of the case. A.I.R. 1935 Oudh 442=1935 O.W.N. 934=36 Cr. L. J. 1209=157 Ind. Cas. 641.

—S. 304—Use of provocative and abusive language by deceased—Death caused by single blow—Sentence.

Where, in a murder case, it appeared that the deceased used abusive and provocative language and the accused gave only a single blow, which, however, proved fatal:

**Held**, that the conviction under S. 304, Part II was valid but that under the special circumstances, a sentence of three years' rigorous imprisonment was sufficient. A.I.R. 1931 Lah. 523=32 P.L.R. 387=32 Cr. L. J. 1082=133 Ind. Cas. 874 (1).

—S. 304.

Accused seeing deceased in the act of illicit intercourse with his wife—Grave and sudden provocation—Light punishment awarded. 1931 M.W.N. 553.

—S. 304—Exceeding right of private defence.

In case of a conviction under S. 304, in awarding sentence, consideration may legitimately be given to the fact that the accused were really in the right at first and were performing a legitimate duty in taking the cattle of the deceased to the pound which had strayed into their land, although in doing so they exceeded the right of private defence of person and pro-



perty. A.I.R. 1937 Oudh 54=37 Cr. L. J. 931=1936 O.W.N. 766=164 Ind. Cas. 151.

—S. 304—Exceeding right of private defence—Lenient sentence.

Where the deceased who was a notorious bully along with another person attacked the accused with their first and after a scuffle which lasted for ten or fifteen minutes in which the accused received some slight injuries, the accused drew a knife and stabbed the deceased:

**Held**, that the fact that the deceased was a notorious bully and the accused received some slight injuries would not form any justification for drawing a knife and striking the deceased with it and that he had exceeded the right of private defence, but that in the circumstances of the case, the sentence might be reduced from one five years' rigorous imprisonment to one of three years' rigorous imprisonment. A.I.R. 1933 Lah. 227=34 Cr. L. J. 1170=146 Ind. Cas. 34.

—S. 304—Accused having right of self-defence.

A sentence of transportation for life for an offence under S. 304, Part I, Penal Code is too severe in a case where the accused had a right of self-defence and is punished only for having exceeded it, especially in a case where the weapon used by the accused is one which he already had in hand. A.I.R. 1932 Lah. 344=33 P.L.R. 282=33 Cr. L. J. 587=138 Ind. Cas. 418.

—S. 304.

Woman carried away by her husband—Her father and brother going out with lathis to fetch her by overcoming opposition—Fight invited by abusing husband's brother resulting in his death:

**Held**, that as regards the sentence, there was this much to be said in mitigation that the woman did not want to return to her husband, and was taken back by force. It was true, the force used did not appear to have been more than was necessary to get her home, and the husband was legally justified in employing it. But men could be forgiven for rebelling against a law of this kind which reduces a woman to the position of a chattel, and circumscribes her right to the command of her own body. It did not mean that they could be excused altogether, for the law must be obeyed above all else, but this circumstance could be taken into consideration. There was also the fact that the accused were attacked first, and attacked with considerable vehemence. A sentence of seven years' rigorous imprisonment in the case of each accused would meet the ends of justice here. (1937) 168 Ind. Cas. 748=38 Cr. L. J. 628.

—S. 304—Aggravating circumstances.

**Held**, that the concerted raid on the innocent and defenceless villagers, including the abominable conduct towards women was the more heinous and reprehensible by reason of the fact that it was perpetrated by British soldiers whose duty it is to protect the lives, persons and property of the inhabitants of India and that that duty they had shamefully betrayed and brought indelible disgrace on their uniform and there was no scope for mitigating the penalty. A.I.R. 1936 Nag. 103=37 Cr. L. J. 607=31 N.L.R. 215 Sup.=162 Ind. Cas. 430.

—S. 304.

Where the offence was committed in the course of a sudden quarrel and in the heat of the moment only

one blow was given, the sentence might be reduced from one of eight years' to one of two years' imprisonment. A.I.R. 1933 Lah. 1052=35 Cr. L. J. 461=35 P.L.R. 195=147 Ind. Cas. 681.

—S. 304.

Where it appeared that the accused struck only one blow on the head of the deceased and that abusive language was exchanged just before the blow was struck and that the blow was given in a sudden quarrel without any deliberate intention and without the accused having taken undue advantage or having acted in a cruel or unusual manner, and as soon as the deceased fell down, the accused refrained from inflicting any further injury upon him:

**Held**, that in the circumstances, a sentence of five years' rigorous imprisonment was excessive and might be reduced to one of two years' rigorous imprisonment. A.I.R. 1933 Lah. 851=35 Cr. L. J. 174 (2)=34 P.L.R. 993=146 Ind. Cas. 695.

—S. 304.

Where as a result of the exchange of abuse between the woman-folk, the accused hit the deceased woman with a stick while he was in such a fit of temper that he could not control himself and there was only one blow struck, and where there was not the slightest suggestion anywhere that any previous ill-feeling existed between the accused and the deceased woman and the quarrel, certainly was not premeditated and the unfortunate incident happened in the heat of passion:

**Held**: that without in any way minimizing the seriousness of the offence and having regard to all the circumstances of the case, a sentence of three years' rigorous imprisonment would meet the ends of justice. 106 Ind. Cas. 449=29 Cr. L. J. 33=9 A.I.Cr. R. 313. (Lah.)

—S. 304—Several accused.

Blows on head causing death—No uncertainty as to responsibility for offence—Sentence of five years rigorous imprisonment held proper. 32 Bom. L. R. 1143=A.I.R. 1930 Bom. 483.

—S. 304.

Where the deceased was the aggressor and had gone to the land of the accused to molest him:

**Held**, that a sentence of five years' rigorous imprisonment would be sufficient. 99 Ind. Cas. 56=7 A.I. Cr. R. 224=28 Cr. L. J. 24=A.I.R. 1927 Lah. 733.

—S. 304 — Two parties fighting — Appellants receiving injuries — Prosecution not telling the whole story—Too severe sentence not justified.

When it was found that two opposite parties were fighting out their differences and there were no independent witnesses, and one party was held by the lower Court to be exercising the right of self-defence:

**Held**, that it should be taken into consideration that the accused who formed the other party have themselves received more or less serious injuries, that one of their party has been killed, that the complete story has not been told by the prosecution and that, therefore, there is a possibility (which nevertheless amounts to nothing more) that they may have been acting in self-defence, and therefore too severe sentence is not justified. A.I.R. 1923 Lah. 313.



**—S. 304—Blow struck without premeditation—Sentence of 7 years is excessive.**

In a scuffle deceased received one injury on the chin and two on the head, one of which resulted in an extensive fracture of the skull. All that can be said to be proved was that G inflicted one of the injuries on deceased's head and that M inflicted the one on the jaw.

**Held:** G had been rightly convicted of an offence under Section 304 but as he is not shown to have struck more than one blow and as it was struck without any premeditation on a sudden quarrel, the sentence of seven years' imprisonment which has been passed on him is excessive. 5 L. L. J. 414=A.I.R. 1923 Lah. 170.

**8. Miscellaneous.**

**—S. 304, 34—Charge to jury.**

In a clear case of murder, to direct the jury that they might alternatively return a verdict of guilty under S. 304 (1) read with S. 34, is to give jury an opportunity to bring in a loophole verdict. (1937) 41 C.W.N. 570=I.L.R. (1937) 2 Cal. 250.

**—S. 304—Wrong direction to jury—Re-trial.**

Where the Judge gave the following explanation of S. 304 to the Jury: "The first part relates to death which is caused without any intention of causing death or causing such bodily injury as is likely to cause death. The 2nd part relates to death which is caused without any intention to cause death or to cause such bodily injury as is likely to cause death, but with the knowledge that such injury may lead to death":

**Held,** that that the explanation was wrong and the mistake was so palpable that it was a good ground for ordering re-trial. A.I.R. 1931 Cal. 345=35 C.W.N. 456=32 Cr. L. J. 598=58 Cal. 1138=130 Ind. Cas. 884.

**—S. 304—Definite charge of hiring—No conviction is tenable for constructive culpable homicide where Jury held that the hired man was not guilty.**

Where a person is charged with an offence under S. 304 read with S. 150 of the Penal Code and the charge against him is a definite one of having engaged or employed a particular person to commit culpable homicide not amounting to murder, and the Jury holds that the latter did not commit the culpable homicide, the person charged with having engaged or employed him cannot be convicted of constructive homicide under the provisions of S. 150 of the Penal Code. 85 Ind. Cas. 818=26 Cr.L.J. 594=A.I.R. 1925 Cal. 903.

**—S. 304—Charge under S. 304 read with S. 149—Conviction under S. 304 read with S. 34—Legality of conviction.**

Where certain persons were charged under S. 304 read with S. 149 but were convicted under S. 304 read with S. 34:

**Held,** that the conviction was not illegal and was not liable to be set aside as no prejudice had been caused to the accused. A.I.R. 1934 Mad. 565=1934 M.W.N. 241=67 M.L.J. 355=40 L.W. 476=36 Cr.L.J. 113=132 Ind. Cas. 554.

**12—F. Y. D.—19.**

**—S. 304.**

A conviction cannot be made under Ss. 325 and 304, Part II in the alternative. If the evidence shows that an offence under S. 304, Part II has been committed, it is unnecessary to mention S. 325; if the evidence does not show an offence under S. 304, Part II, this section should not be mentioned. A.I.R. 1933 Lah. 865=34 Cr.L.J. 1210=146 Ind. Cas. 221 (1).

**—S. 304.**

Where all the accused had been convicted under Ss. 304-149 and Ss. 325-149 not for any injury caused by them individually but on account of the injuries caused by some members of the unlawful assembly of which they also were members:

**Held,** that a conviction under Ss. 325-149 was not illegal in the face of the conviction under Ss. 304-149 as the major offence included the minor. 91 Ind. Cas. 804=7 L.L.J. 368=26 P.L.R. 648=27 Cr.L.J. 132=A.I.R. 1925 Lah. 539.

**—S. 304.**

It is the ultimate consequences of the act committed by the accused which will have to be taken into consideration in convicting him. 99 Ind. Cas. 38=44 C.L.J. 208=28 Cr.L.J. 6=A.I.R. 1927 Cal. 73.

**—S. 304—A.**

**Synopsis.**

1. Applicability and scope.
2. Rash or negligent Act
3. Sentence

**i. Applicability and scope.**

**—S. 304-A.**

**See also: Tort—Negligence.**

**—Rash driving of railway engine—Offence.**

A person who drives a railway engine rashly, relying upon his brakes, does an act which might bring him within the provisions of S. 304-A. A. I. R. 1945 All. 16=I.L.R. (1944) All. 674=1944 A.L.J. 441=1944 A.W.R. 246=46 Cr.L.J. 260=217 Ind. Cas. 237.

**—S. 304-A—Applicability.**

Where the accused had kept a bottle of 'Atlas tree-killer' in his farm-shed and two of his farm-servants drank the stuff thinking it to be arrack and died in consequence:

**Held,** that his prosecution under S. 304-A, was not warranted. A.I.R. 1941 Mad. 766=1941 M.W.N. 684=43 Cr.L.J. 126=197 Ind. Cas. 16.

**—S. 304-A—Applicability.**

The mere fact that just before the accident the accused asked his driver to blow the horn and overtake the car which was going ahead does not warrant a charge under S. 304-A read with S. 114. A. I. R. 1939 Mad. 571=49 L. W. 554=1939 M. W. N. 416=40 Cr.L.J. 850=183 Ind. Cas. 740 (1)



—S. 304-A.—Injuries inflicted intentionally.

S. 304-A deals with the causing of death by a rash or negligent act and not with a case where injuries are inflicted neither rashly nor negligently, but intentionally and designedly. 14 Bom. L. R. 887=13 C. L. J. 798=17 Ind. Cas. 542.

—S. 304-A—Applicability.

S. 304-A of the Code applies to acts not criminal in themselves but punishable by reason of death being caused. 26 P.W.R. 1911 Cr.=12 Cr. L. J. 485=12 Ind. Cas. 93.

—S. 304-A—Applicability — Causing death by negligence—Intention to hurt—Grievous hurt—Death:—

S. 304-A is not applicable to a case where the accused intended to and did cause hurt which led to death. It is applicable only where a rash or negligent act, from which no injury would ordinarily result, leads to death by reason of some supervening cause. (1901) 3 Bom.L.R. 394.

2. Rash or negligent Act.

- (a) Accidental death.
- (b) Contributory negligence.
- (c) Error of judgment.
- (d) Motor car collisions & accidents.
- (e) Rashness and negligence.
- (f) Miscellaneous.

2 (a). Rash or negligent Act—Accidental Death.

—S. 304-A.

Death of one of the combatants in a friendly wrestling bout as the result of an accidental injury. The other, if guilty under S. 304-A. See Penal Code (XLV of 1860), Ss. 80, 87 and 304-A. 1949 A.W.R. 476=A.I.R. 1950 A. 95.

—S. 304-A.

Accused, while using spears against his assailants, accidentally striking deceased who had intervened to separate fighting persons—Accused guilty under S. 326 and not under S. 304-A. A.I.R. 1941 All. 288=42 Cr.L.J. 621=1941-1 A.L.J. 326=I.L.R. (1941) All. 441=194 Ind. Cas. 794.

—S. 304-A—Accident—Hunting party—Shooting one of the party instead of the game accidentally was held to be due to accident.

B with some companions went into a jungle to shoot pig. He took up his position and waited, while his companions proceeded to heat a pig towards him. In due course a boar was driven in his direction and B fired at him. B, however missed the boar and hit A causing him injuries which resulted in his death.

Held: that the act of B in firing was neither negligent nor rash within the meaning of S. 304-A, I.P.C. 9 I.L.J. 422=29 P.L.R. 45=A.I.R. 1927 Lah. 880.

2 (b). Rash or negligent act—Contributory negligence.

—S. 304-A—Considerations for conviction under—Contributory negligence on the part of the deceased—If relevant.

The main thing for consideration in a criminal case, under S. 304-A of the Penal Code, is whether the accused in the case has caused the death of any person by doing any rash and negligent act not amounting to culpable homicide. Once that is proved, the little contributory negligence on the part of the victim is irrelevant except for the purpose of sentence. Contributory negligence, in the strict sense of the term, has no place in Criminal Law. 1950 M.W.N. 39=A.I.R. 1950 Mad. 308 (1)=51 Cr.L.J. 733=(1949) 2 M.L.J. 819.

—S. 304-A—Contributory negligence—Plea of.

Motor truck with defective brakes run at high speed—Another truck standing in middle of road—Workman trying to get in latter truck knocked down by former—Driver, held negligent—Plea of contributory negligence on victim's part held did not avail driver. A.I.R. 1944 Nag. 285=1944 N.L.J. 451=I.L.R. (1944) Nag. 732.

—S. 304-A—Contributory negligence.

Obiter —Contributory negligence on the part of the person killed is no defence of itself to a charge under S. 304-A. I.P.C. A.I.R. 1938 Sind 100=39 Cr.L.J. 566=32 S.L.R. 663=175 Ind. Cas. 116.

—S. 304-A—Contributory negligence.

Where the facts show that it was possible for the driver of a car to have averted the collision in spite of the (real or assumed) negligence of the pedestrian by leaving a sufficient margin for the man to pass; nevertheless as the collision occurred the inference is irresistible that it was directly due to the reckless and negligent conduct of the driver of the vehicle. In these circumstances, a driver of a motor vehicle is culpable even if there is proof of negligence on the part of the pedestrian.

A driver of a motor vehicle who is himself negligent cannot plead in his defence the negligence of a pedestrian whom he knocked unconscious and killed. A.I.R. 1935 Nag. 200=36 Cr.L.J. 1368=31 N.L.R. 26 Sup.=158 Ind. Cas. 330.

—S. 304-A—Determination of liability.

The accused's liability is determined by what is the proximate cause. If the proximate cause is negligence of the accused, the presence of another and contributory cause is not a defence. 92 Ind. Cas. 433=18 S.L.R. 199=27 Cr.L.J. 257=A.I.R. 1925 Sind 233.

—S. 304-A—Death by negligence—Contributory negligence:—Remote cause.

See Tort: 8 C.W.N. 645=32 Cal. 73.

2 (c). Rash or negligent act—Error of judgment.

—S. 304-A.

Lorry loaded with wooden sleepers being driven through gateway not very fast—One projecting



sleeper striking some pillar—Pillar falling and killing person standing behind it—Lorry driven by same driver safely through same gateway previously:

Held, it could not be said that death was not caused directly by act of driver. But under the circumstances of the case, the driver was guilty of error of judgment and could not be convicted under S. 304-A. A.I.R. 1938 Sind 100=32 S.L.R. 663=39 Cr.L.J. 566=175 Ind. Cas. 116.

—S. 304-A—Error of judgment.

The accused who is arraigned with negligence cannot claim the benefit of an error of judgment when he exercised none. 92 Ind. Cas. 433=18 S.L.R. 199=27 Cr.L.J. 257=A.I.R. 1925 Sind 233.

2 (d). Rash or negligent act—Motor-car collisions & accidents.

—S. 304-A—Rash and negligent driving of lorry resulting in death of a young girl—Benefit of doubt.

In the case of motor accidents it becomes very difficult for the Court to ascertain the circumstances of the incident. Where it is found that the speed of the vehicle was moderate and that it stopped within a few paces of the place of accident, it is quite possible that the deceased ran from one side to the other and the vehicle ran over the deceased and in such circumstances the accused is entitled to the benefit of doubt. A.I.R. 1950 Ajmer 45=51 Cr.L.J. 1289.

—S. 304-A—Duty of motor car driver pointed out.

When there is heavy vehicular traffic on the road and the road is invisible in a cloud of dust, it is the duty of all motorists under these conditions to stop the car. To continue driving must obviously be dangerous when it is impossible to see anything at all in the neighbourhood, particularly when the driver continues driving the car and manages to get on the wrong side of the road blocking the right of way of a car in the act of proceeding in the opposite direction and the act of driving amounts to undoubtedly a rash and negligent act. A.I.R. 1941 Lah. 113=I.L.R. (1940) Lah. 646=42 Cr.L.J. 465=193 Ind. Cas. 766.

—Ss. 304-A, 304, 302.

Accused driving lorry carrying five passengers more than he was permitted—Accused driving on in spite of signal from Police to stop—Police chasing accused's lorry for about five miles—Accused driving at speed between 50 and 55 miles—Small child attempting to cross road knocked down and killed—Accused not stopping but still driving on—Offence fell under S. 304-A. A.I.R. (1941) Lah. 459=43 Cr.L.J. 229=I.L.R. (1943) Lah. 50=197 Ind. Cas. 650.

—S. 304-A.—Boy striking against back wheel of lorry—Lorry stopped within short distance—Boy found crushed.

A boy of 6 years stuck against the back wheel of a lorry which was loaded with fruit and which was being driven by the petitioner. The boy was caught in the wheel and was dragged along. The petitioner stopped the lorry at a distance of 21 feet. The boy was found crushed and died on the spot;

Held, that no rash or negligent act could be ascribed to the petitioner. It was not the case of the lorry striking against the boy, but was the case of the boy striking against the lorry. A.I.R. 1939 Pesh. 33=40 Cr.L.J. 834=184 Ind. Cas. 157.

—S. 304-A—Rash and negligent driving—Motor cases.

Driving motor cars has become an essential part of human activities, and it is impossible to avoid a certain number of accidents. It is no part of the duty of Courts to punish with savage sentences every motorist who has the misfortune to have an accident, which results in a loss of life, even though the accident be due to an error of judgment on the part of the driver. The circumstances of each case must be considered in imposing sentence. A.I.R. 1937 Bom. 96=38 Bom.L.R. 1111=38 Cr.L.J. 660=168 Ind. Cas. 870.

—Ss. 304-A, 279, 338—Rash or negligent act—Meaning of.

The rash or negligent act referred to in S. 304-A means the act which is the immediate cause of death and not any act or omission which can at best be said to be a remote cause of death. The words "not amounting to culpable homicide" clearly show that what was intended was an act which had directly caused the death of any person. Sections 279 and 338 are correlative with S. 304-A, which section, while as general as S. 338, is restricted to cases where death has been caused:

Held, that where the absence of the horn or the inefficiency of the brakes was not in any way responsible for the death of the pedestrian, the fact that the accused's lorry had no horn or had inefficient brakes could not, in the circumstances of the case, be taken into consideration under S. 304-A, I. P. C., though they can be made the subject of a prosecution under the Motor Vehicles Act. A.I.R. 1936 Oudh 400=12 Luck. 336=1936 O.W.N. 720=37 Cr.L.J. 975=164 Ind. Cas. 333.

—S. 304-A—Rash and negligent driving—Criterion.

Mere velocity of the vehicle is not the only criterion of rash and negligent driving. It may consist in taking, while driving, risks which, by the exercise of a little diligence, could have been avoided.

Driving a car recklessly until it came so close to the pedestrian that it became impossible to save the collision, cannot but be characterised as rash and negligent driving. It is true that ordinarily the pedestrians who use the road are not exempt from the duty to take care of themselves, but negligence, if any, on the part of a pedestrian cannot excuse negligence on the part of a driver of such a fast and dangerous vehicle as a motor bus. As between a pedestrian and a driver of a motor vehicle, the responsibility of the latter is greater. He has a duty to keep better outlook than a pedestrian. The duty to use care increases in proportion to the danger involved in dealing with the instruments which, for a man's own purpose he brings into relations of proximity to his neighbours. There is the strongest presumption (of negligence) both in fact and in law against a driver who runs down a person in daylight. A.I.R. 1935 Nag. 200=36 Cr.L.J. 1368=31 N.L.R. 26 Sup.=158 Ind. Cas. 330.



**—S. 304-A—Duty of drivers of motor cars.**

A person driving a motor car is under a duty to control the car; he is *prima facie* guilty of negligence if the car leaves the road. It is for the person driving the car to explain the circumstances under which the car came to leave the road. A.I.R. 1934 Mad. 209 (210)=1934 M.W.N. 102=39 L.W. 344=66 M.L.J. 318=35 Cr.L.J. 691=148 Ind. Cas. 573.

**—S. 304-A.**

To impose criminal liability under S. 304-A, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have the *causa sine qua non*.

Where, as the result of a collision of certain motor vehicles, the occupant in one of them was thrown away and killed;

**Held**, that in order to impose a criminal liability on the driver, it must be found as a fact that the collision was entirely or at least mainly due to the act of the driver and in the absence of such a finding his conviction could not be upheld. A.I.R. 1933 All. 232 (233)=1933 A.L.J. 205=34 Cr.L.J. 1013=55 All. 263=145 Ind. Cas. 612.

**—Ss. 304-A, 338, 279.**

Rash and negligent driving of motor car resulting in collision with a lorry and causing injuries to two persons one of whom died later—No definite evidence of rash and negligent driving—Accused cannot be convicted under Ss. 279, 334 and 304-A. A.I.R. 1933 Oudh 391=10 O.W.N. 823=34 Cr.L.J. 1154=146 Ind. Cas. 28.

**—S. 304-A—Negligence, what is—Accused driving too fast—Killing passenger in attempt to evade bullock carts.**

The accused was driving a motor lorry very fast. Two bullock-carts came towards the lorry and on hearing the horn, instead of both going to the left, one cart went to the left and one to the right. The accused made a swerve hoping to get through on the right side. His lorry struck against a tree and a passenger was killed. The accused was convicted under S. 304-A for rash and negligent driving;

**Held**, that while there was negligence on the part of one of the bullock-cart drivers, the accused, if he had had his lorry under proper control, should have been able to avoid the consequences of that negligence. His negligence, therefore, was the negligence that substantially caused the accident and he was, therefore, rightly convicted. A.I.R. 1931 All. 708=1931 A.L.J. 770=32 Cr.L.J. 1061=133 Ind. Cas. 601.

**—S. 304-A.**

In case of death by motor collision, a charge for murder or culpable homicide not amounting to murder is not sustainable. The death is caused by a rash and negligent act under S. 304-A, (31) 1931 M.W.N. 556.

**—S. 304-A—Motor accident.**

Motor Driver must be cautious while passing stationary tram car and should slacken their speed—Driving car on wrong side—Horn not blown—Driver accelerating speed before actually clearing up a

stationary tram car and in so doing fracturing the head of a boy alighting from the rear of the tram car—Mere driving on wrong side was held itself not a rash act within S. 304-A but the accused was held guilty. 111 Ind. Cas. 657=30 Bom. L. R. 655=29 Cr.L.J. 897=11 A.I.Cr.R. 87=A.L.R. 1928 Bom. 208.

**—S. 304-A—Driving motor at night along a road under repair—Persons sleeping on the road killed—Motor running at slow speed—Offence under S. 304-A is not committed.**

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted: 3 All. 776 and 7 M.H.C. 119 Foll.

There is nothing rash or negligent *per se* in driving along a road under repair or partly under repair any more than on a road not under repair except perhaps to the person driving. Any one driving on a road under repair would be called on to exercise the same caution as he would on a road in its normal condition, that is to say, to look out to see what persons or vehicles were on the road making the ordinary use of the road; but it cannot possibly be held that a driver should anticipate that he will find persons sleeping on a road even at night, though a road is under repair, and that he must look out for persons making such an abnormal use of the road, and if he does not do so he is guilty of negligence or rashness.

There is nothing to prevent a man talking and at the same time taking the ordinary precautions against accident and, therefore, engaging in conversation whilst driving is not necessarily a rash or negligent act. 91 Ind. Cas. 889=53 Cal. 333=30 C.W.N. 66=27 Cr.L.J. 153=A.I.R. 1926 Cal. 300.

**2 (e). Rash or negligent act—Rashness and negligence.****—S. 304-A—When applies—Rash and negligent act—Meaning.**

S. 304-A of the Penal Code obviously does not apply to a case where there is an intention to cause death or knowledge that the act done will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash or negligent act. A negligent act is an act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or an act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. 1950 A.L.J. 96=A.I.R. 1950 A. 300=51 Cr.L.J. 865=1950 A.W.R. 23.



**—S. 304-A—Misdemeanour—Rash and negligent act—Degree of negligence to be charged—Manslaughter—Difference.**

The negligence charged in the case of a rash and negligent act, is not necessarily as grave, either in its nature or in its consequences as in the offence of manslaughter. The degree of negligence differs in cases of felony of manslaughter and in cases of misdemeanour (rash and negligent act). Though the negligence in the case of the latter must be of a higher degree than the negligence which gives rise to a claim for compensation in a Civil Court, it is not of so high a degree as that which is necessary to constitute the offence of manslaughter. 61 L.W. 260=1948 M.W.N. 300=49 Cr.L.J. 665=A.I.R. 1948 P.C. 183.

**—S. 304-A.**

**Applicability—Degree of negligence necessary to justify conviction.** 46 Cr.L.J. 759=220 Ind. Cas. 452=A.I.R. 1944 Sind 124.

**—S. 304-A—Burden of proof—Res ipsa loquitur**

Where the facts established were that the motor vehicle had knocked down the deceased who was driving his bullock cart, and the motor vehicle was being driven by a novice who was learning to drive and who had only 12 hours' driving experience, and that the instructor was sitting nearby the driver could not be charged with negligence. The responsibility would naturally fall on the shoulders of the instructor whose duty it was to be vigilant so as to guard against any untoward movement on the part of the learner. It is incumbent on the instructor to explain the circumstances in which the car swerved from the road and what he did to rectify the mistake committed by the novice driver.

The principle of *res ipsa loquitur* does not conflict with the principle of criminal jurisprudence that the burden of proving an offence lies on the prosecution. *Res ipsa loquitur* means that the circumstances are themselves eloquent of the negligence of somebody who brought about the state of things complained of. The *res* speaks because the facts remain unexplained and therefore, natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody. The prosecution has, in the first instance, the obligation of proving relevant facts from which the inference of negligence can be drawn. A.I.R. 1945 Nag. 242=1945 N.L.J. 300=1 L.R. (1945) Nag. 566.

**—S. 304-A—Negligence, meaning of.**

Negligence under S. 304-A does not mean absolute carelessness or indifference but want of such a degree of care as is required in particular circumstances. A.I.R. 1944 Nag. 285=1944 N.L.J. 451=1 L.R. (1944) Nag. 732.

**—S. 304-A—Negligence, standard of.**

Before a conviction can be properly made under S. 304-A, the carelessness shown must be such as to amount to such recklessness as would involve some element of criminality. The criminality lies

in running the risk of doing an act with recklessness or indifference as to the consequences. Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. Before a person can be convicted of a criminal offence, it must be proved that *mens rea* exists, that in fact the accused had a guilty mind. In order to establish criminal liability the facts must be such that, in the opinion of the Court, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against State and conduct deserving punishment. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. But it is probably not all embracing, for "reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction.

A captain had certain military duties to perform and to that end, early in the morning, at about 2 A.M., he was driving in a car on his way to Oil Installations where he was to check the night guard patrol. He was driving at a speed of between 25 to 30 miles an hour. The lights were necessarily dim, because the A.R.P. regulations required that only one dim light should be shown by the car while the street lights were unlit. In the course of the journey, some pedestrians appeared on the road and one of them was knocked down and killed, but the Captain, not realizing that an accident had occurred, went on driving his car. It was only when he was informed of the accident at the Oil Installations that he came to know of the same and expressed his regret and surprise. The road on which accident occurred was uneven and bumps being common while driving a car, the Captain could not realise that an accident had occurred:

Held, that in the circumstances of the case, the Captain could not be said to have driven his car rashly or negligently and thereby caused the death of the pedestrian. A.I.R. 1944 Sind 124=46 Cr.L.J. 759=220 Ind. Cas. 452 (D.B.).

**—S. 304-A — 'Medical practitioner—Criminal negligence, what is.**

A great care which should be taken before imputing criminal negligence to a professional man acting in the course of his profession.

A doctor is not criminally responsible for a patient's death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State. What amount of negligence is to be regarded as gross is a question of degree for the jury, depending on the circumstances of each particular case. The degree of negligence required is that it should be gross, and that neither a jury nor a Court



can transform negligence of a lesser degree into gross negligence merely by giving it that appellation.

Where, in a charge against a medical practitioner for manslaughter due to negligent administration of medical dose of sobita by injection, the defence maintained that the deceased was peculiarly susceptible to the effect of the particular medicine and, therefore, unexpectedly succumbed to a dose which would have been harmless in the case of a normal child, and that in any case, the negligence (if any) did not amount to criminal negligence:

**Held**, that in order to show that the injection given was too strong and to negative the suggestion that the boy's death was due to an exceptional re-action to the medicine in his case, evidence of the symptoms, illness and death of nine other children to whom the accused had given the same treatment, was admissible. The evidence of the illness and death of other persons was admissible, not to prove the bad character of the accused, nor to prove a course of conduct of system but to establish one of the essential points which the prosecution had to establish to show that such a large proportion of the other children who were similarly injected by the accused at the same time and place had re-actions similar to those of deceased at to prove that his re-action could not be due to his own idiosyncrasy, and therefore, must be due to an overdose.

**Held further** that it could not be said that criminal negligence had been proved merely because a number of persons had been made gravely ill after receiving an injection from the accused coupled with a finding that a high degree of care had not been exercised. Merely because too strong a mixture was once dispensed and a number of persons were made gravely ill, it could not be said that a criminal degree of negligence was proved. A.I.R. 1943 P.C. 72=44 Cr.L.J. 569=1943 A.L.J. 427=57 L.W. 269=1943 A.W.R. 48=207 Ind. Cas. 107 (P.C.).

—S. 304-A—Culpable negligence explained—Negligent act must be proximate and efficient cause of death.

Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished. Death should have been the direct result of a rash and negligent act of the accused and that act must have been the proximate and efficient cause without the intervention of another's negligence. It must have been the *causa causans*; it is not enough that it may have been the *causa sine qua non*.

While a village theatrical company was playing the piece called 'Sultana Dacoit' on a *chabutra* as part of the celebrations in connection with a wedding, the accused who was the *mukhia* of the village came on the scene carrying with him his twelve bore gun with one hammer at full cock and wearing a belt with cartridges, as he was in fear of being attacked by certain dacoits who had recently been released from jail, and took his stand on a corner of the *chabutra* or one side of the *chabutra* to watch the performance. While he was doing so, one of the actors B, who was playing the part of a drunken dacoit thought it would be an amusing addition to the play to make an apparent assault on the *mukhia*. He approached the *mukhia* who was standing holding his gun and grappled with him (*lipat gaya*) and there was something in the nature of a

struggle or wrestling and in the course of this struggle, the gun went off and B received shots in his head from which he died:

**Held**, that as the accused was in fear of being attacked by dacoits, he was fully justified in carrying his gun with him and in having it loaded. There was nothing either rash or negligent in carrying a loaded gun at night and standing quietly in a corner and watching a dramatic performance. The accused was in the position of a person who was not endangering anybody's life at all as long as he stood where he was, whether the gun was loaded only or whether it was both loaded and cocked. No doubt the accused was the cause "*sine qua non*", but it was the intervention of the deceased B which brought about the situation of danger and that was not an intervention which the accused could, by any means, be able to foresee. In these circumstances, the accused could not be convicted of an offence under S. 304-A, Penal Code. A.I.R. 1942 All. 328=1942 A.L.J. 321=43 Cr.L.J. 921=I.L.R. (1942) All. 884=1942 A.W.R. 253=203 Ind. Cas. 128.

—S. 304-A—Negligence required.

Mere carelessness is not sufficient for conviction under S. 304-A. Section 304-A, like other sections of the Penal Code requires a *mens rea* or guilty mind. The rashness or negligence must be such as fairly to be described criminal. The phrase "criminal negligence" as used in ordinary conversation conveys something of the meaning. A.I.R. 1938 Sind 100=39 Cr.L.J. 566=32 S.L.R. 663=175 Ind. Cas. 116.

—S. 304-A.—Rash act—Meaning of.

The term 'rash act' within the meaning of S. 304-A connotes the want of proper care and caution. It means an overhasty act. A.I.R. 1933 Rang. 326 (328)=35 Cr.L.J. 248=147 Ind. Cas. 60.

—S. 304-A—Negligently unloading pistol—Person killing another in act of unloading pistol he knows to be loaded is guilty of negligence.

P knowing that a pistol was loaded, tried to unload it and while doing so acted so negligently that the pistol went off killing C's son.

**Held**; that the act had been negligent on P's part and came within the purview of S. 304-A, and that the sentence of six months' simple imprisonment and Rs. 250 fine or three months' more imprisonment in default was sufficient. 1930 Cr.C. 531=A.I.R. 1930 Lah. 462.

—S. 304-A—Administering potion—Administering love potion or drug expecting benefit is no offence but where the wife administers at the instance of her paramour who was the enemy of her husband she is guilty under S. 304-A.

Where the intention to cause death cannot be clearly found without any other possible explanation of the act of the person giving poison a conviction for murder cannot stand. Unless it is shown clearly and without possible doubt that the intention was to cause death where a substance is administered as a love potion, the accused cannot be convicted of murder. The mere administering of a love potion or drug which a person thinks might be beneficial is not in itself an offence but



when it is supposed to have effect upon persons with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any enquiry as to what it really is, her act falls within S. 304-A. 77 Ind. Cas. 801=1924 P.H.C.C. 13=25 Cr.L.J. 449=A.I.R. 1924 Pat. 635.

—S. 304-A—Negligence—Dispensing medicine.

Appellant in charge of a dispensary took out a bottle from a cup-board bearing a label with the word 'Poison' printed on it, thought it contained quinine and administered it as such. Several persons died. **Held**, that he was guilty of gross criminal negligence and his conviction under S. 304-A. was proper. 42 All. 272=18 A.L.J. 160=21 Cr.L.J. 367=55 Ind. Cas. 735.

—S. 304-A—Negligence—Railway servant.

A station master knowing a train to be standing at a particular point gives the 'line clear' in that direction is guilty for rash and negligent act under S. 304-A. 15 A.L.J. 590=18 Cr.L.J. 815=41 Ind. Cas. 335.

—S. 304-A—Death by rashness—Administering poison as a love potion.

The accused administered to her husband a deadly poison believing it to be a love potion to stimulate his affection for her. The husband died from the effects of the poison. **Held**, that the accused was guilty of an offence punishable under S. 304-A inasmuch as she acted both rashly and negligently in giving as a love potion, a deadly form of poison. 17 Bom. L.R. 217=16 Cr.L.J. 305=28 Ind. Cas. 641.

—S. 304-A—Wilful offence—Rash act—Distinction.

A wilful offence does not take the character of rashness because the consequences have been unfortunate. But acts which in themselves are not offences but which possibly or probably involved danger to others may be offences under S. 304-A, if done without due care to guard against dangerous consequences. 7 M.H.C.R. 119, 4 C. 764, Foll. 39 Cal. 855=15 C.L.J. 512=13 Cr.L.J. 195=16 C.W.N. 1055=14 Ind. Cas. 195.

—S. 304-A—Administering poison believing it to be a charm—Rash and negligent act—Liability for.

Where the accused received a powder from an enemy of her relative, took no precaution to ascertain whether it was noxious and mixed it with his food believing that by doing so, he would become rich: **Held**, her conduct was wanting in that prudence and circumspection which every human being is supposed to exercise and as by her rash and thoughtless act she caused death she was guilty of an offence under S. 304-A. 4 Bom. L.R. 425 dis. 1885 P.R.Cr.P. 6. (1909) 6 A.L.J. 203=31 A. 290=9 Cr.L.J. 522=2 Ind. Cas. 214.

—Ss. 304-A. 336, 337, 338, 114—Interpretation of—Scope of Ss. 304-A and 336—Rash and negligent act—Definition of abetment.

Where by the bullet fired by the one or the other of two accused persons who were practising at target shooting at a place near which was a public road,

which the accused would have noticed if they had used the least circumspection, a man was wounded resulting in his death. **Held** that both the accused were guilty of an offence under S. 304-A, and that in such a case the one whose bullet struck the deceased and caused death cannot be held to be the only principal offender under S. 304-A, and the other whose shot did not strike the deceased, his abettor under S. 114. The definition of culpable rashness and negligence given by **Holloway, J.** in 7 M. H. C. 119, 120 foll. The words "rash or negligent act" as used in S. 304-A. have the same meaning as the words "does any act so rashly and negligently" which are to be found in Ss. 336, 337, 338. S. 304, does not create a new offence; its provisions are similar to those of S. 337 when an act is done so rashly or negligently as to endanger human life or the safety of others, it is an offence under S. 336, quite irrespective of the consequences that might follow and when such an act results in the death of the person, the offence becomes one under S. 304-A. 1 Ind. Cas. 814=9 Cr.L.J. 393=13 C.W.N. 362=9 C.L.J. 204=36 C. 302.

—S. 304-A—Proximate cause—Death—Rash or negligent act.

To impose criminal liability under S. 304-A, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*. (1902) 4 Bom. L.R. 679.

2 (f). Rash or negligent act—Miscellaneous.

—Ss. 304-A and 79—Firing of gun in jungle on a dark night—Object fired at taken for animal—Human being hit and killed—Act, if rash and negligent—Protection under S. 79—Availability.

When on a dark night in a forest where no human being could be expected to be present a man fires a shot at what he considers to be an animal, he cannot be said to be guilty of a rash and negligent act because it so happened that his shot hit a human being and he died of it. Moreover as there was a mistake in that the man mistook something else for an animal, S. 79, I. P. Code, would come to his rescue. I.L.R. (1947) All. 240=48 Cr. L.J. 829=1946 A.L.J. 502=1947 A.L.W. 119=1946 A.W.R. (H.C.) 631=A. I. R. 1947 A. 99.

—S. 304-A—Approximate and ultimate cause of death, distinction between.

It is very dangerous to attempt to distinguish in cases under S. 304-A, between the approximate and ultimate cause of death due to a rash and negligent act. A.I.R. 1937 Bom. 96=38 Bom. L.R. 1111=38 Cr.L.J. 660=168 Ind. Cas. 870.

—S. 304-A.

Devil dancers attempting to cure a woman by branding her—Death due to injuries—Devil-dancers, held, were guilty of offence under S. 326 and not under S. 304-A, I. P. C. A.I.R. 1935 All. 282=36 Cr. L.J. 344=1935 A.W.R. 57=153 Ind. Cas. 425.



## —Ss. 304-A and 302.

Evidence establishing that the accused and the boy (deceased) were last seen together, sometime before the death of the boy—Ear-rings worn by the deceased found in the possession of the accused—Absence of adequate or intelligible motive for the murder—Medical evidence as regards the cause of death inconclusive—Confession by the accused before the Magistrate that 'unmindful of the consequences, he gave the boy a kick by raising his leg, that the boy at once fell down . . . and died'—Confession afterwards retracted.

**Held**, if the accused gives an explanation which might reasonably be true—Though one may not be convinced as to its truth—The prosecution cannot be held to have proved all that is necessary to bring home the guilt of murder to the accused. The accused therefore, cannot be convicted under S. 302.

**Held further**, that on evidence and probabilities of the case, the accused should be convicted under S. 304-A. 1934 M.W.N. 856.

## —S. 304-A—Overloading motor lorry.

Though overloading a lorry may be an offence under the Motor Vehicles Act, it is not a rash and negligent act within the meaning of S. 304-A. A.I.R. 1932 Lah. 366=33 Cr.L.J. 436=33 P.L.R. 492=137 Ind. Cas. 262.

## —S. 304-A—Act amounting to negligence.

Where a girl of 17 years of age being tired of her husband's ill-treatment attempted to commit suicide by jumping into a well and she had no consciousness that her child was on her neck and she jumped with the child and the child died of the jump though the girl survived.

**Held**: that the girl was only guilty under S. 304-A. 87 Ind. Cas. 840=27 Bom. L.R. 604=26 Cr.L.J. 1016=A. I. R. 1925 Bom. 310.

## —S. 304-A—Knowledge when presumed.

Assault on an old man causing several fractures—Knowledge that death would be caused must be presumed. 77 Ind. Cas. 489=25 Cr.L.J. 409=A.I.R. 1923 Lah. 516.

## —S. 304-A—Excess of sexual intercourse.

A person who has sexual intercourse with his wife who had not attained puberty though above twelve years of age and causes her death is liable under S. 304-A as the husband's right to enjoyment is subordinate to her personal safety. 18 Cr.L.J. 1003=11 S.L.R. 76=42 Ind. Cas. 731.

## —S. 304-A—Boat overcrowded—Sinking due to strong wind—Liability of lessees.

The lessees of a ferry are not liable for the loss of life caused by rough weather unless it is shown that the boat though overcrowded was unseaworthy at the time of the occurrence. 1 O.L.J. 711=16 Cr. L.J. 72=26 Ind. Cas. 664.

## 3. Sentence.

## —S. 304-A—Sentence.

Motor driver driving car at rash speed—Passing over another car and in trying to come on right side, losing control—Collision with tree—Occupants dying—Sentence of 4 months' rigorous imprisonment under S. 304-A:

**Held**, that the rash and negligent act of the accused was in driving at a speed in which he was unable to control the car and that the death of persons was not a natural and probable consequence of his act and that therefore, the punishment was not so grossly inadequate that the High Court ought to interfere in revision. A.I.R. 1937 Bom. 80=38 Bom. L.R. 1111 and 1113=38 Cr. L.J. 658=168 Ind. Cas. 865.

## —S. 304-A — Sentence — Determination of.

The mere fact that a human life is lost due to negligent driving of motor car does not justify the Court in passing a deterrent sentence, if the lost life could not have been reasonably anticipated by the accused. In considering the question of enhancement of sentence, one has to consider whether the rash and negligent act of the accused which has occasioned the death, shows callousness on his part as regards the risk to which he was exposing other persons. The severity of the sentence must depend, to a great extent, on the degree of callousness which is present in the conduct of the accused. A.I.R. 1937 Bom. 96=48 Bom. L.R. 1111=38 Cr. L.J. 660=168 Ind. Cas. 870.

## —S. 304-A—Sentence.

In a serious case of rash driving of a motor bus resulting in an offence under S. 304-A, a lenient sentence should not be passed. 1937 M.W.N. 1328.

## —S. 304-A—Sentence—Mitigating circumstances.

Although cases of accident due to rash and negligent driving of motor cars should be adequately punished, where the accused is a young man, pleads guilty to the charge and is repentant and the car was not being driven at a speed of more than 25 miles an hour and the accident was unfortunate, severe sentence is not called for. A.I.R. 1934 Oudh 18=10 O.W.N. 1349=147 Ind. Cas. 698 (1).

## —S. 304-A—Sentence—Knowledge and intention absent.

Two women were quarrelling; the accused came up armed with a stick which he threw at one of the women who was holding an infant, one year old. The stick hit the infant on the head and it died from the injury. The infant was the nephew of the applicant and the blow was purely accidental. The stick used was a light stick. The father of the infant pleaded for mercy.

**Held**, that one year's rigorous imprisonment should be reduced and that a sentence of six months' rigorous imprisonment was enough. 4 L.L.J. 487=A.I.R. 1921 Lah. 297.



—S. 306—Suicide—English and Indian law.

The committing of suicide in itself is not and cannot be regarded as a crime in India. In this respect the English Common Law is inapplicable to India as the criminal law of India is the creation of statute. A.I.R. 1938 Lah. 561=40 P.L.R. 735=I.L.R. (1938) Lah. 542=178 Ind. Cas. 210.

—S. 306—Widow burning herself on husband's funeral pyre—Accused desiring the widow to become sati.

Where a widow burnt herself on the funeral pyre of her husband on his death, and it was indicated by the evidence that the accused desired that the woman should become a *sati* and arranged for cremation of the dead body in the village itself and not at the usual cremation ground which was far away, and that several villagers had assembled to see the *sati* and the first accused was the head of the deceased's family and the others his relations :

**Held**, that the offence of abetment of suicide under S. 306, I.P.C. was committed by the accused. A.I.R. 1933 All. 160=1933 A. L. J. 7=34 Cr. L. J. 1069=145 Ind. Cas. 880.

—S. 306—'Sati'—Inducing woman to get herself burnt along with body of deceased husband—Accused are guilty.

Accused were charged under Ss. 149 and 306 with being members of an unlawful assembly whose common object was to abet the suicide of a woman and with abetting the woman's suicide. It was found that they induced her to get herself burnt along with the body of her deceased husband. With that object, they made her sit on the pyre with the husband on her lap and instantly a fire broke out from her hand. She tried to escape and leapt in the adjoining river wherefrom she was rescued by the police but she died ultimately three days later. The accused foiled the attempts of the police to save her at an earlier stage.

**Held**, that the accused were guilty and the method of destruction resolved on for the suicide was fire and the method of ignition of the fire whether miraculous, whether self-applied or whether applied by others was totally immaterial. 36 All. 26, Foll. 112 Ind. Cas. 363=8 Pat. 74=9 P.L.T. 683=29 Cr. L. J. 1035=11 A. I. Cr. R. 371=A.I.R. 1928 Pat. 497.

—S. 306—Suicide—Sati—Abetment.

Where some people gave ghee to the widow which she poured over the fire and burnt herself, the accused were guilty of abetting suicide. 36 All. 26=11 A.L.J. 997=14 Cr. L.J. 634=21 Ind. Cas. 682.

—S. 307. Synopsis.

1. Applicability and Scope.
2. Attempt to murder—What amounts to.
3. Burden of proof.
4. Essentials.
5. Evidence.
6. Interpretation.
7. Procedure.
8. Sentence.
9. Miscellaneous.

1. Applicability and Scope.

—Ss. 307, 324—Applicability and Scope—P, when pursued as a thief by B, firing at B and hitting him not in vital part of body—Offence, held fell within S. 307.

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P who was not an expert shot, pursued as a thief by B, fired at one particular part of his pursuer's body and hit that part and that part only, it was contended that the case did not come under S. 307 at all because P did not fire to kill at all but fired only to injure and stop pursuit.

**Held**, that when P fired his revolver under these circumstances, his act, if death had followed, would clearly have fallen under Part IV of S. 300, I.P.C. It was an act so imminently dangerous that it would, in all its probability, cause death or such bodily injury as would be likely to cause death. Fortunately, however, for him, B was not hit in a vital part of his body and did not die : nevertheless, it could not be said that this was a simple case only of an offence under S. 324, I.P.C., and that S. 307, I.P.C., did not apply. A.I.R. 1944 Sind 83=45 Cr. L. J. 598=212 Ind. Cas. 352 (F.B.).

—Ss. 307, 308—Applicability—Knowledge and intention—Effect.

Per Digby, J.—So far as a conviction is to be based on knowledge as opposed to intention, the act (not necessarily the injury caused) must be likely to cause death and S. 307 or S. 308 will reply according to the degree of likelihood and the knowledge of the assailant established. A.I.R. 1943 Nag. 145=I.L.R. (1943) Nag. 411=1943 N.L.J. 90=44 Cr. L.J. 512=206 Ind. Cas. 382.

—S. 307—Applicability and scope.

Per Niyogi, J.—An act may be regarded from two points of view; one in relation to the intention which preceded the act and another, the actual consequence which follows from it. For the purpose of S. 307 what is material is the intention or knowledge, not the consequence of the actual act done for the purpose of carrying out the intention. That section clearly contemplates an act which is done with the intention of causing death but which fails to bring about the intended consequence on account of the intervention of a cause operating independently of the volition of the agent. A.I.R. 1943 Nag. 145=44 Cr. L. J. 512=I.L.R. (1943) Nag. 411=1943 N.L.J. 90=206 Ind. Cas. 382.

—Ss. 307, 308—Applicability and scope—Type of case in illustration is not the only type of case under S. 308.

Per Digby J.—In Ss. 307 and 308, I.P.C., the words "under such circumstances" have been used to distinguish "attempted" murder from "attempted" culpable homicide not amounting to murder. The illustration to S. 308, though it supports the interpretation, does not warrant the conclusion that the type of case mentioned in the illustration is the only type of case falling under that section. An offence under S. 307 can be committed where there is no intention proved but only knowledge that the act is so imminently dangerous that it must, in all probability, cause death, and an offence under S. 308 can be committed where there is no intention proved but only knowledge by the offender that he is likely to cause death by his act. A.I.R. 1943 Nag. 145=I.L.R. (1943) Nag. 411=1943 N.L.J. 90=44 Cr. L. J. 512=206 Ind. Cas. 382.

—Ss. 307, 304—Applicability and scope—Accused caught by constable effecting escape by inflicting wound on chest with knife—Victim indoor patient for 11 days—Conviction, if should be under S. 307 or S. 304—Knowledge and intention.

M who was driving in his bullock cart was persistently molested by R. When M arrived at the cross-road, he appealed to a Police constable on point duty,



for help. The Police constable intervened and demanded the name of R who defiantly refused to disclose his name. The constable caught hold of his right hand and led him to the Kotwall. On the way, R suddenly whipped out a knife from his waist, and with a sharp sweep of his left hand, dealt a blow with it on the chest of the Police constable. As his hold was relaxed, R set himself free and effected his escape. The constable's medical examination disclosed a punctured wound 7-10" x 1.5" x 1/2" deep situated on the left side of the chest nearly 3" away and in the line of left nipple; the wound was transverse, its edges were clean cut and there was oozing. The medical officer's opinion was that the injury had been caused by a sharp pointed weapon like a knife and that if it had penetrated an inch deeper it would have brought about instantaneous death. The constable remained in the hospital as an indoor patient for 11 days. R was acquitted of the offence of an attempt to commit murder (S. 307, I.P.C.) but was found guilty of the offence of voluntarily causing hurt by a dangerous weapon (S. 324, I.P.C.) and of voluntarily causing hurt to deter public servant from his duty (S. 332, I.P.C.). In an appeal by the Provincial Government it was contended that the accused should be convicted under S. 307.

**Held**, the knife and the injury on the chest were no doubt material but not conclusive in themselves to prove the requisite intention or knowledge contemplated in S. 307. On the other hand, the assailant's immediate purpose was to release himself from the constable's hold and run away. His object in dealing the blow would, therefore, be nothing more than to disable the constable. The surrounding circumstances made no contribution to the proof of the intention or knowledge. It had, therefore, to be inferred only from the nature of the act itself. If the act caused an injury which, in point of law, amounted only to simple hurt, it would not be open to impute to him an intention or knowledge other than that of causing simple hurt. When the nature of the act itself is the only means of judging the intention, the agent must be presumed to intend only the natural consequences of the act which in the present case was simple hurt. The accused, therefore, could not be convicted under S. 307, I.P.C. A. I. R. 1943 Nag. 145=1943 N.L.J. 90=I.L.R. (1943) Nag. 411=44 Cr. L.J. 512=206 Ind. Cas. 382.

—Ss. 307, 324—Applicability and scope—Simple injury with knife—Offence, held fell under S. 324, and not under S. 307.

The only act which could fall within the purview of S. 307, I. P. C., is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events and the accused's criminal liability must be limited to the act which he, in fact, did and cannot be extended so as to embrace the consequences of another act which he might have done but did not do.

An accused stabbed the complainant with a knife and caused three injuries: (1) a stab wound 3/4" x 1/4" and 3/4" deep on the left back in the middle. (2) A contusion mark 2-3/4" x 1/4" on the right chest at its lower part. (3) A stab wound 1 1/2" x 1/2" and 1/4" deep on the back of the left thigh in its middle. All these injuries were simple in nature:

**Held** that the offence was under S. 324 and not under S. 307. A.I.R. 1942 Pesh. 21 (2)=43 Cr. L. J. 595=199 Ind. Cas. 799.

—Ss. 307, 326—Applicability and scope.

The complainant was attacked by the accused owing to a sudden quarrel rather than as a result of any pre-concerted plan. The complainant had 17 injuries on

his person but they were not on vital parts, and some of them were mere bruises:

**Held**, that the appropriate section applicable to the case was S. 326, I.P.C., and not S. 307. A.I.R. 1941 Lah. 322=43 P.L.R. 436=43 Cr. L. J. 165=197 Ind. Cas. 413.

—S. 307—Applicability and scope—Person inflicting hurt upon another with intention of putting his life in danger—Conviction.

If a person inflicts hurt upon another with the intention of putting his life in danger, that is the same thing as saying that the offender is trying to kill the man whom he attacks. Such person should be convicted under S. 307. A.I.R. 1941 Mad. 489=I. L. R. (1941) Mad. 592=1941 M.W.N. 91=(1941) 1 M. L. J. 236=42 Cr. L. J. 821=53 L. W. 175=196 Ind. Cas. 119.

—Ss. 307, 337—Applicability and scope—

If a man fires blindly in the dark with a shot gun in the direction from which he has heard sounds coming from a distance away, it cannot be held that his act must in all probability cause death or such bodily injury as was likely to cause death. Such a person cannot possibly be convicted under S. 307 but should be convicted under S. 337, Penal Code. A.I.R. 1938 Rang. 220=39 Cr. L. J. 692=176 Ind. Cas. 150.

—S. 307—Applicability—Causing of injury, if necessary—Intention, proof of.

Section 307, Penal Code, may apply even if no hurt is caused. The causing of hurt is merely an aggravating circumstance and it cannot, therefore, be reasonably argued that unless an injury sufficient in the ordinary course of nature to cause death is inflicted on the victim, the intention contemplated by S. 307, Penal Code, cannot be presumed. Under this section, the intention precedes the act and is to be proved independently of the act, and not merely gathered from the consequences that ensue. All that is necessary to be established is the intention with which the act is done and if once that intention is established the nature of the act will be immaterial. A.I.R. 1937 Lah. 619=I.L.R. (1957) Lah. 111=38 Cr. L. J. 1052=171 Ind. Cas. 284.

—Ss. 307, 324—Applicability and scope—Accused drunk and inflicting slight injuries on provocation—Offence.

Where the accused was drunk when he inflicted injuries and had both given and received provocation, the injuries were of a trivial nature and he himself had received beating.

**Held**, that the conviction under S. 307, should be altered to one under S. 324, Penal Code. A.I.R. 1936 Lah. 914=38 P.L.R. 630=17 Lah. 284=38 Cr. L. J. 24=165 Ind. Cas. 909.

—S. 307—Applicability and scope.

**Held**, after considering evidence that accused could not be convicted under S. 364, conviction under S. 307 would be proper. A.I.R. 1936 Oudh 44=37 Cr.L.J. 12=1935 O.W.N. 1177=159 Ind. Cas. 945.

—S. 307—Applicability and scope—Accused shooting at A but wounding B.

Section 307 provides for the punishment of a person who intends to commit murder but fails in achieving his object. The effect of Ss. 301 and 307 read together is that an accused person who shoots at A and wounds B by mistake would be guilty under S. 307 although he has not been able to get the person whom he



intended to injure. A.I.R. 1935 Pesh. 74=37 Cr. L.J. 25=158 Ind. Cas. 648.

—**S. 307—Applicability and scope—Persons pursued by Police turning round and firing—Bullets not found and nobody hit—Offence.**

Where certain persons who were pursued by the Police were found to have turned round and deliberately fired, it cannot be said that they were attempting to hit and the offence falls under S. 307, Penal Code, although nobody was hit and no bullets were found. A.I.R. 1933 Cal. 354=37 C. W. N. 312=60 Cal. 543=34 Cr.L.J. 611=143 Ind. Cas. 593.

—**S. 307—Applicability and scope—Use of pistol with reckless disregard to consequences—Offence—Arms Act (11 of 1878), S. 19 (f).**

Where a pistol was used by the accused with a reckless disregard to consequences against a Police Constable who was chasing him and the bullet remained lodged inside.

**Held**, that the presumption of the accused's intention to cause death must be drawn and that he was guilty both under S. 307, Penal Code, and S. 19 (f), Arms Act. A.I.R. 1933 Lah. 852=34 P.L.R. 672=35 Cr. L.J. 171=14 Lah. 820=146 Ind. Cas. 843.

—**Ss. 307, 149—Applicability and scope.**

Where, in a fight between the parties who are well armed, the way in which the spears are used is in itself strong proof of the intention of the persons using them and the protracted nature of the attack shows that all the accused had common object in the unlawful assembly, and death has ensued as a result the accused should be convicted under S. 307, read with S. 149. A.I.R. 1933 Lah. 661=35 C. L. J. 250=35 P.L.R. 238=146 Ind. Cas. 949.

—**Ss. 307, 149—Applicability and scope.**

Person was assaulted and seriously injured and assailants were tried for offences under Ss. 307, 149. They were acquitted by the Sessions Judge :

**Held**, on an examination of evidence that the charge under S. 307 had been brought home and that the order of acquittal, would be set aside. A. I. R. 1933 Oudh 340=34 Cr. L. J. 538=10 O.W.N. 585=143 Ind. Cas. 129.

—**Ss. 307, 324—Applicability and scope—Act not capable of causing death in the natural course of events—Conviction under S. 307, legality of.**

The only act which could fall within the purview of S. 307, Penal Code, is an act which, by itself, must be ordinarily capable of causing death in the natural and ordinary course of events. A. I. R. 1931 Lah. 63=32 Cr. L. J. 582=31 P.L.R. 1004=130 Ind. Cas. 649.

—**Ss. 307, 328, 511—Applicability and scope—Administering poison—Victims recovering—Accused young and acting under instigation—Offence.**

Where the accused who was a youth administered poison to his brother through food, of which his brother's son and daughter also partook and he was charged under S. 307, but the evidence showed that he was acting under the instigation of a person who had absconded and that owing to the ready help by neighbours none of the three succumbed, and there was, in the opinion of High Court, a probability for the accused to become a fit member of the society after discipline, the High Court convicted the accused under S. 328 instead of S. 307, Penal Code. A.I.R. 1931 Pat. 346=32 Cr. L. J. 1228=134 Ind. Cas. 639.

—**S. 307—Applicability and scope.**

In determining the intention, the act done and the manner of its doing as well as the announced intention at the time may be taken into consideration.

The accused came armed with dangs and beat the complainant to unconsciousness with whom they had previous enmity. Previous to giving him this beating they announced their intention of killing him.

**Held**, that the charge under S. 307 was not wholly unjustified or illegal. 112 Ind. Cas. 224=29 Cr. L. J. 1008=11 A. I. Cr. R. 262=A.I.R. 1929 Lah. 67.

—**S. 307—Applicability and scope—Discharging loaded gun—Offence.**

A person intentionally discharging a loaded gun at another, from a short distance and inflicting injuries which might have proved fatal, should be convicted of an offence under S. 307 and not merely of grievous hurt. 16 Cr. L.J. 542=29 Ind. Cas. 670 (Mad.).

—**Ss. 307 and 324—Applicability and scope—Blow with hatchet—Nature of offence.**

Where the accused struck his wife on the neck with a hatchet he ought to be convicted under S. 324, I.P.C. and not under S. 307 since the blow with a hatchet would not ordinarily cause death. The act contemplated by S. 307 is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events. 15 Bom. L. R. 991=14 Cr. L. J. 641=21 Ind. Cas. 881.

—**S. 307—Applicability and scope.**

Where the accused who had previously administered datura to other persons who had died from the effects thereof, administered the same poison to C who became ill but recovered, he is guilty of an offence under S. 307. 32 P.L.R. 1911=12 Cr.L.J. 125=9 Ind. Cas. 731.

—**S. 307—Applicability and scope—Throwing child and wishing that death should fall as a curse.**

A woman, throwing her child three years old into a small pond wishing that its death should fall as a curse on the head of some other woman who was quarrelling with her, can be presumed to have an intention to cause death of the child, and is guilty under S. 307 though the child was immediately saved. 11 Cr. L.J. 48=5 Ind. Cas. 138 (All.).

2. Attempt to murder—What amounts to.

—**S. 307—Attempt to murder—What amounts to—Number of blows struck at neck of person not in position to defend himself—No death caused—Act, if attempt to murder.**

In order that an act shall amount to an attempt to murder all that it is necessary to prove is that if the act had caused death, it would have amounted to murder provided that it was done with such intention or knowledge as would be necessary to be proved in the case of murder. The fact that an act results in minor injuries or even in no injuries at all is not relevant for the purpose of deciding whether it amounted to an attempt to murder or not. Where a number of blows are struck at the neck of a person not in a position to defend himself and if the attack is successful, the act amounts to murder and when death does not result from such an attack, it is an attempt to murder within the meaning of S. 307. A.I.R. 1941 Pat. 51=42 Cr. L.J. 303=7 B.R. 475=22 P. L. T. 419=192 Ind. Cas. 523.



person knows that certain result will ensue from his act he must be deemed to intend such result by doing the act. Further it is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assailed. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in S. 307. 125 Ind. Cas. 183=A. I. R. 1930 Lah. 253.

—S. 307—Offence under—Essentials.

An offence under S. 307 is committed when the accused does an act which must in the ordinary course of events cause death. 130 Ind. Cas. 649=32 Cr. L. J. 582=A. I. R. 1931 Lah. 63=31 P. L. R. 1004.

5. Evidence.

—S. 307—Evidence—Attempt to kill or hurt—Benefit of doubt.

Where the accused took away a boy under the pretext of "magic worship" and caused several injuries on his body, mostly skin-deep, but one of which was an incised wound on the back of the neck, but subsequently he took the boy home, apologized and bandaged the wound :

**Held**, that though there were good reasons for believing that the accused actually intended to kill the boy, yet since he subsequently changed his mind, he was entitled to the benefit of doubt and the conviction from one of attempted murder should be altered to the less serious offence of causing grievous hurt, which he undoubtedly committed. A. I. R. 1935 All. 614=1935 A. W. R. 812=37 Cr. L. J. 305=160 Ind. Cas. 525.

—S. 307—Evidence.

Abrasions found on person of accused—Incriminating circumstance not proved against him—Accused cannot be called upon to explain them. 120 Ind. Cas. 210=31 Cr. L. J. 15=13 A. I. Cr. R. 157=1929 Cr. C. 673=A. I. R. 1929 Nag. 350.

—S. 307—Evidence.

Where it was proved that a shot was fired from the house in which the accused was residing, but it was not proved that the shot was aimed at any one in particular, and it was also doubtful whether the accused himself fired the shot.

**Held**, that the accused cannot be convicted under S. 307 as benefit of doubt should be given to him. 9 L. L. J. 331=A. I. R. 1927 Lah. 853.

—S. 307—Evidence.

Where accused, a sowar pursued deceased whom he thought to be the person wanted at the police station, and fired three shots and deceased who was standing in the river at the time of the third shot never appeared again.

**Held**, there is no sufficient evidence to support the conviction. It is necessary to prove that the accused did an act with such intention or knowledge that if he had caused death by that act he would have been guilty of murder. The only act which he is clearly proved to have committed is to pull the trigger of a loaded rifle three times. It was just likely on the facts disclosed that he would have fired into the air in order to frighten and stop deceased as that he would fire at deceased. 76 Ind. Cas. 1028=25 Cr. L. J. 308=A. I. R. 1923 Lah. 415.

—S. 307—Evidence—Evidence doubtful against two of the accused—Conviction not proper.

Where a prosecution witness who was not interested in the accused Nos. 1 and 2, and who came up after the occurrence, deposed that he was told by Maula Bakhsh and Khair Din eye-witnesses that Abdul Hamid accused No. 3 had killed Nizam Din, and they did not immediately after the occurrence name the accused Nos. 1 and 2

**Held**, it appears highly probable that accused Nos. 1 and 2 did not take any part in the actual attack, and as Abdul Hamid alone could easily have caused all the injuries found on Nizam Din's person, it would be unsafe to convict accused Nos. 1 and 2. A. I. R. 1923 Lah. 236.

—S. 307—Evidence—Murderous intent—Benefit of doubt.

Where an accused has given several blows aimed at the head causing about 10 incised wounds, he must be charged with murderous intent. The accused is entitled to the benefit of doubt when it is found that, of the several alleged eye-witnesses to the occurrence standing at a short distance none of them came to the rescue of the injured man. The probability in such a case is that they did not see the assault. 13 P. W. R. 1915 Cr. =132 P. L. R. 1915=16 Cr. L. J. 462=29 Ind. Cas. 94.

—S. 307—Evidence—Circumstantial evidence, conviction under.

Where in a case under S. 307, I. P. Code, two persons were named at the thana as the assailants but a third was substituted for one at the spot and eye-witnesses saw only their backs the accused could not be convicted on the evidence, the existence of blood-stains on the clothes being insufficient. 14 Cr. L. J. 196=14 P. W. R. 1913 (Cr.)=67 P. L. R. 1913=19 Ind. Cas. 196.

—Ss. 307, 328 and 511—Evidence—Attempt to administer poison—Quantity not known—No evidence to prove—Probable effects—Intention to cause hurt.

**Held**, in absence of evidence of probable effects of poison administered it cannot be said that accused intended to cause more than hurt. 5 L. B. R. 79=3 Ind. Cas. 721.

6. Interpretation.

—Ss. 307, 308—Interpretation.

Per Digby J.—The word "attempt" used in the marginal notes to the sections should not receive weight in construing the sections themselves. A. I. R. 1943 Nag. 145=I. L. R. (1943) Nag. 411=1943 N. L. J. 90=44 Cr. L. J. 512=206 Ind. Cas. 382.

—S. 307—Interpretation—'Under such circumstances,' meaning of.

The expression "under such circumstances" refers to facts which would introduce a defence to a charge of murder such as for instance that the accused was acting in self-defence or in the course of military duty. A. I. R. 1932 Bom. 279=34 Bom. L. R. 571=33 Cr. L. J. 613=56 Bom. 434=138 Ind. Cas. 503.

7. Procedure.

—Ss. 307 and 324—Procedure.

**Held**, that the act of the accused amounted to an attempt to commit murder and the Deputy Magistrate should commit the accused to the Sessions and ought not to try it himself. 5 M. L. T. 257=11 Cr. L. J. 196=4 Ind. Cas. 1134.



## 8. Sentence.

## —S. 307—Sentence.

Muderous assault by accused on his own brother—Sentence of four years' rigorous imprisonment—Quarrel between brothers made up—Injured brother desiring reduction in sentence and making prayer to High Court—Revision by accused.

**Held**, that in the interests of justice the sentence should be reduced to one year, since a longer sentence would lead to renewal of old feud. A.I.R. 1944 Pat. 37=44 Cr.L.J. 336=9 B.R. 208=25 P.L.T. 43=205 Ind. Cas. 195.

## —Ss. 307, 147, 148—Sentence.

Rioting and hurt—Section 149 applied—Accused convicted and sentenced under S. 307—Separate sentences under Ss. 147 or 148 should not be passed. A.I.R. 1943 Sind 212=I.L.R. (1943) Kar. 132=45 Cr.L.J. 130=209 Ind. Cas. 282.

## —Ss. 307, 326—Sentence—Accused aiming gun and threatening to shoot a person—Grievous hurt to such person—Conviction under Ss. 307 and 326—Propriety of.

Where a person aimed his gun at another and tried to shoot him but in so doing, his gun went off and the person aimed at was grievously wounded and the accused was convicted, both of attempted murder and grievous hurt.

**Held**, that conviction was not improper as there was nothing incongruous between S. 307 and S. 326, but punishment should be one. A.I.R. 1937 Sind 61=30 S.L.R. 238=38 Cr.L.J. 487=167 Ind. Cas. 943.

## —S. 307—Sentence.

Member of the conspiracy only aiding others who actually attempting murder, not himself taking part in it—No sentence of death can be passed against him under Ben. Criminal Law Amendment Act—Maximum sentence that can be passed is 14 years' imprisonment under S. 307, read with S. 115, Penal Code. A. I. R. 1935 Cal. 561=39 C.W.N. 334=36 Cr.L.J. 1275=62 Cal. 433=157 Ind. Cas. 1070.

## —S. 307—Sentence.

Where, in pursuance of a conspiracy to murder the Governor of Bengal, one of the conspirators armed with a loaded revolver attempted to fire with such revolver at the Governor with intent to murder him.

**Held**, that the offence came under S. 307 and he could be sentenced to death under the Ben. Criminal Law Amendment Act, 1925, as amended by subsequent Acts. The fact that in the attempt some one else was hurt has some bearing on the sentence. A. I. R. 1935 Cal. 561=39 C.W.N. 334=62 Cal. 433=36 Cr. L. J. 1275=157 Ind. Cas. 1070.

## —S. 307—Sentence—Conviction—Considerations to be made.

When awarding punishment the fact that the accused was a man of advanced years, of weak mind and had contracted *morphia* habit, may be considered though no mental aberration is proved. 6 P.R. 1912 (Cr.)=24 P.W.R. 1912 (Cr.)=13 Cr. L.J. 197=14 Ind. Cas. 197.

## 9. Miscellaneous.

## —Ss. 307 and 323—Miscellaneous—Confirmation of order of discharge under S. 307 but ordering further enquiry into offence under S. 323—Legality—Trial Magistrate feeling evidence not sufficient.

Where a Sessions Judge set aside an order of discharge under S. 307, I.P. Code, but ordered a further enquiry with regard to the alleged offence under S. 323, I.P. Code.

**Held**, that it will not be open to a Sessions Judge to bisect an order of discharge into two parts, confirm one part and set aside the other. The order of discharge must be taken and read as a whole. As the Magistrate did not accept evidence of witnesses it necessarily followed that the non-acceptance would amount to disbelief of evidence regarding offence under S. 323. 1950 M.W.N. 875 (1)=51 Cr. L.J. 1176=A.I.R. 1950 Mad. 503=4 A.I.Cr. D. 441=(1950) 1 M.L.J. 313.

## —S. 308—Grave and sudden provocation, what is.

A person can be said to have been provoked if he has been injured by some act or word, if by word, to his reputation, character or dignity. A well-merited rebuke cannot be described as a grave and sudden provocation. 1937 M.W.N. 637.

## —S. 309—Attempts to commit suicide.

The offence is not an attempt to commit suicide inasmuch as the word "attempts" in S. 309, Penal Code, involves conscious effort. A.I.R. 1940 All. 486=1940 A.L.J. 583=42 Cr.L.J. 146=I.L.R. (1940) All. 647=1940 A.W.R. 488=191 Ind. Cas. 328.

## —Ss. 309 and 302—Attempt to commit suicide—Pains of labour—Child born dead as a consequence.

If a woman attempts to commit suicide owing to the painful labour and in consequence the child is born dead, she is guilty for attempting to commit suicide only. 17 A.L.J. 478=20 Cr.L.J. 395=50 Ind. Cas. 1003.

## —S. 309—Jumping into a well to avoid police—Attempt to commit suicide.

Mere jumping into a well to avoid the police cannot amount to an attempt to commit suicide in the absence of evidence that the jumping was to commit suicide. 14 Bom. L.R. 146=13 Cr. L. J. 246=14 Ind. Cas. 598.

## —S. 309—Attempt to commit suicide—Sentence—Discretion of Court.

The law confers upon the Court a very wide discretion in the matter of punishment, and it is not necessary to inflict a sentence of imprisonment upon a person who, on account of family discord, destitution, loss of a dear relation, or other cause of a like nature, overcomes the instinct of a self-preservation and decides to take his life. In such a case, the unfortunate person deserves indulgence, and should be either released on probation of good conduct or sentenced to a fine if he is not too poor to pay the fine. These observations apply with greater force to the case of a woman who attempts to commit suicide in similar circumstances. It is not possible to lay down any hard and fast rule on the subject but the Court must, in each case, consider the motive which has prompted a person to destroy his or her life. A.I.R. 1934 Lah. 514=35 P.L.R. 439=15 Lah. 872=36 Cr.L.J. 682=155 Ind. Cas. 283.

## —S. 312—Attempt to commit an offence—Ingredients—Accused with intention of causing miscarriage administering harmless substance—Whether guilty of attempt to cause miscarriage.

Under the Criminal Law of India there are four stages in every crime, the intention to commit, the



preparation to commit, the attempt to commit and if the third stage is successful, the commission itself. Intention alone, or intention followed by preparation are not sufficient to constitute an attempt. But intention followed by preparation, followed by any "act done towards the commission of the offence" are sufficient. "Act done towards the commission of the offence" are the vital words in this connection.

Where the accused, with the intention to administer something capable of causing a miscarriage to a woman with whom he was in criminal intimacy, administered a harmless substance to her :

**Held**, that this did not amount to an act towards the commission of the offence of causing miscarriage and that the accused should not be convicted of an attempt to cause miscarriage. A.I.R. 1933 Cal. 893=37 C.W.N. 1151=35 Cr. L.J. 97=61 Cal. 54=146 Ind. Cas. 590.

—S. 312—Miscarriage—Attempt to commit suicide.

A woman attempting to take her own life owing to the severe pains of labour and the child was born dead, is not guilty of causing miscarriage. 17 A.L.J. 478=20 Cr. L.J. 395=50 Ind. Cas. 1093.

—S. 317—Abandonment of child—Benefit of doubt.

The prosecution must prove beyond all reasonable doubt, that the accused had exposed or left a child under the age of twelve years in some place with the intention of wholly abandoning it. Mere neglect or temporary abandonment is insufficient. In cases of reasonable doubt as to the intention with which the child was left, the accused is entitled to the benefit of the doubt. 21 Cr. L.J. 253=55 Ind. Cas. 205.

—S. 317—Concealing illegitimate child in bush.

Where after birth, of an illegitimate child a woman threw it into a bush and concealed the act and never showed any solicitude for the child, she commits an offence under S. 317. 11 U. B. R. (1914) 5=15 Cr. L.J. 525=24 Ind. Cas. 837.

—S. 317—Exposure and abandonment of child—Person having care of a child, exposing and abandoning it.

A person who received the child from the mother on condition of her not desiring to have it back must be deemed to be a person having the care of the child, until he entrusts it to some other person or institution. When the person so receiving the child abandons or exposes it, he is guilty under S. 317, though his custody of the child may have been only temporary or short and handing over by the mother for abandonment makes her also guilty under Ss. 317 and 109, I.P.C. 41 Bom. 152=18 Bom. L.R. 934=18 Cr. L.J. 98=37 Ind. Cas. 306.

—S. 317—Exposure and abandonment.

The gist of the offence under S. 317, is the exposure, with intention to abandon, and the manner of exposing and the fact that the child was sure to be found and looked after are not essential ingredient though they may be taken into consideration in passing the sentence. (1901) 24 M. 662. See 1903 A.W.N. 43 Supra.

—S. 318—Scope—Fact of birth merely disclosed to a confidant—Effect.

Section 318, Penal Code, is designed to punish a person for intentionally concealing the birth of the child

from all and sundry, though she will not escape the consequences of her act if she merely discloses the fact of the birth to some confidant. A.I.R. 1935 Cal. 489=36 C.W.N. 990=36 Cr. L.J. 1460=62 C.L.J. 260=62 Cal. 1127=158 Ind. Cas. 761.

—S. 318—Birth in hospital and known to nurses and others—Case of concealment of birth if made out.

Where the birth took place in the Medical School Hospital and was attended by nurses and others in the hospital who were well aware that the woman (accused) had given birth to twins and it was known to two women whom the nurse endeavoured to persuade to adopt the children and another relative of the woman (also accused) knew about the birth.

**Held**, that there was no concealment of birth within the meaning of S. 318, Penal Code. A.I.R. 1935 Cal. 489=36 C.W.N. 990=36 Cr. L.J. 1460=62 C.L.J. 260=62 Cal. 1127=158 Ind. Cas. 761.

—S. 318—Attempt to conceal birth of child—Essentials to be proved.

In order to convict a woman of attempting to conceal the birth of her child, the dead body must be found and identified as that of the child of which she is alleged to have been delivered. A. I. R. 1935 Cal. 489=36 C.W.N. 990=36 Cr. L.J. 1460=62 C.L.J. 260=62 Cal. 1127=158 Ind. Cas. 761.

—S. 318—Placing the child on Batora.

The placing of the dead body of a child on a batora (dung heap) close to a public road does not amount to a secret disposing of it within S. 318 of the Code. 26 P.W.R. 1913 Cr.=14 Cr. L.J. 525=328 P.L.R. 1913=20 Ind. Cas. 1005.

—S. 318—Leaving in a public place, near houses.

Leaving the dead body of a child in a public place near a number of houses does not amount to secret deposition of the body under S. 318. (1911) 2 M.W.N. 379=12 Cr. L.J. 562=12 Ind. Cas. 650.

—Ss. 319, 323, 326, 352—Hurt—What amounts to.

Hurt need not be caused by direct physical contact between accused and victim—Victim woman—Serious mental derangement by causing shock amounts to hurt—Accused, with intent to frighten victim, presenting himself in dark in sudden and horrifying manner—Intention to cause hurt can be presumed—Hurt, whether simple or grievous depends on medical evidence. A.I.R. 1944 Sind 19=45 Cr. L.J. 247=211 Ind. Cas. 88.

—Ss. 319, 34, 149—Common intention—Joint liability.

Where S. 149 is found not applicable, yet if the accused are found to have the common intention of causing hurt to their victim and if hurt is caused by any of them, they are all liable under S. 34, for the offence of hurt. A.I.R. 1938 Lah. 543=39 Cr. L.J. 781=40 P.L.R. 850=I.L.R. (1938) Lah. 608=176 Ind. Cas. 678.

—S. 319—Serious form.

Where a man of thirty, even though he had been dazed by a blow on the head inflicted by somebody else, approached the prostrate body of a dying man, kicked him on neck and then pressed with his foot the dying man's head into the ground so that it became buried in the earth.



**Held**, the man was guilty of the most serious form of simple hurt and maximum sentence should be awarded. 113 Ind. Cas. 481=5 O.W.O. 391=12 A.I.Cr.R. 2=30 Cr. L.J. 173=A.I.R. 1928 Oudh 282.

—**S. 320—Bone cut—No evidence to show extent of cut—Grievous hurt, if can be inferred.**

Where the evidence is merely that a bone has been cut and there is nothing whatever to indicate the extent of the cut, whether deep or mere scratch upon the surface, it is impossible to infer from that evidence alone that grievous hurt has been caused within the meaning of the definition in S. 320. Penal Code. A.I.R. 1942 Pat. 376=43 Cr.L.J. 511=8 B.R. 658=23 P.L.T. 633=200 Ind. Cas. 296.

—**S. 320—Non-fatal wounds.**

When two persons armed with deadly weapons intentionally attack and kill a person, and the deceased bears the marks of two wounds on his person, of which one only is fatal neither of the accused can escape being convicted of murder. 1941 M. W. N. 953.

—**Ss. 320, 149—Presumption.**

If a mob armed with deadly weapons goes to achieve a particular object by force or show of force, it is reasonable to infer that all the members of the assembly know that grievous hurt, if not murder, is likely to be caused in prosecution of that object. A.I.R. 1939 Pat. 611=18 Pat. 544=6 B.R. 203=41 Cr. L.J. 191=21 P.L.T. 45=185 Ind. Cas. 529.

—**Ss. 320—Death due to tetanus—Wound not itself dangerous to life—Death within 20 days due to tetanus supervening—Hurt is not grievous.**

The designation in S. 320, Penal Code of a hurt as grievous which causes the sufferer to be during the space of twenty days in severe bodily pain, applies only when such effect actually lasts for a period of twenty days and when the sufferer dies before that period has expired.

Where the wound was not itself dangerous to life but death was caused within 20 days, due to tetanus which supervened.

**Held**, that the wound was not 'grievous hurt'. 84 Ind. Cas. 438=26 Cr. L. J. 294=A. I. R. 1925 Lah. 297.

—**S. 320—Endangering life—Wound on neck with sharp-edged weapon is dangerous to life, but it is not sufficient in itself to cause death.**

The accused, a young man of twenty, inflicted a wound with a sharp-edged weapon on the neck of the friend in a sudden impulse as a result of a quarrel. The wound became septic and wounded man died.

**Held**, that a wound on the neck was "dangerous to life" within the meaning of Cl. 8, S. 320 and was therefore grievous. But the wound itself was not in itself sufficient to cause death and the circumstances did not justify a finding that the accused knew that his act was likely to cause death. Considering the age of the accused and the circumstances, the sentence of seven years passed on the accused was very severe and sentence for two years was sufficient. 120 Ind. Cas. 431=31 Cr. L.J. 77=11 L.L.J. 519=A.I.R. 1930 Lah. 305.

—**S. 320—Endangering life.**

Wounds, which though not likely to cause death cause death must be held to have 'endangered' life within the meaning of S. 320. 73 Ind. Cas. 49=9 F. Y. D. 12=20.

O.L.J. 490=26 O. C. 18=24 Cr. L.J. 513=A. I. R. 1923 Oudh 97.

—**S. 321—Hurt—Elements of.**

Causing bodily pain is the essential element of hurt. 167 Ind. Cas. 748=19 N.L.J. 18=38 Cr. L.J. 442.

—**Ss. 322, 114, 109—Accused holding legs of complainant—Accused's son thrusting lathi into rectum—Offence—Section applicable.**

A person who forcibly thrusts a lathi into rectum of another must at least know that he is likely thereby to cause grievous hurt to the victim as the rectum is a very tender part of human body, even if it be supposed for a moment that he did not thereby intend to cause grievous hurt. A.I.R. 1935 Oudh 468=36 Cr. L. J. 1151=1935 O.W.N. 902=11 Luck 384=157 Ind. Cas. 370.

—**Ss. 352 and 322—Grievous hurt—Intention—Nature of injury—Intention.**

An intent to cause grievous hurt may be inferred from the circumstances of the case and the nature of the injury caused. When a man hits another over the head with a stick hard enough to fracture his skull and endanger his life, he must in the circumstances, have either intended to cause grievous hurt or known that he was likely to cause it. (1911) 1 U.B.R. 105=13 Cr. L.J. 471=15 Ind. Cas. 311.

—**Ss. 322 and 325—Offence—Essentials.**

To sustain a conviction under S. 322 it must be shown not only that grievous hurt has been caused, but if it has been caused that the accused intended or knew himself to be likely to cause grievous hurt. If the accused intended to cause or knew himself to be likely to cause simple hurt, a conviction under S. 325 is bad. 11 U.B.R. (1914) 35=16 Cr. L. J. 431=28 Ind. Cas. 1007.

**S.—323.**

**Synopsis.**

1. Abatement.
2. Alteration of conviction.
3. Applicability and scope.
4. Conviction without specific charge.
5. Death by beating.
6. Evidence disbelieved—Conviction—Legality.
7. Private defence.
8. Public servant.
9. Punishment by teacher.
10. Sentence.
11. Separate conviction and sentence.
12. Miscellaneous.

—**S. 323—See CR. P. CODE, S. 403 (4). 5. Bom. L.R. 125.**

—**S. 323—See S. 220. 5. Bom. L.R. 597.**

—**S. 323—Voluntarily causing hurt—Injury—Rioting—Acquittal. See CR. P. CODE, S. 437. 5 C.W.N. 72.**

**1. Abatement.**

—**S. 323—Abatement.**

A criminal prosecution under S. 323 does not abate by reason of the death of the person hurt. 25 P. R. Cr. 1919 and 26 P. R. Cr. 1917. Dissented from. 65 Ind. Cas. 549=44 Mad. 417=13 M.L.W. 379=1921 M.W.N. 227=30 M.L.T. 349=23 Cr. L. J. 117=A.I.R. 1921 Mad. 278=40 M.L.J. 351.



—S. 323—Abatement—Death of person hurt.

A criminal prosecution under Section 323 of the Indian Penal Code does not abate by reason of the death of the person injured. 44 Mad. 417, Foll. 81 Ind. Cas. 719=22 A.L.J. 520=5 L.R.A. Cr. 96=25 (Cr.) L.J. 1007=A.I.R. 1924 All. 666.

2. Alteration of conviction.

—Ss. 323, 376—Alteration of conviction.

A conviction under S. 376, I. P. C., cannot be altered to one under S. 323. A.I.R. 1934 Lah. 178=34 P.L.R. 787=35 Cr. L.J. 519 (1)=147 Ind. Cas. 799 (2).

—S. 323—Alteration of conviction.

Accused assaulting Police constable in uniform. Matter should not be treated lightly. (Conviction under Ss. 325 and 353 was altered to one under S. 323, as the blows to the constable must have caused bodily pain.) A.I.R. 1939 Nag. 95=I.L.R. (1939) Nag. 488=1939 N.L.J. 101=40 Cr. L.J. 905=184 Ind. Cas. 231.

—S. 323—Alteration of conviction—Conviction under S. 147 can be altered to one under S. 323.

S. 238, Criminal Procedure Code is no bar to alter the conviction from one under S. 147 to one under S. 323; whether S. 147 is applicable or not depends on the number of persons concerned, and this is a question which has to be determined by the Judge. A.I.R. 1922 All. 114.

3. Applicability and Scope.

—Ss. 323 and 324—Applicability and scope—Offence under—Injuries caused by lathi.

Whether the lathi used in a case is or is not an instrument likely to cause death is a question of fact in each case and where the lathi used is not before the Court, it cannot be said that the injuries were caused by an instrument likely to cause death. The conviction of the accused in such a case would be under S. 323 and not under S. 324. I. P. Code. A.I.R. 1950 E.P. 209=51 Cr. L.J. 1005.

—S. 323—Applicability and scope—Offence under—Proof of—Medical evidence—Necessity.

No medical evidence is required to prove an offence of causing simple hurt. Causing any physical pain even momentarily is sufficient. A.I.R. 1950 Kut. 41=51 Cr. L.J. 1062.

—Ss. 323 and 147—Applicability and scope—Accused, held should be convicted under S. 323.

Where in a fight between the accused and the neighbours, injuries amounting to simple hurt were inflicted by the accused and the fight was a riot, not in a real but technical sense :

Held, that the accused should be convicted under S. 323 and not S. 147. A.I.R. 1945 All. 340=I. L. R. (1945) All. 422=1945 O. W. N. (H.C.) 148=1945 A.W.R. (H.C.) 142=221 Ind. Cas. 289.

—Ss. 323, 452—Applicability and scope—Accused charged of having committed dacoity—If can be convicted under Ss. 323 and 452.

An accused charged merely in general terms of "having committed dacoity" should not be convicted under Ss. 323 and 452 as latter offences are not necessarily cognate offences and in committing dacoity, one does not necessarily cause simple hurt or house trespass. A. I. R. 1345 All. 87=1945 A. I. J. 141

=1945 O.W.N. (H.C.) 138=46 Cr.L.J. 495=I.L.R. (1945) All. 432=1945 A.W.R. (H.C.) 145=218 Ind. Cas. 372.

—Ss. 323, 362—Applicability and scope.

Charge of abduction supported by medical evidence of ruptured hymen—Charge should not be entered as under S. 323. A. I. R. 1942 Bom. 71=44 Bom. L.R. 27=43 Cr.L.J. 529=I.L. R. (1942) Bom. 384=199 Ind. Cas. 202 (F.B.).

—Ss. 323, 326, 302, 304—Applicability and scope—Offence, held one under S. 394.

The accused struck her daughter with a very heavy piece of wood whereupon she fell down and never stirred and everybody took her to be dead. She was then hung to a beam so as to make it appear that she had committed suicide :

Held, that in the absence of a post mortem certificate it was not easy to say that accused must have had the requisite knowledge and intention for a conviction under S. 302, I.P.C. Under the circumstances of the case, there was no reason to think that the deceased did not die immediately. Accused therefore, committed at least an offence punishable under S. 304.

Held, also that even if the offence might have been one of a minor nature punishable under S. 323 and the girl might have died subsequently after she had been hung to a beam the accused would still be guilty of an offence punishable under S. 326. A.I.R. 1942 Mad. 415=55 L. W. 71=(1942) 1 M. L. J. 224=1942 M.W.N. 169=4 Cr. L.J. 671=201 Ind. Cas. 444.

—Ss. 323, 325—Applicability and scope.

Which of two accused caused grievous hurt, not clear—They cannot be convicted under S. 595, but only under S. 323. A.I.R. 1940 Mad. 586=51 L.W. 590=(1940) M.W.N. 538=41 Cr.L.J. 923=412=190 Ind. Cas. 490.

—S. 323—Applicability and scope—Hurt—Several assailants—Some not actually striking—Conviction.

Where a number of persons are attacking, it is not necessary that every one of them should actually strike the victims although they may be near enough themselves to receive injuries if the victims are lashing out in self-defence. 40 P.L.R. 217.

—S. 323, 325, 97—Applicability and scope.

Accused, not a proclaimed offender rescued from custody of village **chaukidar** who, in the course thereof, receiving slight injury—Rescuers, held neither guilty under S. 325 nor under S. 323. A.I.R. 1940 Pat. 696=42 Cr. L.J. 199=7 B.R. 236=22 P.L.T. 80=191 Ind. Cas. 590.

—S. 323—Applicability and scope.

Constable assaulted at **Ramilla** performance—Constable not there in pursuance of duty, but only as spectator :

Held, that the offence, fell under S. 323 and not under S. 332, I.P.C. 161 Ind. Cas. 12=37 Cr. L.J. 375=58 N.L.J. 188.

—S. 323—Applicability and scope.

A person is not said to be guilty of robbery if he rescued illegally attached bull by inflicting an injury. He is guilty only under S. 323. 1935 M.W.N. 1295 (2).



**—Ss. 323, 110—Applicability and scope.**

Accused grappling with the deceased—Accused calling out her son—Son giving a lathi blow—Accused hitting on head of the deceased :

**Held**, that the accused could be convicted under Ss. 393, 110, I.P.C. A.I.R. 1935 Oudh 473=1935 O.W.N. 909=36 Cr. L.J. 1201=157 Ind. Cas. 372.

**—S. 323—Applicability and scope.**

—Accused and number of other persons assaulting and causing injuries to complainant's men—When first injury was caused to any person, force was used and offence of rioting was complete and that subsequent injuries, though inflicted in pursuance of the same common object, were distinct injuries justifying a conviction under S. 323. A.I.R. 1933 All. 819=34 Cr.L.J. 1099=1933. A.L.J. 1178=145 Ind. Cas. 913.

**—Ss. 323, 114—Applicability and scope—Previous conspiracy.**

It is not necessary to sustain a conviction under S. 323 read with S. 114 that there should be any evidence of previous conspiracy between the abettor and that person abetted. 1933 M. W. N. 715.

**—S. 323—Applicability and scope—Offence under.**

Removing by force a person other than a person against whom a decree for ejectment from house and possession is obtained, is punishable under S. 323, I. P. C. 34 C.W.N. 583=A.I.R. 1930 Cal. 720=127 Ind. Cas. 551.

**—Ss. 323 and 34—Applicability and scope—Attempt to cause hurt—Joint action.**

Two of the four persons with the common object of beating the complainant assaulted him while the other two stood ready armed with lathis to take part in the assault if required. **Held**, that the latter two were guilty, under S. 323, I.P.C. 18 Cr. L. J. 382=38 Ind. Cas. 766 (Pat.).

**—S. 323—Applicability and scope—Biting by dog—Omission to take care of dog is offence under S. 289 and not under S. 323.**

The accused was charged with omission to take order with his dog inasmuch as the animal bit the complainant in the front aspect of the right forearm causing three incised wounds :

**Held**, he is guilty under S. 289 and not under S. 323. 81 Ind. Cas. 53=2 Bur. L. J. 8=25 Cr. L.J. 565=A.I.R. 1923 Rang. 147.

**—Ss. 323 and 336—Applicability and scope—Stone throwing—Rash or negligent act causing hurt—Intention—Offence.**

S. 336 should not be applied where the facts constitute a graver offence. The accused, who had a quarrel with his debtor over non-discharge of a loan, pelted brickbats at his house knowing that there were occupants in it, and hurt one of them who was under medical treatment for ten days. **Held**, that the accused should be convicted under S. 323 and not under S. 336, as the hurt caused was the natural and probable consequence of his act. 17 Cr. L.J. 465=36 Ind. Cas. 145 (L.B.).

**—S. 323—Applicability and scope—Conviction—Abusive language.**

Conviction under S. 323 is bad where the complainant merely mentioned that accused used abusive

language and made no mention of assault. 1 P.W.R. 1916 Cr.=17 Cr. L.J. 111=32 Ind. Cas. 847.

**4. Conviction without specific charge.**

—Ss. 323, 147—Conviction without charge—Accused prosecuted for rioting—Charge mentioning only S. 147 but indicating that accused were charged not merely with rioting but actually with causing hurt—Some accused acquitted and remaining convicted under S. 323—Conviction, held not illegal as offence of which accused were convicted was mentioned in charge sheet—Mere omission of "S. 323" held, did not prejudice accused. A.I.R. 1941 Nag. 10=42 Cr. L. J. 203=1940 N. L. J. 575=I. L. R. (1941) Nag. 139=191 Ind. Cas. 593.

**—Ss. 323, 325—Conviction without specific charge—Attempt to commit murder—Conviction for voluntarily causing hurt without specific charge—Legality of.**

The offence of hurt is included in the offence to the attempt to commit murder. The Court has jurisdiction to convict the accused of voluntarily causing hurt without a specific charge in that behalf. 167 Ind. Cas. 748=19 N.L.J. 18=38 Cr. L. J. 442.

**5. Death by beating.****—Ss. 323, 324—Death by beating.**

There was no previous premeditation about the matter. The party did not go to attack deceased in any way. They had gone to rescue the cattle from the deceased who was taking them to pound. The attack was only a scuffle between the deceased and the rescuers except that one of the rescuers suddenly inflicted a blow with his knife on the deceased which proved fatal :

**Held** that the accused other than the one who had inflicted a knife blow, were not guilty of offence more than under S. 322. It did not appear that at any stage before the incident happened they were aware that there was any likelihood of the deceased receiving any stab wound. Their conviction under S. 324/109 could not be sustained. A.I.R. 1942 Cal. 426 (2)=43 Cr. L. J. 455=199 Ind. Cas. 55.

**—Ss. 323 and 304—Death by beating.**

Deceased was dragged, fisted and kicked by accused—Death from asphyxia due to strangulation—No motive, no enmity—Intention to hurt only :

**Held**, that the accused could be convicted under S. 323 and not under S. 304. 1934 M.W.N. 691.

—S. 323—Death by beating—Continual ill-treatment of daughter-in-law by mother-in-law—Daughter-in-law spilling oil—Beating—Death—No evidence showing intention or knowledge of likelihood of causing death—Mother-in-law was held not guilty under S. 304 but under S. 323. 85 Ind. Cas. 150=5 L.R.A. (Cr.) 161=26 Cr.L.J. 470=A.I.R. 1925 All. 126.

—S. 323—Death by beating—Fight over cattle trespass—Accused's party desirous of chastising cattle-owners—Accused holding deceased and his partisans beating him with lathis—Death caused by blows on temple—Accused is guilty under S. 323.

There was a quarrel and fight over cattle trespass and the party in whose field trespass was committed disposed of the party of the owners of cattle, as the supporter of the owners came one by one. When the deceased came up, the accused caught his hands and



some of the members of his party hit deceased with lathi. There was no intention on the part of the accused's partisans for causing the death of or grievous injury to the owners of the cattle. The desire was to chastise the owners of the cattle which caused damage. One of the blows was hit on the temple and killed the deceased.

**Held:** that the accused must have expected that simple injuries would be caused and he could not be held liable for one of his party hitting a blow on the temple and causing the death of the deceased and that the accused was guilty only under S. 323, I.P.C. 88 Ind. Cas. 520=2 O.W.N. 465=26 Cr. L.J. 1160=A.I.R. 1925 Oudh 482.

—S. 323—Death by beating.

Where death is caused as a result of simple injuries and where it is shown that the accused person had no knowledge that the deceased's spleen was diseased, he could only be convicted of causing simple hurt. 72 Ind. Cas. 533=24 Cr. L.J. 421=A.I.R. 1924 Lah. 218.

—Ss. 323 and 325—Death by beating.

Where the accused gave blows and kicks to the deceased simply with intent to give him a good thrashing which resulted in his death should be convicted under S. 323 in absence of express proof that he intended to cause death or grievous hurt. 57 Ind. Cas. 826 (Pat.)

**6. Evidence disbelieved—Conviction—Legality.**  
—Ss. 323, 324, 395, 452, 147, 148—Evidence disbelieved—Conviction—Legality—Case of dacoity—Entire evidence of prosecution found false—Case must fail—Case cannot fall under Ss. 323 and 324.

Where, in a case of dacoity, the Court disbelieves the entire evidence for the prosecution as regards the dacoity, the case must fail and the Court cannot convict the accused under S. 323 merely on the ground that the complainant's party had received injuries and the injuries may have been caused by some of the accused. A.I.R. 1945 All. 87=1945 A.L.J. 141=46 Cr. L.J. 495=1945 O.W.N. (H.C.) 138=I.L.R. (1945) All. 432=1945 A.W.R. (H.C.) 145=218 Ind. Cas. 372.

—S. 323—Prosecution evidence disbelieved—Conviction based on injuries on persons of accused—Whether can be upheld.

Where in a prosecution under S. 323, I.P.C., the Judge disbelieved the entire prosecution evidence and convicted the accused simply because they bore a number of injuries on their persons:

**Held,** that the conviction could not be upheld simply because they bore injuries on their persons. If the Judge wanted to maintain the convictions of the accused, it was incumbent upon him to base the convictions on some evidence apart from the presence of injuries on the persons of the accused. 169 Ind. Cas. 453=39 P.L.R. 7=38 Cr. L.J. 797 (1).

—S. 323—Disbelieved—Conviction—Legality—Evidence.

Where the major portion of the prosecution evidence is found to be false and tainted with gross exaggerations it is impossible to build up a case of an offence under S. 323, I.P.C., out of the mass of lies told by the prosecution witnesses. A.I.R. 1934 Oudh 124=11 O.W.N. 337=35 Cr. L.J. 804=9 Luck. 517=148 Ind. Cas. 870.

7. Private Defence.

—Ss. 323, 96—Private defence—Boy raising cloud of dust in street—Passer-by chastising and beating boy—No offence is committed.

Where a boy is causing injury to the passers-by, of whom accused is one, by raising a cloud of dust, and the accused prevents the boy or chastises him and beats him, he cannot be said to be committing any offence. Technically, it would amount to an act done in the exercise of the right of private defence. A.I.R. 1944 Mad. 168=1943 M.W.N. 801=(1943) 2 M.L.J. 644=45 Cr. L.J. 524=212 Ind. Cas. 8.

—S. 323—S. 54, Criminal P.C.—Private defence—Non-cognizable offence—Refusal to go to thana.

Where the accused are charged under an offence which is non-cognizable and therefore, one to which S. 54 of Criminal P. C. does not apply, the accused are perfectly within their right to refuse to be driven to the thana. Even if they use some force to extricate themselves from the clutches of the Police, they cannot be held guilty. 22 P.L.T. 29.

—S. 323—Private defence.

The applicant was convicted of an offence under S. 224; Sessions Judge in appeal found that applicant was not in lawful custody and acquitted him of the offence under S. 324, but convicted him under S. 323.

**Held,** the constable was guilty of the offence of wrongful confinement and obviously as against him the appellant would be entitled to right of private defence. 85 Ind. Cas. 44=26 Cr. L.J. 428=A.I.R. 1923 All. 34.

8. Public Servant.

—S. 323—Public Servant—Offence under S. 359, Madras District Municipalities Act.

It is open to the Magistrate to proceed against the accused on a charge under S. 323 Penal Code when information was laid before him only for an offence under S. 359, Madras District Municipalities Act, for obstructing a municipal servant in the discharge of his duties. A.I.R. 1946 Mad. 102=(1945) 2 M.L.J. 541=58 L.W. 640 (1)=1946 M.W.N. 274=223 Ind. Cas. 575.

—Ss. 323, 307, 304—Public servant—Accused caught by constable, effecting escape by inflicting wound on chest with knife—Medical opinion that had the injury been deeper, an inch more, it would have caused instantaneous death—Victim indoor patient for 11 days:

**Held,** that the circumstances and situation proved that there was no requisite 'intention' or 'knowledge' as contemplated in S. 307. On the other hand, the assailant's intention was to release himself from the constable's hold and run away. His object in dealing the blow would be nothing more than to disable the constable. When the nature of the act itself is the only means of judging the intention, the agent must be presumed to intend only the natural consequence of the act, which in the present case, was simple hurt. Hence the accused could not be convicted under S. 307, Penal Code. A.I.R. 1943 Nag. 145=1943 N.L.J. 90=44 Cr. L.J. 512=I.L.R. (1943) Nag. 411=206 Ind. Cas. 382.

—Ss. 323, 332—Public servant.

When the accused chased the Police Constable and beat him very severely but his attack was not concerned with the actual rescue of the arrested person, they



were guilty of the minor offence punishable under S. 323 and not under S. 332. A.I.R. 1940 Cal. 321=44 C.W.N. 502=41 Cr. L.J. 744=12=189 Ind. Cas. 480.

—Ss. 323, 354—Public servant—Process-server and decree-holder going to house to effect delivery of it to decree-holder—Woman occupant refusing to vacate—Forcible removal—Struggle—Dhoti of woman getting loose—Civil P.C., O. 21, R. 35.

Where, under an order of a Civil Court a peon was deputed to hand over possession of a house to the decree-holder and on his going there to deliver possession, he was told by the daughter-in-law of the judgment-debtor that the latter was not there and she and her husband refused to vacate the house and they were forcibly removed from the house by the applicants :

**Held**, that she was wrong in refusing to vacate the house and being bound by the decree; under O. 24, R. 85, Civil P.C., she could, if necessary, be forcibly removed from the house if she refused to vacate and that the applicants were not to blame in removing her and her husband forcibly from the house on their refusal to vacate :

**Held**, also that as for the dhoti of the woman getting loose in her struggle, that was no deliberate act on the part of the applicants but that was a direct result of her own violence during the struggle and there was no attempt to violate her modesty. Consequently, the applicants were wrongly convicted of the offences of causing simple hurt and of assaulting a woman with the intention of outraging her modesty. The violence that was used was only sufficient to remove her from the house to which she was not legally entitled, and the applicants acted in good faith in the exercise of their legal rights. A.I.R. 1936 Oudh 379 =1936 O.W.N. 601=37 Cr. L.J. 892=164 Ind. Cas. 99.

—Ss. 323, 332—Public servant—Naib Tahsildar going to accused's village and demanding revenue—Beating of Naib Tahsildar by accused's sons—Court considering it not improbable that accused was roughly treated by Naib Tahsildar—Section 332 if applies.

On the Naib Tahsildar going to the village of the accused to demand payment of land revenue from him he raised an outcry and his sons came out and beat Naib Tahsildar. The accused alleged that he raised an outcry because he was beaten and his beard was pulled by the chaprasis who had accompanied the Naib Tahsildar and under his orders. It appeared that although the reason alleged was not satisfactorily proved, there was more than a probability of the accused having been treated in the manner alleged :

**Held**, that, in the circumstances, the accused were entitled to the benefit of the doubt in that they tried to resist an illegal act of the officer and that S. 332, I.P.C., would not apply to the case, and that for the injuries caused to the Naib Tahsildar, the person who caused them committed an offence under S. 323. A.I.R. 1933 Lah. 162=33 P.L.R. 1065=34 Cr. L.J. 460=142 Ind. Cas. 897.

—S. 323—Public servant.

Where there are serious irregularities in connection with house search and the person whose house is searched assaults and beats a constable, the offence falls under S. 323 and not under S. 332. 11 B.L.T. 878 =125 Ind. Cas. 784. A.I.R. 1930 Pat 387.

—S. 523—Public servant.

A person beating a public servant entrusted with the duty of executing a warrant of attachment is guilty

under S. 323 and is not justified in beating under S. 99. 105 Ind. Cas. 684=28 P.L.R. 290=28 Cr. L.J. 972= A.I.R. 1927 Lah. 851.

—S. 323—Public servant—No hurt but criminal force used to public servant—Charge was altered from S. 323 to S. 352.

When there is nothing to show that any bodily pain, disease or infirmity was caused to anybody or that any act was done with the intention of doing so, but where the accused clearly used criminal force, the Court on reference altered the conviction under S. 323 to one under S. 352 especially in view of the fact that the accused intended to prevent the warrant being executed but which happened to be technically not legal. 71 Ind. Cas. 503=20 A.L.J. 921=45 Ail. 142=24 Cr. L.J. 151= A.I.R. 1923 All 87.

#### 9. Punishment by teacher.

—S. 323—Applicability—Principal or Headmaster of school—Infliction of corporal punishment on erring pupil for correction and maintaining school discipline—Offence—If protected. See PENAL CODE S. 88. 51 L.R. 1031 I.L.R. (1949) Bom 46=A.I.R. 1949 Bom. 226.

—S. 323—Punishment by teacher.

Child below 12 years—School-master inflicting corporal punishment necessary for school discipline is protected under Ss. 79 and 89—Extent of schoolmaster's control over a pupil depends upon circumstances of each case. 94 Ind. Cas. 412=3 Rang. 659=27 Cr. L.J. 636=A.I.R. 1926 Rang. 107.

#### 10. Sentence.

—S. 117—Sentence—Three months R.I. not excessive. 4 A.I. Cr. D. 178.

—Ss. 423 and 147—Sentence.

Even when the proceedings under 8.145, Criminal P.C., had ended with an order declaring the accused to be in possession of property in dispute and that his possession should not be disturbed, the question of title not yet having been decided, even assuming that the accused was in actual possession of the fields at the time and had sown the crop, his behaviour in collecting men and making a violent attack in broadlight in the streets of the village on the party which had cut and removed the crop, instead of obtaining the assistance of the Police was an act of grave lawlessness for which sentences of imprisonment were properly imposed.

(His Lordship declined to reduce the sentence), A.I.R. 1945 Nag. 269=1945 N.L.J. 349=4 Cr. L. J. 111=I. L.R. (1945) Nag. 881=221 Ind. Cas. 199.

—Ss. 323, 304, 325—Sentence.

When deceased had come to make a report about a murder, the accused who was a Sub-Inspector, thinking that the deceased was concealing some facts, got angry and slapped and knocked him down. The deceased then went to the Police Station and when his report was copied down came back without any assistance but complaining of great pain. The accused took him to his house, where it was alleged he was killed and his body, with the aid of others was thrown in a jungle. The skull of the deceased was found fractured. No motive whatever was suggested why the Sub-Inspector should have wished to cause any serious injury. There was absolutely no evidence at all that



the Sub-Inspector at any time used any weapon which could have caused the fracture of the skull. It was not impossible for the injury to be caused when the body was thrown into the ravine in the jungle. The doctor's evidence showed that the **chankidar** was a man of about 60 years of age and it might be probable that the fracture of the skull was caused by throwing the body into the ravine after death :

**Held**, that in the absence of any direct medical evidence on the point, it was not impossible that death may have been caused by some internal injury inflicted by the Sub-Inspector when he first attacked the deceased. The fact that the accused took him to his house did not necessarily suggest that there was any intention on the part of the accused to cause him further injury. Of the two alternatives that the Sub-Inspector caused his death by hitting him on the head with a **lathi** or similar weapon and that the Sub-Inspector caused his death by inflicting some internal injury, the Court must act upon that which involved the lesser guilt. The accused was, therefore, only guilty under S. 323, and not under S. 304 or S. 325 :

**Held**, however, that an assault upon an old man of 60 made in such a way that death resulted, even if that result was in some way unexpected, was an attack of a very brutal nature calling for the severest sentence for the offence that it was possible to inflict. A.I.R. 1938 All. 91=(1937) A.L.J. 1253=39 Cr. L.J. 364=1937 A.W.R. 1099=173 Ind. Cas. 838.

**—S. 323—Sentence—Injuries of a minor nature and detected after four or five days.**

Where the injuries inflicted are of a minor nature and are detected only after four or five days, a sentence of six months and three months on the accused is too severe and punishment for the period of imprisonment already undergone (one and a half months) would be sufficient. A.I.R. 1933 Lah. 311 (1)=34 P.L.R. 68=35 Cr. L.J. 605 (1)=147 Ind. Cas. 1226 (1).

**—S. 323—Sentence—Death by beating.**

A strong young man, who on very trivial incident and without any provocation hits his wife in the abdomen within a few days of her having delivered of a child and thus causes her an injury which results in her death the next day may, if the woman had an enlarged spleen, not be guilty of an offence higher than that under S. 323, but there can be no doubt that a sentence of three months' rigorous imprisonment only is ridiculously low in such a case, and should be enhanced. 114 Ind. Cas. 442=30 Cr. L.J. 300=1929 Cr. C. 90=A.I.R. 1929 Lah. 531.

**11. Separate conviction and sentence.**

**—Ss. 323, 149—Separate conviction and sentence—Some of rioters throwing stones and causing injury—Such persons not known—Conviction.**

Where some of the rioters threw stones causing injury and the persons who did so could not be known, the conviction should be under S. 323 read with S. 149 and not under S. 323 alone and the imposition of distinct and separate sentences under S. 323 and S. 149 is illegal. A.I.R. 1942 Pat. 319=23 P.L.T. 18=8 B.R. 795=43 Cr. L.J. 742=201 Ind. Cas. 486.

**—Ss. 323, 325—Separate conviction and sentence.**

Accused causing grievous and simple hurts to same person on same occasion—He can be convicted only under S. 325, and not also under S. 323 separately. A.I.R. 1940 Oudh 419=1940 O.W.N. 659=41 Cr. L.J. 775=1940 A.W.R. 307 (2)=16 Luck. 51=189 Ind. Cas. 648.

**—S. 323—Separate conviction and sentence.**

Accused assaulting person—All convicted under Ss. 147 and 323 and separate sentence under each section awarded—Offences under Ss. 147 and 323 held were separate and S. 71 did not apply. A.I.R. 1940 Oudh 419=1940 O.W.N. 659=41 Cr. L.J. 775=1940 A.W.R. 307 (2)=16 Luck. 51=189 Ind. Cas. 648.

**—Ss. 323, 452—Separate conviction and sentence—Conviction both under Ss. 323 and 452 for offence committed on same occasion—Separate sentences.**

An offence under S. 323, I.P.C., is not necessarily included in one punishable under S. 431. Where therefore an accused is convicted for offences both under Ss. 323 and 152, committed on one and the same occasion, separate sentences can be passed for each offence. A.I.R. 1938 Rang 114=39 Cr. L.J. 487=174 Ind. Cas. 952.

**—S. 323—Separate conviction and sentence—Rioting and causing hurt—Separate sentences can be passed.**

Causing hurt and using force are not the same thing and the word "force" does not appear in the definition of "hurt". The use of criminal force is no doubt an ingredient of the offence of rioting, but the force necessary to constitute these offences may fall far short of "causing bodily pain," and if further force is used which does cause bodily pain, then the offences which involve and are complete by mere use of criminal force have been exceeded and that excess constitutes another offence, viz., that of causing whatever more serious form of bodily hurt has been the result: Mad. Cr. Revn. Cases 248 of 1924 and 982 of 1926. Diss. from. 105 Ind. Cas. 806=39 M. L. T. 543=1927 M.W.N. 850=28 Cr. L. J. 982=9 A.I. Cr. R. 160=A.I.R. 1928 Mad. 18=53 M.L.J. 653.

**—S. 323—Separate conviction and sentence.**

The offence of causing hurt is a separate offence from that of rescuing cattle and separate sentences may legally be passed. 105 Ind. Cas. 806=39 M.L.T. 543=1927 M.W.N. 850=28 Cr. L.J. 982=9 A.I. Cr. R. 160=A.I.R. 1928 Mad. 18=53 M.L.J. 653.

**—S. 323—Separate conviction and sentence.**

It is by no means uncommon for an offence punishable under S. 323 to require, and get, a much heavier sentence than one punishable under S. 325. 97 Ind. Cas. 1053=27 Cr. L.J. 1229=A.I.R. 1927 Nag. 49.

**—Ss. 323, 326—Separate conviction and sentence.**

Separate sentences cannot be passed under Ss. 323 and 326 in the case of an assault upon a single person. Where it is found as a matter of fact, that one of the accused attacked with a spear and the others inflicted blows on legs and arms with lathis, it is not necessary to find that all the accused are guilty of an offence under S. 326. In such a case each accused should be convicted for the offence of which he is actually found to be guilty. 103 Ind. Cas. 198=28 Cr. L.J. 662=A.I.R. 1927 Oudh 313.

**—S. 323—Separate conviction and sentence—S. 149, merely declaratory—S. 147 and S. 323 create distinct offences—Separate sentences not illegal.**

S. 149 creates no substantive offence in itself. It is merely declaratory of the law and makes a person who has been a member of an unlawful assembly



liable for the offences committed by any other member of it. But S. 147 is a substantive offence in itself and makes a person guilty of the offence of rioting as distinct from actually causing any injury or hurt. Similarly S. 323 is a distinct offence in itself; therefore there is nothing illegal in convicting a person of offences under both these sections. As soon as the first injury is caused to any person force is used and the offences of rioting is complete. Subsequent injuries though inflicted in pursuance of the same common object, would be distinct injuries justifying a conviction under S. 323: 17 Bom. 260 (F.B.), Appr. 6 All. 21, Dist.; 9 All. 645 and 14 A.L.J. 738, Foll. 92 Ind. Cas. 463=24 A.L.J. 178=7 L.R.A. Cr. 13=27 Cr. L.J. 287=A.I.R. 1926 All. 225.

#### —S. 323—Separate conviction and sentence.

Conviction under Section 323 on charge under section 148 is not illegal. 85 Ind. Cas. 822=26 Cr. L.J. 598=A.I.R. 1923 Lah. 326.

#### —S. 323—Separate conviction and sentence—Inter-relation of section discussed.

An unlawful assembly may have a common object of committing hurt or grievous hurt and when such an assembly uses force or violence of the least amount, the members thereof are guilty of rioting and punishable under S. 147. If, however, their common object is accomplished by causing hurt or grievous hurt, they would be liable to conviction for the further offence under S. 323 or 325 as the case may be. The individual members committing the hurt of grievous hurt will be convicted for those offences and, if the other members who did not actually commit the hurt of grievous hurt, knew that such an offence was likely to be committed in the prosecution of the common object they would also be liable to conviction for the hurt or grievous hurt, as the case may be, by reason of S. 149 of the Code.

Section 71 of the Code may be invoked to relieve the offender under S. 323 if that is stated to be the common object of the assembly and as necessary ingredient constituting an offence under S. 147. 16 61 Ind. Cas. 833=2 P.L.T. 91=22 Cr. L.J. 449=A.I.R. 1921 Pat. 432.

### 12. Miscellaneous.

#### —S. 323—Miscellaneous.

Where an offence was committed under S. 323 I.P.C. in connection with the possession of field, the question as to who was in possession of the field in dispute was very material to the merits of the case. 1939 A.W.R. (C.C.) 319=1939 O.W.N. 1105.

#### —S. 323—Miscellaneous—Husband, if has general and unqualified right to beat his wife for impudence.

A husband has no general or unqualified right of punishing his wife by beating her for impudence or impertinence. No such general or unqualified right is now-a-days recognised by law, and wife-beating is not *eo nomine* one of the exceptions in the Chapter of "General Exceptions" in the I.P.C. Although a Judge may be entitled to have his own views on the subject in a private capacity, yet he is not justified in laying down the law in this manner from his seat on the Bench, and declaring in general and unqualified terms that a husband has such a right. A.I.R. 1936 Mad. 788=44 L.W. 348=1936 M.W.N. 895=37 Cr. L.J. 1153=165 Ind. Cas. 330.

#### —Complaint under S. 323—Miscellaneous—Proceedings under S. 107. Criminal P.C., against same persons by same complainant—Transfer of latter to Bench Magistrates—Propriety of.

In a case where the same complainant files a complaint under S. 107. Criminal P.C. and a separate one against the same persons under S. 323, I.P.C., the former alone should not be transferred to the Court of the Bench Magistrates. A.I.R. 1934 Oudh 85=35 Cr. L.J. 417 (2)=11 O.W.N. 66=147 Ind. Cas. 516.

#### —Ss. 323, 325, 147—Miscellaneous.

An offence under S. 147 has been made a substantive offence by I.P.C. and there is no illegality in the accused being charged under that section in addition to charges under Ss. 323, and 325. A.I.R. 1938 Oudh 95=1938 O.W.N. 218=39 Cr. L.J. 341=173 Ind. Cas. 386.

#### —S. 323—Miscellaneous—Altercation and squabble—Technical offence.

On a finding on appeal that there was probably an altercation and squabble between the parties and that only a technical offence was committed, the accused should be acquitted. 6 P.W.R. 1919 Cr. =20 Cr. L.J. 303=50 Ind. Cas. 351

#### —S. 324, 307—Applicability.

P, when pursued as a thief by B, firing at B and hitting him, not in vital part of his body :

**Held**, that it was an act so imminently dangerous that it would, in all probability, cause death or such bodily injury as would be likely to cause death. It was not a simple case of an offence under S. 324, I.P.C., but that the offence fell within S. 307, I.P.C. A.I.R. 1944 Sind 83=45 Cr. L.J. 598=212 Ind. Cas. 352 (F.B.).

#### —S. 324—Right of self-defence—Burden is on accused.

Under S. 324, I.P.C., the burden is on the accused to show that they had a right of self-defence. A.I.R. 1943 Mad. 590=1943 M.W.N. 275=(1943)1 M.L.J. 352=56 L.W. 329=44 Cr. L.J. 783=208 Ind. Cas. 424.

#### —Ss. 324, 114—Private defence.

Where all that the accused were alleged to have done was that they ordered certain persons of their party to assault the complainant, and the order was given by them at the time when the complainant was trespassing into the land which is found to belong rightly to and in possession of the accused party and the accused never ordered such persons to cause grievous hurt to the complainant, the accused cannot be said to have exceeded the right of private defence of property and their convictions and sentences under S. 324 read with S. 114 cannot be maintained. A.I.R. 1943 Pat. 6=15 R.P. 213=23 P.L.T. 577=44 Cr. L.J. 172=9 B.R. 135=204 Ind. Cas. 271 (D.B.).

#### —Ss. 324, 149—Threat by only two of the accused.

Use of threatening words by two of accused that none of the persons should be left alive, held, did not show that rest of the accused shared homicidal intention with them—These accused alone held guilty of murder and rest of hurt. A.I.R. 1942 Mad. 446=55 L.W. 192=1942 M.W.N. 298=(1942)1 M.L.J. 460=43 Cr. L.J. 813=202 Ind. Cas. 311.



—Ss. 324, 325, 326—Conviction under ss. 324, 325 and 326—One sentence for all offences—Propriety.

Where the accused are convicted of offences under Ss. 324, 325 and 336, I.P.C., it is improper to give one sentence for all the offences but, if the cumulative sentence passed is such that it could be passed by the Magistrate in respect of any of the offences, there is no ground for interference in revision. A.I.R. 1942 Oudh 444=1942 O.W.N. 440=43 Cr. L.J. 781=1942 A.W.R. 286=201 Ind. Cas. 791.

—Ss. 324, 307—Applicability.

An accused stabbed the complainant with a knife and caused three injuries, (1) a stab wound  $3\frac{1}{4}'' \times 1\frac{1}{4}''$  and  $3\frac{1}{4}''$  deep on the left back in the middle. (2) A contusion mark  $2\frac{3}{4}'' \times 1\frac{1}{4}''$  on the right chest at its lower part. (3) A stab wound  $1\frac{1}{2}'' \times 1\frac{1}{2}''$  and  $1\frac{1}{4}''$  deep on the back on the left thigh in its middle. All these injuries were simple in nature :

Held, that the offence was under S. 324 and not under S. 307, I.P.C. A.I.R. 1942 Pesh. 21 (2)=43 Cr. L.J. 595=191 Ind. Cas. 799.

—S. 324—Student, if a mitigating circumstance.

The fact that the accused is a student is no mitigation of the offence of causing hurt with a *bhala*. A.I.R. 1941 Pat. 129=21 P.L.T. 970=7 B.R. 514=42 Cr. L.J. 361=193 Ind. Cas. 241.

—Ss. 324, 304, 302—Injury by accused on deceased's head not of nature to entail serious consequences in man of normal health—Deceased suffering from chronic malaria—Formation of abscess due to lowered vitality—Offence.

The injury inflicted by accused on the head of the deceased was not such as to entail serious consequences to a man in normal health. It had healed up at the end of seven days, but he had a temperature and on this account, the doctor advised him to remain in the hospital until the temperature had subsided. However, the deceased stated that he suffered from chronic malaria and that this fever was due to malaria, and he insisted on leaving the hospital. He was brought back to the hospital again. He was then partially paralyzed on the left side, and there was an abscess over the seat of the first injury which was healed. An operation was performed on the same day; the abscess was lanced and about eight ounces of pus were removed, but he became unconscious and died. Had the deceased stayed in hospital as advised, even if the abscess on the injury had formed, it would have been a simple matter to have cured it and no abscess on the brain would have formed at all and the deceased would have recovered. The deceased suffered from chronic malaria and this malaria lowered his power of resistance and helped the formation of pus when there was an open wound. Death was not due directly to the enlarged spleen or to the heart, but these contributed indirectly because they lowered the vitality and power of resistance of the deceased. Thus the immediate cause of his death was his debilitated condition for which the injury was in no way responsible :

Held, that the accused was guilty of causing simple hurt, with a weapon for cutting, punishable under S. 324, I.P.C.

Held further that the fact that a dangerous weapon was used was often and might be indeed generally, a matter to be taken into account in deciding questions of intention; but circumstances alter cases and, having regard to the medical evidence as to the wound itself

it was impossible to say that there was an intention to cause such injury as was likely to cause death. The offence could not, therefore, amount even to culpable homicide. A.I.R. 1941 Rang. 141=1941 Rang. L.R. 138=42 Cr. L.J. 591=194 Ind. Cas. 547.

—S. 324—Evidence of attack and persons attacking doubtful—Conviction even for hurt is not justified.

Where the fact of the evidence itself being of a doubtful character, was the determining reason which led the Sessions Judge to reduce the offence to one of hurt under S. 324, I.P.C. there is really no justification for this conviction in view of the unsatisfactory evidence relating to the attack on the deceased and in particular to the persons who took part in it. A.I.R. 1940 Mad. 43=1939 M.W.N. 879=50 L.W. 557=41 Cr. L.J. 337=186 Ind. Cas. 525.

—Ss. 324, 307—Attack by several accused—Benefit of doubt regarding weapons used—Conviction.

Where the only doubt arising from the prosecution evidence was as to the particular weapons used by particular accused, the accused cannot be acquitted altogether. The benefit of doubt on the question of possession of weapons only means that witnesses were not able to observe the details of attack with sufficient care or minuteness for them to be certain which accused caused which particular injury. In such a case all the accused will be held guilty of the lesser offence. 1937 M.W.N. 1331.

—S. 324—'Fracture', significance of—Cut on head with knife—Skin and membranes outside skull cut through—Knife touching skull-bone causing injury to surface but not cracking it—Held, offence fell under S. 324.

The primary meaning of the word "fracture" is "breaking," though it is not necessary in the case of a fracture of the skull bone that it be divided into two separate parts because it may consist merely of a crack which extends from the outer surface of the skull to the inner surface.

Where, therefore, on a cut on the head with a knife, the skin and membranes outside the skull bone were cut through and the knife then touched the skull bone and perhaps caused some injury to its surface but did not cut it through and did not crack it, though it may be that the knife cut through the substance of the skull-bone to a very small extent, there is nothing which even remotely suggests a fracture and the accused is guilty of offence under S. 324 I.P.C. A.I.R. 1937 Rang. 253=38 Cr. L.J. 960=170 Ind. Cas. 753.

—Ss. 324, 323, 302—Offence under S. 324—Nature of instrument—Blow with bamboo stick—Offence, if under S. 324.

To bring an offence under S. 324, I.P.C., the instrument must be one, not which is "liable," but which is "likely" to cause death; the instrument used must be one of which one can predicate that the probable result of its use will be, by virtue of its very nature, cause death. It must be inherent in the nature of the instrument used that death is likely to ensue. Where the injury results from a blow with a bamboo stick, the conviction should be altered to one under S. 323. A.I.R. 1937 Rang. 8=38 Cr. L.J. 299=166 Ind. Cas. 840.

—Ss. 324, 307—Alteration of conviction.

Where the accused was drunk when he inflicted injuries and had both given and received provocation,



the injuries were of trivial nature and he himself had received beating:

**Held**, that the conviction under S. 307 should be altered to one under S. 324, I.P.C. A.I.R. 1936 Lah. 914=17 L. 284=38 P.L.R. 630=38 Cr.L.J. 324=165 Ind. Cas. 909.

—Ss. 324, 302, 34—No allegation of specific act against the accused—Conviction, legality.

Charge against three accused under S. 302 read with S. 34—No specific act alleged in charge to have been done by first accused—Such accused cannot be convicted under S. 324 even though there was *prima facie* evidence against him of the commission of offence under that section. 1935 M.W.N. 360.

—Ss. 324, 148—Conviction under—Only one sentence should be passed. A.I.R. 1934 Lah. 614 (1)=35 P.L.R. 587=36 Cr.L.J. 294=153 Ind. Cas. 198 (1).

—Ss. 324, 325—Thrusting lathi into the anus of a man—Injury to rectum not cause of death—Offence.

The thrusting of a lathi into the anus of a man is causing grievous hurt which endangers life and when it is clear from the medical evidence that injury to rectum was not the cause of death but that it created a shock which contributed to the cause of death the offence committed is one under S. 324, I.P.C. and not one under S. 304. A.I.R. 1934 Oudh 87 (2)=11 O.W.N. 32=35 Cr. L.J. 467=147 Ind. Cas. 734.

—S. 324—Simple injury from a pistol shot—Nature of offence.

Where a quarrel took place over a disputed plot of land between the accused and an old lady, and the accused, a young man of 22, lost his head and in order to make an impression and to cause some injury to her, took out a pistol and fired it with the result that a simple injury was caused:

**Held**, that it would be safer to convict him of an offence under S. 324, I.P.C. A.I.R. 1933 Lah. 315=34 Cr.L.J. 1051=145 Ind. Cas. 702.

—S. 324—Applicability.

Accused aged 21 hitting turbaned head of old man—No intention to kill—Death due to brittle skull:

**Held**, that the offence fell under S. 324. 1931 M.W.N. 1152.

—S. 324—Applicability.

Death resulting from small provocation—Offence does not amount to murder but one under S. 324, I.P.C. 1931 M.W.N. 765.

—S. 324—Mutual injuries—Fight between factions—Accused proved to have inflicted injuries—Self-defence not disproved—Conviction for hurt—Sustainability.

Where two factions were engaged in rioting and the accused were proved to have inflicted certain blows on the other party and there was nothing to show that the injuries were not in self defence or justified by extreme provocation.

**Held**, that under those circumstances the conviction for hurt should be set aside. 1929 M.W.N. 583.

—S. 324—Offence under.

Where the injury caused is simple but is caused with a cutting weapon, it falls under S. 324 and not under S. 326. 1930 Cr.C. 1046=A.I.R. 1930 Lah. 950=129 Ind. Cas. 483.

—S. 325. Synopsis.

1. Abatement.
2. Grievous hurt—What is.
3. Injuries causing death.
4. Intention and knowledge.
5. Joint attack.

See also (1) S. 34, I.P.C. (2) S. 325, I.P.C. —INJURIES CAUSING DEATH.

6. Omission to specify.
7. Private defence.
8. Punishment and sentence.
9. Revision.
10. Miscellaneous.

—S. 325—Voluntarily causing grievous hurt—Onus  
—See ONUS. 8 C.W.N. 714.

### 1. Abatement.

—S. 325—Abatement.

A case under S. 325 can be proceeded with in spite of the death of the complainant. A.I.R. 1943 Pat. 379=9 C.L.T. 39=45 Cr.L.J. 331=10 B.R. 351=211 Ind. Cas. 200.

### 2. Grievous hurt—What is.

—S. 325—Grievous hurt—What is.

In order to frame a charge for grievous hurt under S. 325, there must be evidence to show not only that the assaulted person had remained under treatment in the hospital for more than 20 days but also that the injured person was in severe bodily pain for that period or was unable to carry on the ordinary avocations. A.I.R. 1931 Lah. 280=32 Cr.L.J. 1254=134 Ind. Cas. 829.

—S. 325—Grievous hurt—What is.

When a man has been struck on the head and a fracture is caused, to surround and beat him with lathis is to cause hurt which endangers life within S. 320. 104 Ind. Cas. 708=28 Cr.L.J. 868=A.I.R. 1928 Pat. 46.

### 3. Injuries causing death.

—Ss. 325, 302—Injuries causing death.

Thefts of jewels by cutting nostrils of the victim—Victim dying—Charge of murder, held must fail and that the accused must be convicted only under S. 325. 1944 M.W.N. 233=57 L.W. 211=I.L.R. (1945) Mad. 73=(1944) 1 M.L.J. 281.

—S. 325—Injuries causing death.

Number of persons inflicting lathi blows on deceased, some of which being fatal—Person who inflicted the fatal blow not known—Common intention to cause death, not proved:

**Held**, that it was impossible to hold that the convictions under S. 325 were incorrect. A.I.R. 1939 Oudh 207=1939 O.W.N. 576=40 Cr.L.J. 722=14 Luck. 660=182 Ind. Cas. 345.

—S. 325—Injuries causing death.

Where the intention of the accused was to give the deceased a beating with lathis, but one of them actually commits murder, others in reality abet an offence under S. 325, I.P.C., and are guilty under S. 325 read with S. 109 and though the act of murder committed by one of them was done with the aid of others



it cannot be said that it was a probable consequence of the abetment on their part.

A **lathi** is a lethal weapon and anyone who uses it on the head of another with such force as to fracture the skull must know that he is doing an act which, in all probability, must cause death and the offence is murder. A.I.R. 1938 Oudh 256=40 Cr. L.J. 14=1938 O.W.N. 1057=1938 A.W.R. 92 (2)=178 Ind. Cas. 162.

—S. 325—Injuries causing death.

Inflicting a kick on temple—Deceased found hanging on a tree and the medical report disclosing that death was due to that blow.

Held, that accused was guilty of hurt and not of grievous hurt. 1935 M.W.N. 1094.

—S. 325, 302—Injuries causing death—Intention of accused only to cause grievous hurt—Sudden impulse—Accused striking deceased with **dang** lying nearby—Offence.

Where the only inference possible from all the circumstances of the case was that the accused did not intend anything more than causing grievous hurt to the deceased under sudden impulse, when he found that another person had escaped due to the accused having been brought on one side by the deceased, and the accused struck him on the head by a **dang** lying nearby.

Held, that S. 325, I.P.C., applied and not S. 302. A.I.R. 1934 Lah. 335=35 Cr.L.J. 1348=36 P. L. R. 313=151 Ind. Cas. 390.

—S. 325—Injuries causing death.

When the accused knew he would be smashing his victim's skull by his blow, he must as well have known he was likely to cause the death of his victim. He ought, therefore, to be convicted for culpable homicide and not merely for grievous hurt. 32 Bom. L.R. 1143=129 Ind. Cas. 351=A.I.R. 1930 Bom. 483.

—S. 325—Injuries causing death—Accused in fit of temper losing self-control—Blow on head with **dang**—Death held not intentional.

The accused, who was chagrined because his melons were not purchased, went into a fit of temper and lost self-control. The **dang**, with which the blow on the uncovered head of the deceased came to be inflicted, was lying close at hand. The accused picked it up and at once dealt the blow which resulted in the fatal injury to the deceased.

Held, that there was no intention on the part of the accused to cause the death.

Held, further; that the case fell within the purview of S. 325 instead of S. 302. 1929 Cr. C. 639=A.I.R. 1929 Lah. 863.

—S. 325—Injuries causing death—Death due to multiple injuries each not fatal by itself—No inference of common intent to cause injury likely to cause death.

Three persons were accused of having injured a person and thus causing his death. The deceased died of shock from multiple injuries which included a fracture of five ribs. None of the injuries in itself was such as could be called a fatal injury. They were believed to have been caused by a blunt weapon like a **sota**.

Held, It was not possible to attribute any particular injury to any individual assailant. Nor could it be said

that any particular injury was the direct cause of death. The common intent of the assailants could not be held to have been to cause such injury as they knew was likely to result in death. The accused could not therefore be safely convicted of murder. They were guilty of grievous hurt. 114 Ind. Cas. 704=30 P.L.R. 171=30 Cr.L.J. 368=1929 Cr. C. 8=A.I.R. 1929 Lah. 456.

—S. 325—Injuries causing death.

The accused seven in number attacked the deceased with the intention of beating him. They did so after an exchange of words with the deceased, and caused two incised wounds of trivial character, and three contused wounds sufficient to stun the victim, who subsequently died. There was no medical evidence to prove that death was due to the injuries.

Held, that the accused were guilty under S. 325 read with S. 149, and not under S. 304. 118 Ind. Cas. 433=30 Cr.L.J. 917=A.I.R. 1929 Lah. 178.

—S. 325—Injuries causing death—Intention of causing death or injury likely to cause death absent—Liability.

Where the accused could not have known that they were inflicting such injury as would be likely to cause death and the intention of causing death or of causing such bodily injury as was likely to cause death was not even imputed to them and the injuries were not directly responsible for the death, but the death was only an indirect consequence of the wounds.

Held, that the accused cannot be convicted under S. 304, but the conviction should be under S. 325. 101 Ind. Cas. 177=2 Luck. 433=8 A.I. Cr. R. 46=4 O. W.N. 337=28 Cr. L.J. 401=A.I.R. 1928 Oudh 36.

—S. 325—Injuries causing death—Culpable homicide—More than one person aggressive—Common object to inflict grievous hurt presumed.

Where six persons, one of whom had an iron-shod lathi, came determined to take possession of a **taur** while the deceased was determined to resist them and the person having the iron-shod lathi inflicted the fatal injury on the head of the deceased and thus fractured his skull and killed him :

Held, that the members of the party were undoubtedly the aggressors and they certainly knew that grievous hurt was likely to be inflicted and came prepared in furtherance of their common object to inflict it.

Further, the man who inflicted the fatal injury when he aimed the blow he did, at the deceased's head, knew that there was a likelihood of his death, seeing that he had brought with him such a lathi. 9 L.L.J. 529 = A.I.R. 1927 Lah. 881.

—S. 325—Injuries causing death.

Where all the accused had been convicted under Ss. 304-149 and Ss. 325-149 not for any injury caused by them individually but on account of injuries caused by some members of the unlawful assembly of which they also were members:

Held, that a conviction under Ss. 325-149 was not legal in the face of the conviction under Ss. 304-149 as the major offence included the minor. 91 Ind. Cas. 804=7 L.L.J. 368=26 P.L.R. 648=27 Cr. L.J. 132 = A.I.R. 1925 Lah. 539.

—S. 325—Injuries causing death.

Where a joint attack was made by two men armed with **Jatrus** on another who died of the injuries received.



**Held :** that there can be no doubt that there was a common intention to cause grievous hurt or that at least they knew that it was likely that grievous hurt would be caused, and that the accused were guilty under S. 325, though in the absence of clear proof as to who caused the fatal injury, neither of them could be convicted under S. 304. 86 Ind. Cas. 341 = 7 L. L. J. 44 = 26 Cr. L. J. 757 = A.I.R. 1925 Lah. 318.

**—S. 325—Injuries causing death—Blow with stick on the head, in revenge for previous beating—Internal bleeding and death—Liability.**

The accused and the deceased were both young men of about 18 years. The deceased and a friend of his gave a beating to the accused. The next day the accused unexpectedly met the deceased, and forthwith formed the design of hitting him in return for the beating which he had received. Then he struck him a violent blow on the back of his head with a hockey stick which he was carrying and ran away. The deceased walked on for about 30 paces and sat down. He was taken home where half an hour later, he was unconscious. The blow caused internal bleeding and a clot of blood on the surface of the brain. This caused death.

**Held :** that the accused was not guilty of murder, but of an offence under S. 325 as it could not be said under the circumstances of the case that the accused knew that the blow was so imminently dangerous that it must in all probability cause death or that the bodily injury which he intended to cause was sufficient in the ordinary course of nature to cause death. 88 Ind. Cas. 286 = 26 Cr. L. J. 1118 = 7 L. L. J. 573 = 26 P. L. R. 430 = A.I.R. 1925 Lah. 559.

**—S. 325—Injuries causing death.**

Where five persons armed with dangerous weapons made an attack upon another and death was due to a single blow inflicted by one of them but who that one was, was not proved.

**Held :** they could not be convicted under S. 304 read with S. 34 but should be convicted under S. 325 read with S. 109 or rather S. 114, as they had armed themselves with dangerous weapons. 86 Ind. Cas. 337 = 6 L. L. J. 385 = 26 Cr. L. J. 753 = A.I.R. 1925 Lah. 117.

**—S. 325—Injuries causing death.**

Where the accused did not lift his lathi above his head, with both hands and bring it down on the head of the deceased but struck a swinging sideways blow and it was not proved that the accused intended to rupture the deceased's liver or even knew that he was likely to do so. **Held,** the offence committed was one under S. 325. 81 Ind. Cas. 869 = 11 O. L. J. 563 = 25 Cr. L. J. 1145 = A.I.R. 1925 Oudh 135.

**—S. 325—Injuries causing death—Attack by four persons with lathis—Blow by one fracturing skull and killing—Liability.**

Where the skull of the deceased was fractured as a result of a blow on the head in an attack upon one man by four persons who beat him with lathis, but there was no other grievous hurt and it was not known which of the accused struck the blow which fractured the skull and resulted in his death.

**Held :** the accused did not know that death was likely to be caused but they must have known that grievous hurt was likely to be caused, and that they committed therefore the offence of causing grievous hurt. 84 Ind. Cas. 861 = 6 L. L. J. 317 = 26 Cr. L. J. 381 = A.I.R. 1924 Lah. 654.

**—S. 325—Injury causing death—Causing death of child by accident while beating his mother—Conviction under S. 325 is proper.**

The appellant was beating one S with his fist when the wife of S with a two months' baby on her shoulder interfered. The appellant hit at the woman and the blow struck the child on the head; the baby died two days later from the effects of the blow.

**Held :** although the child was hit by accident the appellant's act was not covered by the exception of S. 80, that he was not guilty of culpable homicide under S. 301 as, while wanting to hit the woman with his fist the appellant never intended or knew to be likely to cause the death of the woman, and that it would be proper to record a conviction under S. 325. 74 Ind. Cas. 533 = 24 Cr. L. J. 789 = A.I.R. 1924 Oudh 228.

**—S. 325—Injuries causing death.**

Where the common intention was not to cause death, but to cause grievous hurt or where all the members of the unlawful assembly at least knew that grievous hurt was likely to be caused, the accused can only be convicted under S. 325 read with S. 149 and not under S. 302. 81 Ind. Cas. 179 = 25 Cr. L. J. 691 = A.I.R. 1923 Lah. 43.

**—S. 325—Injuries causing death—Blow with stick—Death—Offence.**

An accused who is proved to have struck the deceased with a lathi on the head and caused a fracture of the skull which resulted in death, is guilty under S. 325, I.P.C. 3 Pat. L. J. 636 = 20 Cr. L. J. 139 = 49 Ind. Cas. 171.

**4. Intention and knowledge.**

**—Ss. 325 and 322—Blow with a stick breaking arm—Not sufficient for conviction under S. 325 unless there was intention or knowledge that the act was likely to cause grievous hurt.** 1936 M.W.N. 522 (1).

**—S. 325—Intention and knowledge.**

A poor old sweeper went out towards the latter part of the night and was taking cowdung cakes belonging to the accused's master when the accused fell on him with a dang, beating him severely on the head and arms, whereby the arms were disabled completely. There was no evidence whatever that the accused had any intention of killing the sweeper, or that he knew that he was likely to kill him.

**Held,** that the accused could not be convicted under S. 308 but was guilty of an offence under S. 325. 102 Ind. Cas. 907 = 28 Cr. L. J. 619 = A.I.R. 1927 Lah. 801.

**—Ss. 325 and 323—Intention and knowledge—Grievous hurt, intention or knowledge essential for conviction—Imprisonment obligatory under S. 345.**

Before any one could be convicted of causing grievous hurt, it must be proved that there was an intention on his part to cause grievous hurt or at least knowledge that it would be caused. The imposition of the punishment of imprisonment on conviction for grievous hurt is obligatory. 15 Cr. L. J. 192 = 22 Ind. Cas. 768 (Mad.).

**5. Joint attack.**

**See also (1) S. 34, I.P.C. (2) S. 325, I.P.C. INJURIES CAUSING DEATH.**



—Ss. 325, and 34—Accused having common intention of beating deceased—Conviction for grievous hurt—Legality.

The question whether a number of persons who joined in the commission of an offence had a common intention or not is a question of fact and not one of law. Where all the accused had the common intention of giving the deceased a sound beating regardless of whether it resulted in causing only simple injuries or grievous hurt, they can be convicted under S. 325, I.P. Code. 50 Cr. L. J. 878=A.I.R. 1949 All. 582.

—Ss. 325 and 34—Joint attack—Conviction under—Legality—Absence of evidence to show which accused actually caused the grievous hurt.

A conviction under S. 325 read with S. 34, I.P. Code, could not be maintained where there is no evidence to indicate as to which of the accused actually caused the grievous hurt even though it could be inferred from their conduct that there should have been a prearranged plan to give a beating. 1948 A.W.R. (H.C.) 139=1948 A.L.W. 212=1948 O. A. (H.C.) 139=49 Cr. L.J. 595=A.I.R. 1949 All. 77=1948 A.L.J. 194.

—S. 325—Joint attack—Grievous hurt caused in the course of beating by several persons—Absence of evidence as to who actually caused the grievous hurt—Conviction for grievous hurt—Legality.

Though it may be presumed from the conduct of several persons striking another with lathis that each of them intended to cause grievous hurt, such a presumption is not sufficient to establish the offence of grievous hurt against an accused unless it be further shown that that accused actually caused grievous hurt. I.L.R. (1947) All. 684=1947 A.L.J. 208=1947 A. W. R. (H.C.) 271=1947 A.L.W. 358=48 Cr. L.J. 858=A.I.R. 1917 A. 408.

—S. 325—Joint attack—Simultaneous attack with lathis by accused on another—Intention to cause grievous hurt can be presumed against every one of them.

Where accused persons simultaneously attack another person with lathis, it can fairly be presumed against every one of them that he had at least the intention of causing grievous hurt and therefore each of them is guilty of an offence under S. 325, Penal Code. A.I.R. 1946 All. 153=1945 All. L. J. 531=1946 Oudh W.N. (H.C.) 38.

—Ss. 325, 304—Joint attack—Sudden fight between two parties—No undue advantage taken by any party and no intention to kill—U's rib fractured and fractured rib piercing his lung and causing death—Who gave blow causing fracture of rib not known—N accompanying accused A and H to thana to help them in making first information report—Offence.

The prosecution story was that one N was ploughing a field which did not belong to him and which was given by the owner on *batai* to U who was unable to obtain possession from N. U who was at work in his own field next door, passed some remarks about the way in which N was cultivating a field which did not really belong to him and as a result, N and his companions A and H left the field in dispute came into the field of U and attacked him and thereafter a fight took place between N, A and H on the one side and U and C on the other. In the course of the fight which lasted for some time a number of injuries were received by persons on both the sides. N however, had not a single injury on his person. U re-

ceived some injuries on the head but they were not serious and his death was caused by fracture of the ribs and sternum, one fractured rib unfortunately having pierced a lung and caused haemorrhage and death. There was evidence that N had gone with accused A and H to the *thana* to help them to make the first information report:

Held, that the evidence was not sufficient to establish N's participation in the fight and he was entitled to get benefit of doubt.

Held, also that the case was of a sudden fight in the heat of passion upon a sudden quarrel and that no undue advantage was taken. Since there was a quite long drawn out fight with passions considerably raised and yet without any intention to kill and it was impossible to say who gave the fatal blow which broke the rib which pierced the lung of the deceased and it was difficult to say that in inflicting any of the injuries found on the body of the deceased the accused were really saddled with the knowledge that, by so doing, they were likely to cause the death of U much less that there was an imminent danger of his death being caused, the accused A and H should properly be convicted under S. 325 and not under S. 304 as there clearly was a common intention to inflict hurt extending to grievous hurt upon U and C. A.I.R. 1942 All. 400=44 Cr. L.J. 110=1942 A.W.R. 259=203 Ind. Cas. 546.

—Ss. 325, 323—Joint attack—Which of two accused caused grievous hurt, not clear—Conviction.

Where it is not possible to say as to which of the two accused caused the grievous hurt, neither of them can be convicted under S. 325, I.P.C. but both can be convicted only under S. 323. A.I.R. 1940 Mad. 586=51 L.W. 590=1940 M.W.N. 538=41 Cr. L.J. 923=13 R.M. 412=190 I.C. 490.

—Ss. 325, 323—Accused causing grievous and simple hurts to same person on same occasion—He can be convicted and sentenced only under S. 325 and not also under S. 323 separately. A.I.R. 1940 Oudh 419=1940 O.W.N. 659=41 Cr.L.J. 775=1940 A.W.R. 307(2)=16 Luck. 51=189 Ind. Cas. 648.

—Ss. 325, 34—Joint attack.

Held, on facts that since the common intention of the accused was merely to give the deceased a sound beating, it must be held that the offence committed by them fell under S. 325 read with S. 34, and not under S. 302 read with S. 149. A.I.R. 1939 Oudh 254=1939 O.W.N. 662=40 Cr.L.J. 754=1939 A.W.R. 96=183 Ind. Cas. 265.

—Ss. 325, 34, 323—Joint attack—Common intention only to cause simple hurt—Grievous hurt caused by one person exceeding common intention—Others, if liable under S. 325.

Where the finding is the intention of the accused was only to cause simple hurt to the complainant and the common intention of all of them extended only to the causing of simple hurt to them, the fact that another who joined them exceeded that common intention by causing grievous hurt to a person to whom none of the accused caused any grievous hurt will not render the accused liable under S. 325, I.P.C. A. I. R. 1935 Oudh 178=35 Cr.L.J. 410=11 O.W.N. 86=147 Ind. Cas. 400.

—Ss. 325, 34—Joint attack—Accused armed with sticks with intention of beating.

Held, on facts that if the accused go armed with sticks with the intention of beating, the question whether



or not they are guilty of causing grievous hurt under S. 325 read with S. 34, I.P.C. is one deserving serious consideration. A.I.R. 1936 Nag. 87=37 Cr.L.J. 715 (2) =I.L.R. (1936) Nag. 54=162 Ind. Cas. 925.

—**Ss. 325, 34—Joint attack—Two persons attacking another—Absence of proof that one of them struck a blow.**

Where M, armed with an axe, accompanied K, armed with a spear and with him made a concerted attack upon D, and K was convicted under S. 304, part II, and M under S. 325:

**Held**, that the mere fact that no particular blow had been proved to have been struck by M would not absolve him from the charge under S. 325 on which he was tried.

**Held**, also that the omission of a charge under S. 34 against M was not material as he was not in any way misled in his defence. A.I.R. 1933 Lah. 313=34 Cr.L.J. 724=34 P.L.R. 699=144 Ind. Cas. 300.

—**S. 325—Joint attack.**

Two persons armed with lathis attacked a third person beat him to the ground, broke his thigh and ulna bone struck him at nine places and continued to strike him after he had fallen on the ground. But there was only one injury on the head.

**Held**, that taking the injuries as a whole the legitimate inference was that they did not intend to kill him. They are therefore guilty not under S. 307 but under S. 325. 100 Ind. Cas. 234=8 Lah. 521=28 P.L.R. 559=28 Cr.L.J. 266=A.I.R. 1927 Lah. 217.

—**S. 325—Joint attack.**

Where three men attack another with dangs and caused two separate grievous hurts.

**Held**, it can fairly be presumed that all intended to cause or knew that they were likely to cause grievous hurt. 85 Ind. Cas. 941=6 L.L.J. 268=25 Cr.L.J. 653 =A.I.R. 1924 Lah. 555.

—**S. 325—Joint attack.**

In the case of rioting resulting in grievous hurt convictions and separate sentences under S. 325 are legal where it is shown that the accused actually joined in the assault. Some of these assaults may have resulted in simple hurt, others in grievous hurt, but all the actual assailants are under S. 149, I. P. C. liable for all the results. 82 Ind. Cas. 473=3 Bur. L. J. 49=25 Cr. L. J. 1305=A. I. R. 1924 Rang. 291.

—**S. 325—Joint attack.**

If it is not shown which of the two appellants dealt the blow which caused grievous hurt, both the accused cannot be convicted of an offence under S. 325, unless they had a common intention of causing grievous hurt. 81 Ind. Cas. 48=25 Cr. L. J. 560=A. I. R. 1923 Lah. 35.

—**S. 325—Joint attack—Grievous hurt—Conviction of other accused—Intention.**

Where two persons were charged and convicted of an offence of causing grievous hurt, but hurt was caused by the blow inflicted by only one of them, the conviction of the other for grievous hurt is illegal without a finding that he participated with the other in the intention of causing grievous hurt. 7 Cr.L.R. 173 (Mad.).

#### 6. Omission to specify.

—**Ss. 325, 34—Accused convicted under S. 325 Penal Code—Court applying S. 34, Penal Code—**

**S. 34 not mentioned in charge sheet—No failure of justice—Defect, if cured by S. 535, Criminal P.C.**

Where the accused is convicted under S. 325 by application of S. 34, the absence of the specific mention of S. 34 in the charge sheet does not make the conviction and sentence under S. 325 invalid, if no failure of justice has been occasioned by this omission. The omission by the Magistrate to mention S. 34 in the charge sheet is cured by the operation of S. 535, Criminal P.C. A.I.R. 1934 Lah. 227=35 Cr.L.J. 1386 =151 Ind. Cas. 741 (2).

—**Ss. 325 and 326—Omission to specify—Robbery—Grievous hurt—Separate charge of common object—Cr. P. Code, S. 106.**

Accused were charged separately with having entered complainant's house and removed his earrings out of his ears. There was no specification of a common intention to inflict grievous injury and the conviction under S. 325 was bad, for which conviction under S. 323 must be substituted. An order under S. 106 of the Cr. P. Code is not illegal though there is technically no breach of the public peace by the accused. A person who enters on another's premises and uses violence to him and deprives him of his property commits a breach of the peace within the wider sense of expression. 19 Cr. L.J. 929=47 Ind. Cas. 445 (Mad.).

#### 7. Private Defence.

—**Ss. 325, 302 and 34—Private defence.**

Dispute between deceased and accused who were brothers, over rights to possess certain land—Land admittedly in possession of accused—Deceased attempting to plough land—Accused and his party arriving on spot—Sudden quarrel arising between parties and accused and his party inflicting injuries on deceased with sticks—Accused held to be guilty under S. 325/34 and not under S. 302—No right of private defence of person or property held to exist. A.I.R. 1938 Pesh. 18 =39 Cr. L.J. 627=174 Ind. Cas. 678.

—**Ss. 325, 105—Private defence—Right of private defence of property—Held, accused exceeded that right.**

Accused pursuing deceased who was running away with property—Held, accused acted in private defence of property but that in striking a fatal blow on the head of the deceased, the accused exceeded the right of private defence of property but in the circumstances, a sentence of six month' rigorous imprisonment was sufficient. A.I.R. 1936 Lah. 28=37 Cr. L.J. 428=161 Ind. Cas. 344.

—**Ss. 325 and 99—Private defence—Complainant's party in large numbers, aggressors—Right of private defence.**

The complainant's party trespassed on the lands of the accused in small numbers and were driven away. Then they returned to the land of the accused in larger numbers to enforce their supposed right of cutting grass and were again driven away by the party of the accused, and a number of men of the complainant's party suffered injuries:

**Held**, that the accused were acting in exercise of their right of private defence of property and that in view of the fact that the complainant's party came in large numbers as the aggressors and only one of them suffered grievous hurt and a number of others suffered only simple hurts, the accused could not be said to



have exceeded in their right of private defence. A.I.R. 1933 All. 896=1933 A.L.J. 1119=35 Cr. L.J. 236=56 A. 188=146 Ind. Cas. 914.

—S. 325—Private defence—Three against two—Private defence, plea of, not open to the former.

Where there were 3 persons on the side of the appellants and only two on the side of the deceased who received injuries, from whom was not clear and subsequently died no presumption can be made that the appellants were acting in private right of self-defence. They committed an offence under section 325 and not under section 304. 72 Ind. Cas. 611=25 Cr. L.J. 451=A.I.R. 1922 Lah. 394.

8. Punishment and Sentence.

—S. 325—Sentence of fine only—Legality.

The punishment provided for an offence under S. 325, I.P. Code, is a sentence of imprisonment extending up to seven years and a sentence of fine can only be in addition to such sentence of imprisonment and not in substitution thereof. Hence a sentence of fine only is contrary to law. I.L.R. (1949) A. 434=1948 O.W.N. 383=1948 A.L.W. 381=A.I.R. 1949 A. 213=3 A.I. Cr. D. 350=50 Cr. L.J. 322=1948 A.L.J. 469.

—S. 325—Scope—Sentence—Mere fine for offence under, is not legal.

Section 325, I.P.C. makes it clear that there must be a sentence of imprisonment, whether a fine is imposed or not.

Accused threw a stone at the face of the complainant with a force sufficient to cut his upper lip and knock out six teeth :

**Held**, that he must be presumed to have intended to cause such injury and that he should be convicted under S. 325 :

**Held**, also that a sentence of fine of Rs. 25 was not legal and sufficient for the offence. A.I.R. 1942 Mad. 550=(1942) 1. M.L.J. 595=1942 M.W.N. 377 (1)=55 L.W. 354 (1)=44 Cr. L.J. 65=203 Ind. Cas. 425.

—S. 325—Sentence.

When an officer in control of helpless prisoners beats and tortures them the severest sentence known to the law should be inflicted. In addition, an example must be made in order to show conclusively to others, who may be similarly inclined to ill-treat those in their custody that the Courts cannot tolerate such cruelties.

Since the torture had resulted in the death of some of the convicts, the accused was sentenced to seven years' rigorous imprisonment, the most severe sentence possible under S. 325, I.P.C. A.I.R. 1940 Lah. 210=I.L.R. (1940) Lah. 521=41 Cr. L.J. 639=188 Ind. Cas. 440.

—S. 325—Punishment and sentence.

In a case where an accused is convicted of an offence under S. 147 and also under S. 325 read with S. 149, it is not illegal to inflict on him separate sentences for the two offences. A.I.R. 1939 Oudh 91=1939 O.W.N. 27=40 Cr. L.J. 217=179 Ind. Cas. 461.

—S. 325—Sentence—Accused hitting deceased with lathi—Deceased not armed—No fighting proved—Sentence.

A sentence of rigorous imprisonment for a period of three years is not excessive for a man who has caused the death of another by hitting him with a than, and

is held guilty under S. 325, I.P.C., especially when the deceased was not armed and that there was nothing in the nature of a fight. A.I.R. 1937 All. 14=1936 A.L.J. 1310=38 Cr. L.J. 193=166 Ind. Cas. 369.

—S. 325—Sentence—Revision—Fine paid—Interference, if proper.

For an offence under S. 325, a sentence of fine only is not sufficient. But when such is the sentence and fine has been paid, the High Court will not interfere and pass sentence of imprisonment especially when more than five months have elapsed since the case was settled. A.I.R. 1937 Lah. 131=38 P.L.R. 229=38 Cr. L.J. 180 (1)=166 Ind. Cas. 343.

—S. 325—Punishment and sentence.

Fine alone is not one of the punishments that can be awarded for an offence under S. 325 and therefore whipping cannot be awarded in lieu of or in addition to fine alone. A.I.R. 1935 Rang. 219 (2)=13 R. 115=36 Cr. L.J. 1129=157 Ind. Cas. 244.

—S. 325—Punishment and sentence—Sudden and unpremeditated fight—Accused throwing stone at deceased without deliberation and causing death—Sentence.

Where, in a fight which is sudden and unpremeditated the accused throws a stone at the deceased and causes death, he is guilty under S. 325, I.P.C. But as he did not throw the stone deliberately, the sentence of seven years was reduced to four years. A.I.R. 1934 Lah. 111=35 P.L.R. 301=35 Cr. L.J. 1456=151 Ind. Cas. 968.

—Ss. 325 and 323—Punishment and sentence.

When there is only one beating conviction should not be under both S. 323 and S. 325 but only under S. 325 in view of S. 71. Illus. (a). 1933 M.W.N. 244.

—S. 325—Sentence.

It had been proved that the accused had broken the legs of the victim by beating him severely. There was no misdirection or non-direction by the Sessions Judge in his charge to the jury. The charge was a fair one and no point has been left out which, in view of the evidence, in the case, might have been legitimately urged in favour of the accused.

**Held**, that under the circumstances the sentence of 2 1/2 years rigorous imprisonment was not at all severe for an offence under S. 325 and the sentence was confirmed. 52 C.L.J. 425.

—S. 325—Sentence—Blows on head causing death—No uncertainty as to responsibility for offence—Sentence of five years' rigorous imprisonment held proper.

The accused had caused death by blows on head of the deceased with sticks. It had been proved that the accused were the assaulters and were aware of the result of their action. There was no uncertainty as to responsibility for the offence by which death was caused.

**Held**: that under the circumstances the sentence of five years, rigorous imprisonment was reasonable whether the offence be under S. 304 (2) or S. 325. A.I.R. 1930 Bom. 483=32 Bom. L.R. 1143=129 Ind. Cas. 351.

—S. 325—Sentence.

Accused who had dispute with his wife because she ran away to her father's house, beat her with a stick after her return as a result of which she died two day



later. He was convicted under S. 325 for causing grievous hurt to his wife and was sentenced to one year's rigorous imprisonment.

**Held:** that under the circumstances the sentence of one year's rigorous imprisonment was too short and should be enhanced to three years rigorous imprisonment. It was a brutal thing for a man to beat a woman with a heavy stick and hurt her on vital parts of her body causing such injuries that she died in two days. 54 Bom 822=32 Bom L.R. 1286=129 Ind. Cas. 159=A.I.R. 1930 Bom. 593 (2).

—S. 325—Punishment and sentence—Stone thrown from unknown distance—Conviction for simple hurt—Additional punishment for grievous hurt if necessary.

Where two or more persons are tried for simple hurt and for grievous hurt caused by a stone thrown from an unknown distance. **Held,** that even if a certain man was identified as the person who threw the stone no extra punishment was called for because the stone was not thrown at very close quarters.

**Semble.**—The throwing of a stone is not as serious an offence as the wielding of a lathi. 31 P.L.R. 1017=129 Ind. Cas. 223=1930 Cr. C. 1230=A.I.R. 1930 Lah. 1054.

—S. 325—Sentence—Severe beating—Death supervening owing to unforeseen internal troubles—Causing death if need be taken into account in passing sentence.

As soon as it is found that the offence does not amount to culpable homicide it is best to leave the death out of account and look only to the injury. Where the accused gave a man severe beating and they broke no bones and it appeared death supervened owing to some internal trouble which was unforeseen, **held,** that a sentence of three years rigorous imprisonment was sufficient. 123 Ind. Cas. 43=1930 M.W.N. 74=31 Cr. L.J. 477.

#### 9. Revision.

—S. 325—Revision—Conviction under—Sentence of fine only—Interference by High Court.

Where a Magistrate convicted certain persons under S. 325, I.P.C., but sentenced them to pay fines only :

**Held,** that although the sentence was irregular, the High Court would not interfere under their revisional powers which were intended for the redress of genuine grievances and not of mere formal defects. A.I.R. 1933 Pat. 179 (1)=14 P.L.T. 71=34 Cr. L.J. 407=142 Ind. Cas. 624.

#### 10. Miscellaneous.

—S. 325—Miscellaneous.

**Held,** on the facts (by Harrison and Addison, JJ. Dalip Singh J. dissenting) that as there was no evidence to show that the accused were the aggressors and as there was no free fight, the accused could not be convicted for injuries caused to the complainant's party. A.I.R. 1931 Lah. 513=32 Cr.L.J. 868=132 Ind. Cas. 381.

—S. 325—Miscellaneous.

Accused admitting grievous hurt in written statement given in defence of charge under dacoity—Acquittal for dacoity—Admission in written statement cannot be used to base conviction for grievous hurt. 110 Ind. Cas. 795=5 O.W.N. 601=11 A.I. Cr. R. 41=29 Cr. L.J. 763=A.I.R. 1928 Oudh 373.

—S. 325—Miscellaneous—Security order.

Breach of the peace implies offence against public—Offence of causing grievous hurt is not such an offence. 72 Ind. Cas. 955=24 Cr.L.J. 491=A.I.R. 1923 Oudh 37.

—S. 325—Miscellaneous—Offence compoundable—Complainant and accused willing to compromise—Effect of.

The refusal of a third party to compromise is no sufficient reason to refuse composition, if the complainant and the accused are willing to compromise. 17 O.C. 92=15 Cr.L.J. 567=24 Ind. Cas. 975.

Ss. 325-B, 353—Resistance to warrant of arrest—Warrant signed by Deputy Nazir not only authorised—Offence.

Where a warrant of arrest was signed by the Deputy Nazir, an officer who had not been empowered legally or given any lawful authority to sign warrants and the petitioners who had resisted the execution of the same were convicted under Ss. 325-B and 353, I.P.C.

**Held,** that the warrants were illegal and the petitioners were not guilty under S. 325-B, or S. 353, I.P.C. A.I.R. 1934 Mad. 206=39 L. W. 388=35 Cr. L.J. 782=66 M.L.J. 408=1934 M.W.N. 399=148 Ind. Cas. 818 (2).

—S. 326. Synopsis.

1. Applicability and scope.
2. Essentials of
3. Injury causing death.
4. Punishment and sentence.
5. Riot.
6. Unlawful assembly.
7. Miscellaneous.

#### 1. Applicability and scope.

—S. 326—Applicability—Nose cutting—Possibility of healing—If takes offence out of S. 236, I. P. Code.

Where in the case of a nose cutting the doctor's evidence is that it is likely to heal it cannot take it out of the mischief of S. 326, I. P. Code. 1949 A.M. L.J. 64=A.I.R. 1950 Ajmer 13 (1)=51 Cr.L.J. 799.

—S. 326—Applicability and scope.

Section 304-A must be read along with Ss. 336, 337 and 338. All the sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. Reading S. 321 with S. 322, it is obvious that the guilt, of an accused person remains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be, upon one person he actually causes the intended hurt to that person or to some other.

Where in using his spear against his assailants, the accused accidentally struck the deceased who had intervened to separate the fighting persons:

**Held,** that the accused was guilty under S. 326 and his conviction under S. 304-A was illegal. A.I.R. 1941 All. 288=1941 A. L. J. 326=42 Cr. L. J. 621=I.L.R. (1941) All. 441=194 Ind. Cas. 794.

—Ss. 326, 320 and 34—Applicability and scope—Held on facts that S. 34 cannot be applied so as to make two accused liable for assault committed by others.

While A was keeping watch over his master's **khesari** the four accused B, C, D and E went there and proceeded to cut the **khesari**. A remonstrated but seeing



**B** and **C** armed, ran away and was pursued and eventually overtaken at some little distance from the field by **B** who struck him with a **garasa** and by **C** who struck him twice with a **lathi**. **E** and **D** had also joined in the pursuit but took no part in the assault. Their intention was to scare away **A** so that they might continue to cut the **khesari** without further interruption:

**Held**, that in the circumstances, it was quite impossible to apply S. 34, Penal Code, and make either **D** or **E** constructively liable for the assault committed by **B** and **C**. A.I.R. 1942 Pat. 376=43 Cr.L.J. 511=8 B.R. 658=23 P.L.T. 633=200 Ind. Cas. 296.

—**Ss. 326, 307—Applicability and scope—Offence held fell under S. 326 and not under S. 307.**

The complainant was attacked by the accused owing to a sudden quarrel rather than as a result of any pre-concerted plan. The complainant had 17 injuries on his person, but they were not on vital parts and some of them were mere bruises:

**Held**, that the appropriate section applicable to the case was S. 326, Penal Code and not S. 307. A.I.R. 1941 Lah. 322=43 P.L.R. 436=43 Cr.L.J. 165=197 Ind. Cas. 413.

—**Ss. 326, 307—Applicability and scope—Fact that if sepsis and gangrene had intervened, it would have endangered life did not bring offence under S. 307.**

Only one stab was given, and there was nothing to show that the injury inflicted was likely in the ordinary course of nature to cause death. The medical evidence was only to the effect that if sepsis and gangrene had intervened, it would have endangered life, but this could be said of most injuries caused with sharp weapons:

**Held**, that the offence committed by the accused was one of causing grievous hurt by a dangerous weapon and not attempt to murder. A.I.R. 1939 Mad. 780=1939 M.W.N. 513=40 Cr.L.J. 922=(1940) 1 M.L.J. 747=51 L.W. 743=184 Ind. Cas. 336.

—**Ss. 326, 34—Applicability and scope—Trespassing into house for abduction—Causing grievous hurt to pursuer's while escaping—Offence.**

Where all the accused went together armed with deadly weapons with the object of abducting a woman from her husband's house and to use force if necessary for the purpose of attaining their object of abduction and of making their escape, and some of them, while escaping, caused grievous hurt to their pursuers:

**Held**, they were guilty of an offence under S. 326, read with S. 34, Penal Code. A.I.R. 1933 Sind 407=35 Cr.L.J. 357=27 S.L.R. 269=147 Ind. Cas. 264.

—**S. 326—Applicability and scope.**

Where the injury caused is simple but is caused with a cutting weapon, it falls under S. 324 and not under S. 326. 1930 Cr. G. 1046=129 Ind. Cas. 483= A.I.R. 1930 Lah. 950.

—**S. 326—Applicability and scope—Mutual infliction or injury on each other—No eye-witnesses—Conviction must be under S. 326 and not under S. 307.**

Where in the course of a fight the two accused inflicted upon each other injuries so serious that in both cases their dying deposition had to be taken, there were no eye-witnesses to the occurrence and evidence in each trial consisted of the evidence of the complainant, the

wounds on the complainant and the admission of the accused that he was himself wounded in the occurrence and where in separate trials each was convicted of an offence, under S. 307. of the Penal Code:

**Held**, as in case of either of the accused dying of the wounds, the other would have been entitled to the benefit of a reasonable doubt and to plead that the case came within exception 4 to S. 300, neither appellant could legally be convicted under S. 307.

**Held**, further that as under S. 105 of the Evidence Act the burden of proof of self-defence or provocation would have been in each case on the accused, neither of them could under the circumstances claim these defences and that S. 326, was the proper section for conviction. 84 Ind. Cas. 1049=2 Rang. 558=26 Cr. L.J. 409=A.I.R. 1925 Rang. 138.

## 2. Essentials of.

—**Ss. 326, 322—Essentials for conviction under S. 326—Accused, held could be convicted only under S. 323.**

An accused cannot be convicted under S. 326, Penal Code, unless the weapon used by him was deadly and the hurt intended or known to be likely to be caused was grievous. When the injury constituting grievous hurt caused by a stick is a simple fracture of the radius of the arm and there is no evidence as to the size of nature of the stick used, it cannot be said for certain that hurt intended or known to be likely to be caused was grievous. The conviction under S. 326, Penal Code, in such a case is, therefore, unsustainable and the accused can be convicted only under S. 323. A.I.R. 1939 Mad. 507=1939 M.W.N. 414=49 L.W. 553=(1939) 1 M.L.J. 886=40 Cr.L.J. 827 (1)=183 Ind. Cas. 602 (1).

—**S. 326—Grievous hurt—Essence of offence—Jury—Verdict of "guilty but not voluntarily", meaning of—S. 338, conviction under—Causing grievous hurt by rash and negligent act—Cr.P.C. Ss. 237, 238.**

To constitute an offence under S. 326 the act must have been done "voluntarily"—that is of the very essence of the offence. When an accused person was charged with committing offences under Ss. 304, 326 and tried before a Jury, and the latter found him not guilty under S. 304, but returned a verdict of "guilty but not voluntarily" under S. 326, and the Judge without asking the jury to explain the verdict discharged them and then convicted and sentenced the accused under S. 338:

**Held**, that the verdict on charge under S. 326 was in effect a verdict of "not guilty" and the accused was entitled to an acquittal. (1906) 12 C.W.N. 530.

## 3. Injury causing death.

—**S. 326—Injury causing death—Free fight—Some members armed with deadly weapons—Injuries caused resulting in death of one person—Offence is under S. 326.**

Where the death is the result of serious injuries caused in a free fight between both the parties, some of the members of which were armed with **chhavis** and **takwas**, the object of the assembly is merely to give a beating to their opponents and the offence committed is under S. 326. A.I.R. 1947 Lah. 106=223 Ind. Cas. 427=47 Cr. L.J. 391 (Lah.) (D.B.)

—**Ss. 326, 323, 324, 109, 302—Injury causing death—Attack not premeditated—Accused not**



**armed—Only scuffle between deceased and accused—One of accused suddenly giving knife blow—Offence.**

There was no previous premeditation about the matter. The party did not go to the attack armed in any way. They had gone to rescue the cattle from the deceased who was taking them to the pound. The attack was only a scuffle between the rescuers and the deceased, except that one of the rescuers suddenly inflicted a blow with his knife on the deceased which proved fatal :

**Held**, that the accused other than the one who inflicted a knife blow were not guilty of offence more than that under S. 323, Penal Code. It did not appear that at any stage before the incident happened, they were aware that there was any likelihood of the deceased receiving any stab wound. Their conviction under S. 324, 109 could not be sustained.

**Held**, further that as regards the accused who inflicted the fatal blow, there was a reasonable doubt that any of the intentions or requisite knowledge necessary to support a charge of murder under S. 302 of the Code were present. It was clear that grievous hurt endangering life was caused to the deceased and there could be no doubt that the accused voluntarily caused hurt to him and intended or knew himself likely to cause hurt endangering life. It could, therefore, be safely said in the circumstances that he was clearly guilty of an offence under S. 326, Penal Code, while there was room for doubt as regards the charge under S. 302 of the Code. A.I.R. 1942 Cal. 426(2)=43 Cr. L.J. 455=199 Ind. Cas. 55.

—Ss. 326, 148, 149—Injury causing death.

Party of accused and complainants assembled to celebrate wedding—One of complainants' party refusing to allow accused's party to join in *hukka*—Two of accused's party going out and coming back with other accused armed with *dahgs* and *chavis*—Complainant's party unarmed—Complainants' party ready to fight not waiting to be attacked but going out to meet accused—Free fight ensuing—One of complainants' party receiving fatal injury and dying—Accused held guilty under Ss. 326 and 148 read with S. 149. A.I.R. 1942 Lah. 40=43 P.L.R. 729=43 Cr.L.J. 443=198 Ind. Cas. 832.

—Ss. 326, 323, 304, 302—Injury causing death.

The accused struck her daughter with a very heavy piece of wood whereupon she fell down and never stirred and everybody took her to be dead. She was then hung to a beam so as to make it appear that she had committed suicide:

**Held**, that the accused committed at least an offence under S. 304. Even if the offence might have been of a minor nature punishable under S. 323 and the girl might have died subsequently after she had been hung to a beam, the accused was still guilty of an offence under S. 326, Penal Code. A.I.R. 1942 Mad. 415(2)=(1942) 1 M.L.J. 224=55 L.W. 71=1942 M.W.N. 169=43 Cr. L.J. 671=201 Ind. Cas. 444.

—S. 326—Injury causing death.

Accused beating deceased with sticks and stones—Death in about two hours—Offence is culpable homicide and not grievous hurt.

But where the Public Prosecutor in the trial Court conceded that it was only a case under S. 326 and the accused were convicted accordingly and they appealed the appellate Court should order the whole case for retrial. 1936 M.W.N. 648.

F. Y. D. 12—21.

—Ss. 326, 326—109, 201, 88, 92—Injury causing death—Devil-dancers attempting to cure a woman by branding her—Death due to injuries—Woman's husband burying her due to panic—Offence—Sentence.

The accused were hillmen and three of them were devil-dancers who attempted at C's request or at any rate with his consent, to dispossess C's wife of a devil by applying a hot ladle (*Karchhuli*) to her mouth and throat and to various parts of her body, with the result that she died. C subsequently became frightened and buried the body of his wife, and for this reason he was convicted under S. 201, Penal Code, as well as of abetting the other offence.

**Held**, that S. 326 and S. 304-A, Penal Code, applied, that the hurt was grievous because it endangered life, and it was caused voluntarily because the appellants must be held to have known that they were likely to cause hurt which endangered life that Ss. 88 and 92 did not apply as the woman did not give her consent to this abominable treatment and that the view that as the devil was in possession of her she could not signify consent, could not be taken by the Court.

**Held**, also that as their ultimate motive was to cure the woman and that however barbarous their methods were, they were certainly acting in good faith but it would be extremely dangerous in any way to countenance a crime of such a heinous nature on the ground that it was only believed to be the means to an end which is worthy of praise.

**Held further** that it was possible to reduce the sentence of C under S. 201 on the ground that his action was due to panic rather than a deliberate attempt to shield his confederates from punishment. A.I.R. 1935 All. 282=36 Cr. L.J. 346=1935 A.W.R. 57=153 Ind. Cas. 425.

—S. 326—Injuries causing death.

A person who voluntarily inflicts injury such as to endanger life must always, except in the most exceptional and extraordinary circumstances be taken to know that he is likely to cause death. 32 Bom. L.R. 1143=129 Ind. Cas. 351=A.I.R. 1930 Bom. 483.

—S. 326—Injury causing death—Joint attack—Blow with spear on fleshy part of body is not necessarily fatal and offence does not fall under S. 302 but under S. 326.

A, B, C, D assembled together, three of them armed with spears with the intention of attacking another party of men. A gave only one blow with a spear on fleshy part of the body of one of his opponents.

**Held**: that such injury was not necessarily fatal and A could not be convicted under S. 302 and his case fell within the purview of S. 326, but as there had been a loss of life in the fight, a severe sentence was called for, A's companions having been acting in furtherance of a common intention were also guilty under S. 326 read with S. 34, 129 Ind. Cas. 483=1930 Cr. C. 1046=A.I.R. 1930 Lah. 950.

—S. 326—Injury causing death.

Where the accused struck two lathi blows, one severe and the other slight, on the head of the deceased, which caused death, conviction under S. 326 is safer than under S. 304 (2). 115 Ind. Cas. 66=30 Cr. L.J. 378=A.I.R. 1929 Lah. 37.

—S. 326—Injury causing death—Firing while drunk

The accused, when he was fully drunk, fired at the deceased and caused a wound on the upper portion of



his thigh with a shot which was fired at point blank range. The injury was not fatal and was not such as in the ordinary course of nature would cause death. After nearly two months the injured person died, the wound having become septic and dysentery having supervened a few days before his death.

**Held**, that neither S. 300 (3) nor (4) applied to the case, and the accused was not guilty of murder he was not also guilty under S. 304. But he was guilty under S. 326 and as the shot was fired at point blank range on the upper portion of the thigh maximum sentence should be passed. 120 Ind. Cas. 183=11 L.L.J. 44=31 Cr. L.J. 44=1929 Cr. C. 4=A.I.R. 1929 Lah. 433.

—S. 326—Injury causing death—Private defence—Fight over bund—Rival parties—One party seeking to cut down bund—Fight—Death of one—Liability—Plea of private defence.

People of the village S having assembled proceeded to cut the bund. People of village K, resisted but were turned back. Meanwhile a large crowd collected on both sides armed with lathis, spears and garases. People of K seeing that the people of S were not likely to listen to their remonstrances, proceeded in a body to prevent them from cutting the bund and to drive them away. A free fight ensued; one man from village S received mortal injuries and died on his way to the hospital. The Sessions Judge convicted the accused, who were residents of K under S. 302 read with Ss. 147, 148 and 149, I.P.C.

**Held**, that the people of S. had no right to cut the bund under the circumstances mentioned and when they actually proceeded to destroy it the people of K had certainly a right to prevent them from doing so.

**Held**, further that the people of K had erected a bund in their own village and at the time of the occurrence they were in possession of the bund and there had been no lawful order passed by any competent Court directing them or authorising people of K to remove the bund. This being so, it was not unlawful on the part of the appellant to prevent the people of S. from forcibly cutting the bund, and that consequently their convictions under Ss. 147, 148 and 149, could not be sustained.

**Held**, also that under the circumstances of the case and keeping in view the fact that mortal injuries were caused to the deceased in a free fight and in the exercise of the right of private defence of person and property, the conviction of the accused-appellants under S. 302 could not be sustained, especially when the deceased had received injuries from several other assailants. The conviction was therefore altered to one under S. 326, and the sentence of transportation for life passed was reduced to one of three years' rigorous imprisonment. 1929 Cr. C. 283=A.I.R. 1929 Pat. 523.

—S. 326—Injury causing death—Joint assault with deadly weapons—Common intention is presumed.

There was a quarrel over a turn of water in which several persons arrived with Chhavis and assaulted A who died of the injuries caused to him. It was not certain as to who inflicted the fatal blow. All the accused were convicted under S. 326 with S. 34 and inflicted equal punishment.

**Held**, that considering the nature of the assault and the nature of the weapons, it cannot be said with regard to any one of them that he did not mean to cause serious injuries and S. 34, makes them equally responsible in such cases and each one of them was rightly given the same sentence. 72 Ind. Cas. 513=24 Cr. L.J. 401=A.I.R. 1924 Lah. 216.

—S. 326—Injury causing death—Provocation—Hurt with a penknife on provocation—Offence of grievous hurt.

The accused had been married to a girl and the ceremony of *taldie parchat* was to take place on the day of the occurrence. On that day accused found the deceased taking the girl away from the village where the ceremony was to take place and when he remonstrated with her she told him that the girl would not be married to him that day and abused him. The accused thereupon attacked both the girl and the deceased with penknife and inflicted one injury on each in the abdomen. The girl however survived.

**Held**, that the accused acted without premeditation, used only a penknife and gave each woman only one injury and therefore there is a very wrong presumption that he neither intended to cause death nor such bodily injury as he knew to be likely to cause death and that the provocation given to him by the deceased was sufficiently grave and sudden to bring him within the first exception in section 300. **Held**, further that when the accused wounded the women in the abdomen with a penknife he certainly intended to cause them grievous hurt. 73 Ind. Cas. 695=24 Cr. L.J. 663=A.I.R. 1924 Lah. 234.

—S. 326—Injury causing death—Boyish quarrel.

In a case where as a result merely of a boyish quarrel just a short time before, the accused stabbed the deceased with a penknife four inches in length there can be no conviction for murder or culpable homicide not amounting to murder where the *corpus delicti* is not established. The offence of which the accused is guilty is voluntarily causing grievous hurt by an instrument used for cutting. 63 Ind. Cas. 450=3 L.L.J. 581=22 Cr. L.J. 658=A.I.R. 1922 Lah. 26.

—S. 326—Injury causing death—Every person presumed to intend natural consequence of his acts—Dealing blows with lathis—Intention to cause grievous hurt presumed.

Every sane person of the age of discretion is presumed to intend the natural and probable consequences, of his own acts. Every actual consequence is a natural and probable consequence unless and until the contrary is affirmatively shown. Where a number of accused dealt blows with lathis with the result that the assailed person died of it:

**Held**, that having regard to the nature of the weapons used it can be reasonably inferred that they intended to cause grievous hurt punishable under S. 326, of the Code. 66 Ind. Cas. 665=23 Cr. L.J. 313=A.I.R. 1922 Nag. 141.

#### 4. Punishment and sentence.

—S. 326—Punishment and sentence—Permanent disfiguration—Cut on the nose by razor or knife—Opinion of the doctor—Value—Sentence.

A cut on the bridge of the nose causing a cut 1 inch into 1/2 an inch into 1/2 an inch must be held to cause permanent disfiguration though the doctor who examined the cut might have mentioned that it may not be so.

A sentence of 6 months' rigorous imprisonment cannot be said to be excessive in respect of such an offence which is a serious one and should ordinarily be committed to the Sessions. A.I.R. 1950 Ajmer 13 (1)=51 Cr. L.J. 799=1949 A. M.L.J. 64.

—S. 326—Punishment and sentence.

A punishment for an offence under S. 326, I.P.Code, should be severe when injuries inflicted are caused out



of vindictiveness. A.I.R. 1944 Sind 186=I.L.R. (1944) Kar. 103=45 Cr. L.J. 764=215 Ind. Cas. 55.

—**S. 326—Punishment and sentence—One month's rigorous imprisonment, held sufficient.**

The accused had real provocation and all that he did was to take the weapon nearest to him and throw it at the complainant. It was an act done in annoyance when he received an injury which he thought was due to an act of the complainant:

**Held**, that in the circumstances, a sentence of one month's rigorous imprisonment was more than enough. A.I.R. 1943 Mad. 681=56 L.W. 436=(1943) 2 M.L.J. 176=1943 M.W.N. 585=45 Cr. L.J. 143=209 Ind. Cas. 303.

—**S. 326—Punishment and sentence—Accused cutting wife's nose without serious provocation.**

An act of nose-cutting is one which imports deliberate design of a particularly brutal and cruel character.

The accused cut off the nose of his wife. There was neither a ground for suspicion of wife's misconduct nor was there any evidence to suggest that there was anything amounting to serious provocation. The accused was sentenced to nine months rigorous imprisonment:

**Held**, that the sentence was inadequate and should be enhanced. (it was enhanced to one of two years). A.I.R. 1938 Bom. 430=40 Bom. L.R. 832=39 Cr. L.J. 928=177 Ind. Cas. 647.

—**S. 326—Punishment and sentence—Injury with sharp crowbar on head.**

Where the accused plunges into the head of his concubine a sharp crowbar 3" near the left ear, a sentence of 3 years rigorous imprisonment is insufficient to meet the ends of justice and may properly be enhanced to 7 years imprisonment. 1937 M.W.N. 886.

—**S. 326—Proper sentence.**

For an offence under S. 326, Penal Code, a sentence of mere fine is not premissible. 1937 M.W.N. 575.

—**Ss. 326, 307—Punishment and sentence.**

Where a person fired his gun at another and tried to shoot him, but in so doing, his gun went off and the person aimed at was grievously wounded and the accused was convicted both of attempted murder and grievous hurt:

**Held**, that conviction was not improper as there was nothing incongruous between S. 307 and S. 326, but punishment should be one. A.I.R. 1937 Sind 61=30 S.L.R. 238=38 Cr. L.J. 487=167 Ind. Cas. 943.

—**S. 326—Punishment and sentence.**

A person who commits an offence under S. 326, may be punished with whipping in addition to any other punishment to which he may be liable. He may, therefore, be sentenced to a term of imprisonment not exceeding 7 years and in addition to a sentence of whipping, in view of S. 32 (2), Criminal P.C. and S. 3 of Burma Act. (VIII of 1927.) A.I.R. 1937 Rang. 183=14 Rang. 662=38 Cr. L.J. 670=168 Ind. Cas. 975.

—**S. 326—Sentence.**

Person trying to overawe witness of other side—Witness refusing—Assault on him—Case is to be considered serious and compromise should not be permitted and case dropped on mere admonition. A.I.R. 1936 Pat. 175=2 B.R. 392=37 Cr. L.J. 502=17 P.L.T. 327=161 Ind. Cas. 932.

—**Ss. 326, 34 and 302—Punishment and sentence.**

Common intention to inflict grievous hurt—Blow on head given with *chhavi* by one accused causing death—Accused, aged 62 and 60 years—Accused, held guilty under S. 326/34 and 5 years rigorous imprisonment, held sufficient. A.I.R. 1935 Lah. 97.

—**S. 326—Punishment and sentence—Sudden quarrel.**

The fact that the quarrel which ends in the deceased getting a fatal hurt, was a sudden one, arising in a heat of passion, is a mitigating circumstance in favour of the accused and the sentence should be reduced. 30 P.L.R. 582=A.I.R. 1930 Lah. 311.

—**S. 326—Punishment and sentence—Nose cutting—Punishment should not be lenient.**

A Sessions Judge who while upholding the conviction of a person for cutting the nose of his wife reduced the sentence of the Magistrate.

**Held**, that the nose-cutting is an offence for which leniency is out of place. 39 P.W.R. 1915 (Cr.)=20 P.R. 1915 (Cr.)=16 Cr. L.J. 782=31 Ind. Cas. 382.

—**S. 326—Punishment and sentence—Seperate conviction and sentence for grievous hurt and rioting, when illegal—Penal Code, Ss. 147, 149, 326.**

It is illegal to pass and grievous hurt upon persons who are not proved to have individuality committed any acts to cause such grievous hurt or guilty of that offence under S. 149, I.P.C. 16 C. 144, foll. (1903) 8 C.W.N. 344.

**5. Riot.**

—**S. 326—Riot—Riot between bus drivers—Use of motor tools—Both sides receiving injuries.**

Where there is a general riot in which a number of bus drivers and their sparemen take part, and in the course of this riot both sides receive injuries from various weapons which are in most cases motor car tools, it is impossible to say that any particular person is responsible for any particular injury to any other person. A.I.R. 1935 Rang. 436=37 Cr.L.J. 189=159 Ind. Cas. 967.

**6. Unlawful assembly.**

—**Ss. 326, 149—Unlawful assembly—Conviction under Ss. 326, 149, when can be had.**

It is not safe to record a conviction under Ss. 326, 149, Penal Code, where it is not possible to say that the act was done in the prosecution of the common object of the unlawful assembly having the common object of driving away the Hindus. Such members of the assembly as are found to be participating in it are guilty under S. 147. 202 Ind. Cas. 579=43 Cr. L.J. 871=9 B.R. 19.

—**Ss. 326, 149—Unlawful assembly.**

Even though it is not known which accused constituting an unlawful assembly with the common object to cause grievous hurt caused the specific injuries, they can all be found guilty under S. 326, Penal Code, by virtue of the provisions of S. 149, Penal Code. A.I.R. 1942 Mad. 420=1942 M.W.N. 294=(1942) 1 M.L.J. 498=43 Cr.L.J. 745=55 L.W. 856=201 Ind. Cas. 442.

—**Ss. 326, 34—Unlawful assembly—Common object to beat complainant—One accused causing grievous hurt.**



**Held**, that all the accused forming an unlawful assembly were liable to be convicted of the offence under S. 326 and S. 147, Penal Code. A.I.R. 1942 Oudh 444=1942 O.W.N. 440=43 Cr.L.J. 781=1942 A.W.R. 286=201 Ind. Cas. 791.

—Ss. 326, 149—Unlawful assembly—Common object of number of accused to cause hurt—One accused causing grievous hurt with dangerous weapon—Liability of others.

Where the common object of a number of accused was not merely to beat but also to cause hurt; and if in the prosecution of that common object to cause hurt to a certain person, one of them happens to cause grievous hurt and that too with a dangerous weapon, the others would certainly be liable for the grievous hurt so caused by reason of S. 149, Penal Code. A.I.R. 1940 Mad. 298=51 L.W. 484=1940 M.W.N. 242=(1940) 1 M.L.J. 775=41 Cr.L.J. 898=190 Ind. Cas. 313.

—S. 326—Unlawful assembly.

The accused who was charged under Ss. 147, 149, 307 and 148, can be convicted under S. 326 though not charged under that section if unlawful assembly is not proved. A.I.R. 1935 Sind 34=28 S.L.R. 304=36 Cr.L.J. 598=154 Ind. Cas. 915.

#### 7. Miscellaneous.

—Ss. 326, 302—Miscellaneous.

Cross-cases tried by First Class Magistrate under Ss. 326 and 302, Penal Code, close connection between—Commitment of case under S. 326—Commitment, held not proper as the Magistrate was competent to try it and punish adequately or at any rate the case was triable by him exercising enhanced powers under S. 30, Criminal P.C. A.I.R. 1932 Lah. 168=33 Cr.L.J. 255=32 P.L.R. 856=136 Ind. Cas. 272.

—S. 326—Miscellaneous—Charge and conviction.

When a charge has been framed under Ss. 326 and 149, I.P. Code, conviction under S. 326, I.P. Code, is not necessarily bad, the legality of the conviction depending on whether the accused has or has not been materially prejudiced by the form of the charge. 82 Ind. Cas. 465=25 Cr. L. J. 1297=47 Mad. 746=20 M.L.W. 261=35 M.L.T. 21=A.I.R. 1925 Mad. 1=47 M.L.J. 221 (F.B.).

—S. 328—Administration of arsenic through a girl.

The accused was charged under S. 328 for causing arsenic to be mixed in food of X through a girl of 13 years with an intention to injure X, and was convicted on the testimony of the girl, who, according to prosecution was innocent agents but the accused was acquitted on the ground that the girl was an accomplice.

**Held**, that the view that the girl was an accomplice could not be accepted and hence the acquittal was not proper. A.I.R. 1941 Mad. 832 (1)=1941 M. W. N. 790.

—Ss. 328, 307, 511—Administering poison.

Where the accused who was a youth, administered poison to his brother through food of which his brother's son and daughter also partook, and he was charged under S. 307, but the evidence showed that he was acting under the instigation of a person who had absconded and that owing to the ready help by neighbours, none of the three succumbed, and there was, in the opinion of the High Court, probability for the

accused to become a fit member of the society after discipline, the High Court convicted the accused under S. 328 instead of S. 307, Penal Code. A.I.R. 1931 Pat. 346=32 Cr. L.J. 1228=134 Ind. Cas. 639 (S.B.).

—S. 328—Applicability—Attempt frustrated.

Where the accused gave arsenic poison intending to cause death but through some cause or other the persons to whom he administered the arsenic recovered.

**Held**, that he is guilty of attempt to murder under S. 307, or at least under S. 328. 20 All. 143, Foll. 60 Ind. Cas. 50=3 L.L.J. 191=22 Cr. L.J. 194=A. I. R. 1921 Lah. 108.

—S. 328—Dhatara poison—Ss. 328, 302.

Accused administering dhatara with food to three persons—All of them found lying in open next day—Two of them recovering from poisoning but one dying after a week after developing pneumonia—Death, held not due to poisoning—Offence, held fell, not under S. 302 but under S. 328. A.I.R. 1942 Mad. 100=(1941) M.L.J. 661=1941 M.W.N. 1038=43 Cr.L.J. 320=198 Ind. Cas. 225.

—S. 328—Dhatara poison—Administering Dhatara to cause a girl to fall in love with accused is an offence where delirium was accused.

The accused a boy of about 16 years of age became infatuated with a girl Mt. Chando and began to make advances to her and did various tricks to make her inclined towards him. Ultimately he persuaded Kanhaiya, a boy about 12 years of age to take five Peras one of which contained dhatara in order that they might be given to Mt. Chando and other members of her family. Kanhaiya did distribute these peras to various people, including Mt. Chando. All the persons who took these peras showed symptoms of poisoning, and Mt. Chando was in a state of delirium.

**Held**, that the intention to persuade Mt. Chando by some mysterious means or other to fall in love with him, cannot be said to an intention to commit or facilitate the commission of any offence. But dhatara is a very common drug, and it is well known that it is poisonous and a person of the age of the accused must be presumed to know that such a drug is poisonous.

**Held**, further, that if a person by the administration of dhatara is thrown into a delirium, with the possible risk of falling into coma and becoming unconscious for the time being, both bodily pain and infirmity are caused and therefore the accused was guilty under S. 328. 84 Ind. Cas. 1053=46 All. 77=21 A. L. J. 844=4 L.R.A. (Cr.) 229=26 Cr.L.J. 413=A. I. R. 1924 All. 215.

—S. 328—Evidence—Sufficiency of.

One Bhagwana was found by the Police on duty wandering about in a peculiar condition. He was recently with Chajju Chunna and Ram Gopal his companion. Of these the first two were from Bhagwan's village and the third was a stranger who joined them during their travel to Jaharzarah. The police were informed of two neolis or money bags placed beneath the bedding on which Bhagwana had been seen sitting when his companions went to sleep, one containing Rs. 190 was missing. They were searched and Rs. 209 were found on Ram Gopal. Bhagwana was sent to the dispensary and exhibited symptoms of dhatara poisoning. The Sub-Assistant Surgeon gave him purgative and the resultant tools were found to contain dhatara. Chajju and Chunna in their depositions said the some laddus were offered to them and to Bhagwan by Ram



Gopal and after these they ate pans brought by Ram Gopal at a shop. The pans had an intoxicating effect. Some of the laddus and mathris were found on the person of Ram Gopal but they were reported to have shown no traces of *dhatura*. There was nothing wrong with Chunna and Chajju. Ram Gopal was sent up for trial and was convicted of an offence under S. 328, Penal Code, and sentenced to five years rigorous imprisonment, held, that the circumstantial evidence is not sufficient to testify the conviction. 77 Ind. Cas. 981=25 Cr.L.J. 517=A.I.R. 1923 Lah. 687.

—S. 328—Intent necessary.

To convict under S. 328 there must be not merely an administration of a drug but the intention specified in the section. 15 Cr. L. J. 599=25 Ind. Cas. 351 (Mad.).

—S. 328—Intention to hurt, etc.—Absence of—Effect of S. 338—Poison, administering of.

The accused administered arsenic to the deceased, her lover, in sweetmeat balls given to him to eat, in the belief that it was a charm which would revive his love for her; but she did not know that the substance was a deadly poison.

**Held**, acquitting the accused, that to support a conviction against her under S. 328, it must be shown that the poison was administered with intent to cause hurt, or to commit or facilitate the commission of an offence, or knowing it to be likely that she would thereby cause hurt. (1902) 4 Bom. L.R. 425. **But see** 6 A.L.J. 203=31 A. 290.

—S. 329—Theft of grass—Dispute as to ownership of land—Conviction.

A conviction for theft of grass cannot stand where there is dispute as to the ownership of land in which case the matter should be decided by a Civil Court. 40 P. W.R. 1913 (Cr.)=335 P.L.R. 1913=14 Cr. L.J. 659=21 Ind. Cas. 899.

—S. 330—Applicability—Torture applied to suspects to extort information at the orders of Police Officers, when suspects are in their custody—Offence.

Where the corporeal violence is applied by others to the suspects under the orders of the Circle Inspector with the full concurrence of the Sub-Inspector, in their very presence, the Sub-Inspector is in point of law as much responsible for the violence as the Circle Inspector since as a Police Officer, he is under a legal duty to prevent the infliction of torture on those who are in their custody, and his failure to discharge that duty makes him a party to the crime. A Policeman who stands by, acquiescing in an assault on a prisoner committed by another Policeman for the purpose of extorting confession or information leading to the detection of the crime is guilty of the offence punishable under S. 330, Penal Code. The maxim "Respondent Superior" has no application in such a case. A.I.R. 1940 Nag. 186=I.L.R. (1940) Nag. 232=41 Cr. L.J. 757=1940 N.L.J. 667=189 Ind. Cas. 591.

—S. 331—Applicability.

Extorting a promise from complainant to restore the woman that he was alleged to have abducted does not fall within the purview of the section. 73 Ind. Cas. 272=5 L.L.J. 375=24 Cr. L.J. 576=A.I.R. 1924 Lah. 167.

—S. 330—Offence under—Punishment—

The law clearly draws a very great distinction between simple hurt caused in the ordinary way and simple

hurt caused for the purpose of extorting a confession or making an accused person recover any property. The conduct of causing hurt under S. 330, Penal Code, by a responsible Police Officer engaged in the investigation of a crime is one of the most serious offences known to the law. The result of third degree methods or of actual torture or beating must be that innocent persons might well be convicted confessions being forced from them which are false. In almost every case in which a confession is recorded in Criminal Courts, it is alleged by the defence that the Police have resorted to methods such as these. It is seldom, however, that an offence of this nature is or can be proved. It clearly is the duty of the Courts when a case of this kind is proved to pass sentences which may have a deterrent effect. A.I.R. 1936 Lah. 471=37 Cr. L.J. 811=38 P.L.R. 639=163 Ind. Cas. 145.

—S. 330—Requirements of.

S. 330 requires that the assault should be proved to be solely for the purpose of extorting confession or restoration of property. 5 Pat. L. W. 109=19 Cr. L.J. 749=46 Ind. Cas. 525.

—S. 331—Police Officer taking active part in assault on prisoner.

A Policeman who is present and stands by acquiescing in an assault on a prisoner committed by another Policeman for the purpose of extorting confession, is guilty of the offence of abetment of an offence under S. 330, Penal Code. If however, he is not merely standing by but taking active part, he is guilty of an offence under S. 331 if grievous hurt is caused. A.I.R. 1940 Nag. 340=1940 N. L. J. 459=42 Cr. L. J. 17=I.L.R. (1941) Nag. 110=190 Ind. Cas. 849 (D.B.).

—S. 331—Torture by police.

If torture of the police in exacting admission causes grievous hurt resulting in death does not come under the definition of murder, it is an offence under S. 351, I.P.C. 12 P.W.R. 1917 (Cr.)=18 Cr. L.J. 710=40 Ind. Cas. 710.

—S. 332.

Synopsis.

1. Acts not in discharge of duty.
2. Applicability and scope.
3. Essential ingredients.
4. Illegal warrant.
5. Irregularity.
6. Jurisdiction.
7. Punishment and sentence.  
See also S. 332, I.P.C.—Applicability and scope.
8. Private defence.
9. Sentence.

(1) Acts not in discharge of duty.

—S. 332—Exceeding authorities—An officer is not entitled to set fire to reeds on private property.

Section 10 of the Act does not authorise the Collector to enter upon the property of private individuals and to set fire to plants or trees growing thereon in order to facilitate the deposit of soil or silt excavated from the canal bed. Therefore, an officer during any of the above acts cannot be said to be acting in the discharge of the duty as a public servant within S. 332, I.P.C. 105 Ind. Cas. 817=9 L.L.J. 424=28 Cr. L.J. 993=A.I.R. 1927 Lah. 706.



**—S. 332—Acts not in discharge of duties—Unauthorised act.**

Playing cards is not an offence and does not come within any of the eight clauses of S. 34, Police Act, and the act of a constable in prohibiting the men from playing cards is not in the discharge of his duty. So any assault by the persons so playing on the constable does not come under S. 332, I.P.C., but is an offence under S. 323, I.P.C. 92 Ind. Cas. 889=27 P.L.R. 74=27 Cr. L.J. 377=A.I.R. 1926 Lah. 250.

**—Ss. 332 and 323—Acts not in discharge of duty—Constable carrying out, out of date order.**

A constable who carries out an order of a Magistrate which had ceased to have force by expiration of time, is not, discharging a duty imposed by law, under S. 332, I.P.C., and therefore a person causing hurt to the constable executing the order, is not liable except under S. 323, I.P.C. 40 All. 28=15 A.L.J. 813=19 Cr. L.J. 5=42 Ind. Cas. 917.

**—Ss. 332 and 323—Acts not in discharge of duties—Discharge of duty by public servant—Irregularities—Hurt caused to public servant—Offence.**

An Excise Inspector searching the applicant's house for illicit possession of cocaine committed several irregularities such as having no warrant with him authorising the search, taking only one search witness with him, directing a constable to scale over his outer wall of the house, etc. The accused caused hurt to the Inspector and the constables.

**Held**, that the Inspector and the constables were not acting in the discharge of their duties as public servants and therefore the accused was not guilty under S. 332 but only under S. 323. 37 All. 353=13 A.L.J. 439=16 Cr. L.J. 495=29 Ind. Cas. 335.

**2. Applicability and scope.**

**—Ss. 332, 21 (9)—Applicability and scope—Talayari assisting collection of kist is public servant—Assault on him while exercising such function—Offence.**

The Talayari is a permanent servant of the Crown and he exercises some of the functions referred to in S. 21 (9), Penal Code, while assisting the village officer in the matter of the collection of the kist. He is, therefore, a public servant and a person assaulting him while collecting kist is guilty of an offence under S. 332, Penal Code. A.I.R. 1944 Mad. 183=1943 M.W.N. 804 (2)=(1943) 2 M.L.J. 674=45 Cr. L.J. 535=212 Ind. Cas. 75.

**—Applicability and scope—Assault on Sub-Inspector—Criminal P. C., Ss. 54, 47, 48.**

In the investigation of a case under S. 363, Penal Code, the Sub-Inspector went to the house of the petitioners and asked them to produce the kidnapped girl, and one R, who was said to have kidnapped her. The petitioners denied the presence of these two persons in their house, whereupon the Sub-Inspector said that he would search the house. The petitioners then dragged the Sub-Inspector inside the house and assaulted him. The Sub-Inspector had no warrant under S. 100, Criminal P.C.

**Held**, that S. 165, Criminal P. C., empowered the Sub-Inspector to make such a search. Moreover, his authority to act as proposed was to be found in Ss. 54, 47 and 48, Criminal P. C. He was clearly empowered under the first of these sections, without any order or warrant from a Magistrate, to arrest R, who, on the

information before him, was concerned in an offence under S. 363, Penal Code, a cognizable offence. As he also had reason to believe that R, was in the house of the petitioners, under S. 47, the petitioners were, therefore, bound to allow him free ingress to the house and afford all reasonable facilities for a search therein. Failing this, S. 48 authorised the Sub-Inspector to force himself into the house. As all this was in the discharge of his duty as Sub-Inspector in charge of Police Station, the hurt caused to him by the petitioners came within S. 332, Penal Code, and the petitioner's conviction of an offence under that section could not be said to be vitiated by any excess of authority on the part of the Sub-Inspector. A.I.R. 1942 Pat. 281=8 B.R. 307=43 Cr. L. J. 279=197 Ind. Cas. 827.

**—Ss. 332, 323—Applicability and scope—Accused chasing Police constable—Attack not concerned with actual rescue of arrested person—Offence.**

Where the accused chased the Police constable and beat him very severely but this attack was not concerned with the actual rescue of the arrested person, they were guilty of the minor offence punishable under S. 323, I.P.C. and not of the offence under S. 332. A.I.R. 1940 Cal. 321=44 C.W.N. 502=41 Cr. L.J. 744=189 Ind. Cas. 480.

**—Ss. 332, 323—Applicability and scope—Constable not on duty, assaulted at Ramlila performance—Offence.**

Where the constable who was assaulted at Ramlila performance was not there in pursuance of the duty for which he had been detained but went there only in order to enjoy the spectacle.

**Held**, that under the circumstances, the offence of assault fell under S. 323, I. P. C. and not under S. 332. 161 Ind. Cas. 12=18 N.L.J. 188=37 Cr. L.J. 375.

**—S. 332—Applicability and scope—Vaccinator ordered to vaccinate women and children—Knocking at accused's door—Implied consent to enter—Assault—Obstruction to public servant—Boy of eleven acting under influence of elder brother—Sentence.**

During the prevalence of small-pox in a Cantonment area, an order was passed by the Civil Surgeon and communicated to a lady vaccinator that she should go and vaccinate ladies and children in the Cantonment area. She went to the house of the accused and knocked at the front door and the door behind the house. It became known to the inmates of the house as to who was seeking admission. She waited for five minutes, during which time admission was not refused. The door was not closed from inside and she entered. It was alleged that when she entered the house, she was roughly handled by the two accused and her frock was torn. She received some hurt at the hands of the two accused. She remonstrated and said that she had come to vaccinate and that the accused should behave politely; but they, instead of desisting, inflicted some injuries on her.

**Held**, that under these circumstances, the person seeking admittance could assume that he or she had the implied consent of the house-owner to enter and if the person making the entrance happened to be a public servant who has entered the premises in order to discharge his or her public duties and if he or she is obstructed or assaulted, as the vaccinator was assaulted in the case, an offence under S. 332, I. P. C. would be made out.

**Held further**, that as one of the accused, a boy of eleven had not taken any prominent part in the incident whatever little he did might have been under



the influence of his elder brother, his conviction might be set aside. A.I.R. 1935 All. 160=36 Cr. L.J. 356=1935 A.L.J. 175=153 Ind. Cas. 469.

—S. 332—Applicability and scope—Special pass obtained for liquor—Illiterate constable seizing it suspecting absence of certificate—Assault—Provocation, if sufficient—Sentence.

A party of villagers headed by the accused N had decided on a feast. They went to the trouble of obtaining a special pass from Government for the purpose and paid for it like honestmen. Two of their members went and fetched the liquor in a bottle and a canister, and brought it back to the village. Just as they were about to hand it over to the expectant gathering assembled for the purpose, a Police constable appeared, and from a distance of 25 paces told them to stop and asked them what they had in their hands. They took no notice but proceeded on their way. The constable then went up to them and stopped them in front of the place where their expectant companions were awaiting their liquor. The pass was shown and the constable was obviously told that everything was in order. But he could not read and did not believe them; he therefore, told one of the party to accompany him to the Police Station where he could get the 'chitthi' read. There was quite naturally a strong protest against this suggestion. The constable then caught hold of the canister of liquor and was about to take it away :

Held, that the provocation was both grave and sudden when the surrounding circumstances are taken into consideration. It is true that the prestige of the Police must be upheld, but there is another side to the picture. The prestige of Government stands higher than that of its servants. It is even more important that the people of the land should feel they are being dealt with honestly and in good faith, and not that their money is taken for passes on the one hand and their liquor taken away from them with the other. A.I.R. 1934 Nag. 247=17 N.L.J. 78=36 Cr. L.J. 317=153 Ind. Cas. 211 (2).

—S. 332—Applicability and scope.

Search of a place—Police refusing to allow the occupant to enter the house—Occupant causing hurt to a Police Officer in attempting to enter into his house on physical resistance being offered by the latter :

Held, that the occupant is not guilty of an offence under S. 332 or any other section of Penal Code. A.I.R. 1932 All. 449=(1932) A.L.J. 530=34 Cr. L.J. 439=142 Ind. Cas. 790.

—Ss. 332, 323—Applicability and scope.

Naib Tahsildar going to accused's village and demanding revenue—Beating of Naib Tahsildar by accused's sons—Court considering it not improbable that accused was roughly treated by Naib Tahsildar :

Held, that the accused were entitled to the benefit of doubt in that they tried to resist an illegal act of the officer and that S. 332 would not apply to the case and for injuries caused to the Naib Tahsildar, the person who caused them committed an offence under S. 323, I.P.C. A.I.R. 1933 Lah. 162=33 P.L.R. 1065=34 Cr. L.J. 460=142 Ind. Cas. 897.

—S. 332—Applicability and scope—Offence under—Wrestling match—Police maintaining peace and order, interfering with the match—Arena rushed and police hustled—Offence under S. 332 is committed.

While a very evenly contested wrestling match organised by a Municipal Board was going on, one of the

constables, who had been invited by the organizers to keep peace and order happened to be a backer of one of the contestants. He interfered with the wrestling and thereupon a scuffle followed in which some of the police men were hustled and their uniform torn.

Held, that though in a case like this it is difficult for the crowd to resist rushing to the arena, there was no reason for the crowd to hustle the police, and therefore an offence under S. 332 was committed. 92 Ind. Cas. 224=23 A.L.J. 1027=27 Cr.L.J. 240=A.I.R. 1926 All. 168.

—S. 332—Applicability and scope—Officials protecting property in private capacity.

S. 332 of the I.P.C. has no operation when the property is the private property of the officials and where the officials are protecting their property in their private capacity. 161 P.L.R. 1911=12 Cr.L.J. 236=53 P.W.R. 1911 (Cr.)=10 Ind. Cas. 278.

—S. 332—Applicability and scope—Constable arresting burglars.

A person assaulting the police constable who was attempting to arrest persons suspected of having committed burglary is guilty under S. 332 as the constable can arrest without warrant person suspected of having committed an offence under S. 457, I. P. C. 18 P. R. 1910 (Cr.)=32 P.W.R. 1910 (Cr.)=11 Cr.L.J. 423=104 P.L.R. 1910=6 Ind. Cas. 956.

—Ss. 332, 355—Applicability and scope—Causing hurt to deter public servant from his duty—Assault with intent to dishonour—Assault on police witness while giving evidence.

An accused person while under trial struck a Sub-Inspector of Police who was in the witness-box giving evidence against him.

Held, that the offence of which the accused was guilty in this respect was rather that provided for by S. 355 than that punishable under S. 382. 29 All. 596=1907 A.W.N. 186.

### 3. Essential ingredients.

—S. 332—Essential ingredients—Patwari dragged away and beaten in order to force him to make certain entries in revenue papers.

An offence under S. 332 is committed when a person voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant. A duty may be negative as well as positive. It is the patwari's duty not to make entries in his official records under pressure from an interested party which he would not otherwise make. Where the accused drag away the patwari to a certain house and beat him in order to force him to make certain entries in the revenue papers, the accused, by their act, intend to prevent or deter the patwari from discharging his duties as a public servant. In such a case the offence committed is under S. 332 and the fact that when being assaulted the patwari had no official papers with him makes no difference. A.I.R. 1941 Oudh 267=42 Cr.L.J. 321=1941 O.W.N. 82=1941 A.W.R.(C.C.) 69=192 Ind. Cas. 774.

—S. 332—Essential ingredients—Constable assaulted while attempting to arrest accused without warrant—No allegation by constable that he proceeded under S. 54 (1), Criminal P. C.

In order to bring the case within the purview of S. 332, I.P.C., it is necessary to establish that the public servant



was acting at the time of the assault as such public servant and in the particular matter discharging a duty imposed upon him as such public servant. A constable who had no warrant of arrest in his possession at the time of the assault, nor had he been entrusted with the duty of arresting the accused, cannot be said to have been acting in the discharge of his duty if he intended or wanted to arrest the accused. Where there is no allegation by the constable in his deposition that he proceeded under S. 54 (1), Criminal P. C., S. 54 (1), Criminal P. C., does not apply. A.I.R. 1941 Oudh 385 = 1941 O.W.N. 602 = 42 Cr.L.J. 501 = 1941 A.W.R. 151 = 193 Ind. Cas. 817.

—S. 332—Discharging official duties—Essential ingredients.

In considering the question of "discharge of official duties" it is not the dress that concludes the matter but it is what the public servant was doing at the time that counts. 1935 M.W.N. 892.

—S. 332—Essential ingredients.

Assault on Octroi Officer when acting in discharge of his public duty would constitute an offence under S. 332. A.I.R. 1935 Sind. 245 = 29 S.L.R. 54 = 37 Cr.L.J. 148 = 159 Ind. Cas. 665.

—S. 332—Essential ingredients—Knowledge of complainant being public servant is necessary.

An intention on the part of the accused person, namely to prevent or deter a public servant from discharging his duty is an ingredient of the offence. If the accused persons were unaware of the fact that the persons confined were public servants the offence is not committed. 85 Ind. Cas. 245 = 22 A.L.J. 501 = 5 L.R.A. (Cr.) 177 = 26 Cr.L.J. 501 = A.I.R. 1924 All. 1645.

—S. 332—Essential ingredients—Public servant acting bona fide but not in legitimate exercise of his public function—Person hurting is not guilty under the section.

Per Aston, A.J.C.—Where a public servant is acting in the legitimate discharge of his public functions and is hurt, the offender is guilty of one of the special offences relating to public servants. But where the public servant is acting bona fide but not in the legitimate exercise of his public functions, the offender will not be guilty of any of the special offences but of causing hurt or assault as the case may be. 18 All. 216, Rel. on. 83 Ind. Cas. 899 = 26 Cr.L.J. 195 = 16 S.L.R. 161 = A.I.R. 1921 Sind 51.

4. Illegal warrant.

—S. 332—Applicability—Chowkidar attempting to execute warrant of distraint—Assault—Warrant illegal—Offence. see BENGAL VILLAGE SELF-GOVERNMENT ACT, S. 41, Rr. 14 and 18. 230 I.C. 326-A. I.R. 1949 Cal. 487.

—S. 332—Illegal warrant.

Although it is arguable that a property owner is entitled to resist the execution of an illegal warrant of attachment, yet when the attachment is once effected without any protest being made by the property owners, and when that property has passed into the possession of the attaching officer, and when the attaching officer has left the premises it is not permissible that any person should remove the attached property from the custody of such officer. 83 Ind. Cas. 899 = 26 Cr. L.J. 195 = 16 S.L.R. 161 = A.I.R. 1921 Sind 51.

—S. 332—Illegal warrant.

When the authority under which the police attempted to make the search was invalid, persons

resisting them would not be convicted under S. 332, I.P.C. although this act may come under other sections. 38 All. 14 = 13 A.L.J. 979 = 16 Cr. L.J. 819 = 31 Ind. Cas. 995.

5. Irregularity.

—S. 332—Irregularity.

Where there are serious irregularities in connexion with house search and the person whose house is searched assaults and beats a constable, the offence falls under S. 323 and not under S. 332. 11 P.L.T. 878 = 125 Ind. Cas. 784 = A.I.R. 1930 Pat. 387.

—S. 332—Irregularity—Police officer investigating search without warrant or witness—An officer of Police empowered to conduct an investigation can carry out a search without a warrant.

In carrying out such a search he is bound, under S. 103 of the Cr. P. Code to call upon two or more respectable inhabitants of the locality to attend and witness the search, and if he omits to do so a householder would be justified in closing the door and refusing ingress into the house, and would not be guilty of an offence under S. 332, I.P.C. While it may be necessary to oppose a police officer from forcing his way into a house in order to honestly to prevent an illegal search, there would be no justification for compelling him to do something illegal. 42 All. 67 = 17 A.L.J. 1047 = 20 Cr. C.J. 695 = 52 Ind. Cas. 663.

6. Jurisdiction

—S. 332—Jurisdiction.

An offence under S. 332 is triable only by First Class Magistrate. 1934 M.W.N. 271.

7. Punishment and sentence—See also S. 332 I.P.C.—Applicability and scope

—S. 332—Sentence.

Separate sentences under Ss. 147 and 332 of the Indian Penal Code are not illegal in view of amended S. 35. A.I.R. 1926 Bom. 64 and 49 Bom. 916, Foll. 93 Ind. Cas. 600 = 27 Cr. L.J. 824 = A.I.R. 1926 Lah. 521

—Ss. 332 and 149—Punishment and sentence—Rioting.

Offence under Ss. 332 and 149 includes the offence of rioting. In the later the violence is of a very serious kind. It is impossible to punish for the whole former offence without punishing for the offence of rioting. 3 S.L.R. 224 = 11 Cr. L.J. 415 = 6 Ind. Cas. 880.

8. Private defence.

—S. 332—Private defence—Distraint under District Municipalities Act—Resistance to.

A distrainer having a warrant has no right to take the front door of house, and if he threatens to do so, such a proceeding renders the house unsafe calling for immediate defence of private property. Further if the accused resists such attempts he cannot be said to have exceeded his right of self-defence and any conviction under Penal Code, S. 332, is liable to be set aside: 13 Mad. 518, Foll. 1930 Cr. C. 335 = 31 M.L.W. 205 = 1930 M.W.N. 172 = 3 M. Cr. C. 90 = 31 Cr. L.J. 639 = 53 Mad. 508 = 124 Ind. Cas. 139 = A.I.R. 1930 Mad. 430 (1) = 58 M.L.J. 193.

9. Sanction.

—S. 332—Sanction to prosecute, if necessary.

Offences under Ss. 335 and 353, Penal Code, do not require a complaint in writing of the public servant



concerned or of some other public servant to whom he is subordinate before a Court can take cognizance of them, presumably because they are cognizable and the measure of punishment with which they can be visited makes cases relating to them warrant cases. Although offences under Ss. 183, 186, Penal Code, which require no complaint under S. 195, Criminal P.C., may be present in offences under Ss. 332, 353, Penal Code, they are ancillary to them and no question of attracting the provisions of S. 195 (1), Criminal P.C. would arise unless the prosecution sought to include offence under S. 183 or S. 186, or offences under Ss. 183 and 186, with more serious offences or the more serious one of them. A.I.R. 1945 Nag. 210=1945 N.L.J. 239=I.L.R. (1945) Nag. 685=47 Cr. L.J. 175=221 Ind. Cas. 403.

—S. 333—Assault on Sub-Inspector in consequence of what he had done to accused—Accused, when can be convicted.

Under the provision of law contained in S. 333, I.P.C., a person who causes grievous hurt to a public servant can be convicted under three circumstances; (1) when grievous hurt is caused while the public servant is acting in the discharge of his duty as such public servant; in this case motive and object are irrelevant; (2) when a public servant is prevented or deterred from discharging his duty as such public servant; in this case it is necessary that the object of the accused should be to deter the public servant from discharging his duty but it is not necessary to prove any motive; (3) when the public servant is assaulted in consequence of anything done or attempted to be done by that public servant in the discharge of his duty; in this case it is not necessary that the public servant should be discharging his duty at the time of the assault. The object, too, is irrelevant. The only thing that has got to be seen is the motive. The last circumstance mentioned above applies to a case, where the assault is committed on the Sub-Inspector in consequence of what he had done against the accused.

(In this particular case, considering the high-handedness of the offender, the sentence was enhanced to two years' rigorous imprisonment from that of 18 months). A.I.R. 1935 All. 563=1935 A.W.R. 463=36 Cr. L.J. 964=156 Ind. Cas. 602.

—Ss. 333 and 34—Arrest made by chaukidars—Bengal Chaukidari Act (20 of 1856), S. 52—United Prov. Towns Area Act, S. 41.

Two chaukidars arrested one P suspecting that he was in possession of stolen property. On the way to the Police Station he was rescued from their custody by certain persons.

Held, that the chaukidars were not members of the police force, and could not arrest P on mere suspicion as S. 52 of the Chaukidari Act where under they were appointed was repealed by the United Prov. Towns Areas Act, S. 41.

Held also, that P, could not be convicted under S. 333 because it must be shown that the rescuers were acting in pursuance of a common intention within the meaning of S. 34. 14 A.L.J. 789=17 Cr. L.J. 529=36 Ind. Cas. 577.

—S. 333—Private defence—Constable roughly handled by way of self-defence, to prevent him from doing further harm—No offence is made out.

The deceased assaulted the constable and beat him only after he had fired at one of them and caused him serious injury. The object of the accused was to snatch

away the gun from him before he could do any further harm and in doing so they were exercising the right of self-defence. The constable exceeded his lawful rights in firing upon the men and causing such serious injuries to one of the accused as he did, and the others were not bound to stand by and allow the constable to use the gun once more :

Held, the act of the accused did not constitute an offence under S. 333, Indian Penal Code, on the facts disclosed. 71 Ind. Cas. 665=24 Cr. L.J. 201=A.I.R. 1922 Lah. 75.

—S. 333—Unauthorized search—Resistance.

A person who resists a police officer conducting an unauthorised search outside the limits of his station is not guilty of an offence under S. 333, I.P.C. 24 M.L.T. 96=(1918) M.W.N. 526=8 L.W. 225=20 Cr. L.J. 145=49 Ind. Cas. 337.

—S. 334—Provocation—Crying of counter-slogans, held likely to cause provocation.

The crying of a counterslogan, that is to say, in praise of the leader of one's own party and not in dispraise of the leader of the other party in reply to the slogans cried by that party is likely to cause provocation to its members though not grave and sudden. A.I.R. 1939 Pesh. 20=40 Cr. L.J. 831=182 Ind. Cas. 643.

—S. 334—Provocation.

It is wrong to say that no offence is committed by an accused person who strikes a blow under provocation. 94 Ind. Cas. 142=27 Cr. L.J. 574.

—Ss. 334 and 323—Provocation—Abuse—Private defence.

The use of the abusive word 'bugger' to a person of the Bhaduw or gentleman class may constitute a grave and sudden provocation. There is no right of private defence where the apprehension of danger to the body ceases. An ordinary walking stick four feet long and one inch thick is not a dangerous weapon. 14 Cr. L.J. 442=20 Ind. Cas. 602 (Cal.).

—S. 334—Time of provocation—Provocation is necessary at the time of assault.

Police Officers had been harassing one R in the course of an investigation. In order to escape the high handedness of the police and also out of feelings of shame and humiliation felt at the treatment meted out to him, R threw himself into a well. The high-handedness on the part of police was resented by R's friends and the police were roughly handled by them. Four persons were convicted of voluntarily causing hurt to police while discharging their public duties.

Held, that if the assault upon the police had been made while the actual torture of harassment of R was in progress then the position of the accused would have been different and other considerations would have arisen. But as the police officers were attacked after R had thrown himself into the well and escaped oppression, the accused had no justification in law to attack the police. The grave and sudden provocation, if it was ever caused by the conduct of the police had already come to an end. 11 L.L.J. 287=1929 Cr. C. 329=A.I.R. 1929 Lah. 739.

—Ss. 335, 304—Sudden provocation—Injury endangering life—Offence—Plea of self-defence, if available.

Where there is a free fight between the accused and the deceased, the accused must accept responsibility



for the act done by him and he cannot claim a right of self-defence.

If the accused, under sudden provocation, caused an injury that endangered life and the deceased died as the result of that injury, the offence committed is certainly culpable homicide.

In very few cases of murder can it be said that the injury caused necessarily resulted in death; but if it is caused with the necessary intention or knowledge and death results from the injury caused, then the offence committed is murder or culpable homicide as the case may be. A.I.R. 1938 Mad. 723=(1938) M.W.N. 605=48 L.W. 142=(1938) 2 M.L.J. 225=39 Cr. L.J. 871=177 Ind. Cas. 432.

**—S. 335—Offence under S. 335—Provocation—Sentence of fine only—Insufficiency of.**

An offence under S. 335, I.P.C. though committed under some provocation, should not be treated leniently and a sentence of fine only will not be sufficient to meet the ends of justice. A.I.R. 1932 Lah. 194=33 P.L.R. 72=33 Cr. L.J. 368=136 Ind. Cas. 734.

**—S. 335—Nose-cutting—Deliberate design.**

Where the accused was found guilty of cutting of the nose, the act is one which imports deliberate design. The plea of grave and sudden provocation or the excuse it implies in such cases will not have by any means the same effect as in the case of a man who in sudden and provoked anger strikes a blow. Sentence enhanced to two years. 17 Bom. L.R. 68=16 Cr. L.J. 168=27 Ind. Cas. 552.

**—S. 336—Accused's house stoned by people in neighbourhood—Accused firing shots to frighten them.**

The accused's house was being stoned and he fired his gun in all directions merely to frighten off and prevent persons who were throwing stones and to prevent their continuing to do so. He was convicted under S. 336, I. P. C.:

**Held**, that the conviction must be set aside for three reasons: (i) that the firing of the gun was not a rash and negligent act but a deliberate act and, therefore, S. 336, I. P. C., had no application; (ii) there was no proof that human life was actually endangered; and (iii) that *prima facie* no offence was committed because the gun was fired merely to warn the people who were throwing stones and not with the object of hitting them. A.I.R. 1937 Rang. 273=38 Cr. L.J. 897=170 Ind. Cas. 278.

**—Ss. 336, 351—Throwing bricks into another's house—Offence—Assault—'Any act,' meaning of.**

Where it appeared that the accused threw bricks into the complainant's house due to enmity with him:

**Held**, that it was an act which endangered the personal safety of the complainant when he was inside or of any other person who might be inside, and these facts would constitute an offence under S. 336, I. P. C., and that the accused could also be held liable under S. 351 for assault as the throwing of brickbats by the accused would be a gesture which would cause the complainant to apprehend that criminal force was about to be used against him.

The words 'any act' in S. 336, I. P. C. must not be limited to the meaning 'any legal act.' A.I.R. 1932 All. 322=(1932) A. L. J. 224=93 Cr. L.J. 889=140 Ind. Cas. 99.

**—Ss. 336 and 426—Danger to human life.**

Where the accused threw large pieces of brick at the side of the complainant's house there being no one in the house at the time,

**Held**, that the accused could not be convicted under S. 336 there being no evidence in the case that human life or personal safety was endangered; that only section applicable being S. 426. 5 L.B.R. 100=10 Cr. L.J. 552=4 Ind. Cas. 293.

**—S. 336—Endangering safety—Temple—Omission to fence a well.**

During a festival, a temple becomes a place of public resort and it is the duty of the person in charge, to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation. If he omits to enclose a well standing by the path which the pilgrims take to reach the shrine, with the result that a man and a boy fell into the well, he is guilty of an offence under S. 336. 18 C.W.N. 1176=16 Cr. L.J. 131=27 Ind. Cas. 195.

**—S. 336—Hurt not caused.**

At the time of a communal riot in the city of Pilibhit in different parts, the accused threw brick-bats at the Muhammadans who were passing by the land close to his house, he also fired two shots at them from his house. No one was hit by the bricks or the gun shot.

**Held**: that the accused had committed no offence. 87 Ind. Cas. 523=47 All. 606=23 A.L.J. 356=26 Cr. L.J. 987=6 L.R. A.Cr. 121=A.I.R. 1925 All. 396.

**—S. 336—Person deliberately throwing bricks at temple—he is guilty neither under S. 336 nor S. 153.**

G deliberately threw bricks at a temple hoping that the Hindus would believe that the bricks came from the Mahomedan quarter and that thereby the Hindus would be enraged against the Mahomedans and there would be a riot between the Hindus and Mahomedans. Nobody was hurt by the Act.

**Held**: G desired a certain result to follow from the throwing of bricks and he deliberately threw the bricks at the temple for that purpose. There was neither rashness nor negligence in the act. G was not guilty under S. 336.

**Held**: further that the throwing of a brick at a temple is not declared to be an offence, nor is it prohibited by law. G's act was not therefore illegal and he was not guilty under S. 153. 112 Ind. Cas. 592=1929 A.L.J. 175=11 A.I. Cr. R. 207=29 Cr. L.J. 1008=10 L.R.A. Cr. 25=51 A. 465=A.I.R. 1928 All. 745.

**—S. 336—No Rash Act—Driving motor without spectacles—No conviction.**

A car driver who did not wear spectacles as prescribed by the licence for defective sight could not be convicted under S. 336, I.P.C., for collusion by accident, as no rash act on his part without spectacles was made out. If the eyesight is materially defective, it is a rash act for a motor driver to drive a car without spectacles. But mere omission to wear spectacles is not an offence. 42 Bom. 396=20 Bom. L.R. 376=19 Cr. L.J. 605=45 Ind. Cas. 509.

**—S. 336—Rash or negligent act likely to endanger life—Hook swinging—License to swing by cloth attached to swinging apparatus.**

A person having a licence to conduct swinging during a festival does not by allowing persons in his



absence to swing by hooks inserted in the flesh instead of by being attached to the pole by cloth render himself liable to punishment for an offence under S. 336, unless it is shown that he knew of it. (1900) 5 C.W.N. 376.

—S. 337—Rash and negligent driving—If guilty of.

Where the accident was due to the pedestrian himself suddenly moving into the road without looking where he was going, and the driver had to make a quick decision to avoid collision, held that the driver was not guilty of rash and negligent driving. 1938 N. L. J. 44.

—Ss. 337, 307—Shooting blindly with shot gun, in dark in direction of sound heard—Offence.

If a man fires blindly in the dark with a shot gun in the direction from which he has heard sounds coming from a distance away, it cannot be held that his act must, in all probability, cause death or such bodily injury as was likely to cause death. Such a person cannot possibly be convicted under S. 307, I.P.C., but he could be convicted under S. 337, thereof. A.I.R. 1938 Rang. 220=39 Cr.L.J. 692=176 Ind. Cas. 150.

—S. 337—Shooting expedition—Accident.

A big party of some hundreds went for shooting pigs—A boar rushed towards the accused—Accused fired at the boar but missed the boar and the shot struck the leg of a member of the party:

Held, that the case was one of accident and not of rash or negligent shooting and conviction under S. 337 was illegal. A.I.R. 1931 Lah. 54=31 P.L.R. 955=32 Cr.L.J. 587=130 Ind. Cas. 654.

—S. 337—Determination of liability.

The accused's liability is determined by what is the proximate cause. If the proximate cause is negligence of the accused, the presence of another and contributory cause is not a defence. 92 Ind. Cas. 433=18 S.L.R. 199=27 Cr.L.J. 257=A.I.R. 1925 Sind 233.

—S. 337—Error of judgment.

The accused who is arraigned with negligence cannot claim the benefit of an error of judgment when he exercised none. 92 Ind. Cas. 433=18 S.L.R. 199=27 Cr.L.J. 257=A.I.R. 1925 Sind 233.

—Ss. 337, 307, 325 and 109—Poisoning—Giving love potion.

A love potion administered to her husband by accused No. 1, to the knowledge of accused No. 2 and No. 3, who are aware of its nature, without care or caution makes accused No. 1, liable under S. 337, I.P.C. Accused No. 2 guilty of Ss. 307 and 107, I.P.C. Accused No. 3 guilty of Ss. 307 and 109, I.P.C. 19 Bom. L.R. 54=18 Cr.L.J. 443=38 Ind. Cas. 1003.

—Ss. 337 and 338—Native doctor—Operation.

The accused, a **Hakim** performed an operation on the right eye of the complainant using a pair of scissors and a needle ordinarily used by tailors, the most ordinary precautions by way of disinfecting and sterilizing, etc., being entirely neglected. The operation itself was needless and was not in accordance with any recognised Indian method.

Held, that the accused was guilty, in so acting, of an offence punishable under S. 337 and not under S. 338 as there was no permanent privation of the sight of either eye. The act was a rash and negligent one endangering human life or personal safety of another; when a **Hakim**

gives out that he is a skilled doctor the public are entitled to expect of him the ordinary precautions which surgical knowledge regards as imperative. 39 Bom. 523=16 Cr.L.J. 437=17 Bom. L.R. 384=29 Ind. Cas. 69.

—Ss. 337, 286—Causing hurt by means of a gun—Evidence of negligence.

The causing of hurt by negligence in the use a gun would fall within the purview of S. 337 rather than of S. 286. But where all the evidence against the accused was that he went out shooting in the month of July when people were likely to be about in the fields, and that a single pellet from his gun struck a man who was sitting in a field:

Held, that this was not sufficient evidence of rashness or negligence to support a conviction under S. 337. 28 A. 464=1906 A.W.N. 91=3 A.L.J. 332.

—Ss. 338, 279 and 114—Lorry driver permitting minor boy sitting by his side to drive lorry—If liable or accident as principal offender. See PENAL CODE, Ss. 279, 338 and 114. 52 P.L.R. 193.

—S. 338—Accused in charge of motor vehicle permitting unlicensed person to drive it while sitting by his side—Passer-by knocked down by rash and negligent driving—Conviction of accused—Legality.

The accused who was a driver of a motor truck permitted one **X**, a novice, to drive the truck with actual knowledge that he had no licence to drive a motor vehicle, while he was by his side. **X** knocked down a passer-by by rash and negligent driving and caused him grievous hurt. Both **X** and the accused were convicted under S. 338, I. P. Code.

Held, that the accused was guilty of intentionally aiding **X** because he wilfully and with full knowledge of essential facts permitted him to drive the vehicle and failed to prevent him from using it in the manner in which he did. Since he was Present when the offence was committed he should be deemed to have committed the offence as if he were the principal offender, and he was therefore rightly convicted of the offence under S. 338, I. P. Code, as **X** was. I.L.R. (1947) Nag. 144=A.I.R. 1947 Nag. 113=226 Ind. Cas. 500=47 Cr.L.J. 968=1946 N.L.J. 540.

—S. 338—Applicability—Essentials of offence—Criminal intent—Absence of—Effect—Rashness or negligence—Driving motor bus with defective tyre at 15 to 20 miles an hour—Accident caused by bursting of tyre causing injuries to occupants—Offence—Conviction—Propriety.

Petitioner was driving a bus from **B** to **A**, and at about the 6th mile from **B**, the front tyre of the bus burst, as a result of which the bus swerved to the left and dashed against a tree causing injuries to the occupants. It was found that the tyre was too much worn out and that the bus was being driven at a speed of about 15 to 20 miles per hour. On these facts, he was convicted of an offence under S. 338, I. P. Code.

Held, that the petitioner's act of driving could not be characterised as rash or negligent within the meaning of S. 338, I. P. Code, as there was on his part no criminal intent which alone would justify a conviction under the section. Negligence within the meaning of the Motor Vehicles Act or the rules thereunder would not necessarily amount to negligence under the Penal Code and in the absence of evidence to prove negligence or rashness—a prosecution under S. 338, I. P. Code, was miss conceived and the conviction must be set aside a, improper. 16 Cut. L. T. 181.



—Ss. 338, 279—Scope and applicability.

Where the rash or negligent driving actually results in grievous hurt being caused to any person, an offence under S. 338 is committed and the accused can be convicted under S. 338 but not under both Ss. 279 and 338. A.I.R. 1939 Pat. 388=20 P.L.T. 403=40 Cr. L.J. 759 (2)=5 B.R. 954=183 Ind. Cas. 224.

—S. 338—Failure by motorist to sound horn, whether necessarily negligence—Sounding of horn, whether negative rashness or negligence—Presumption.

Failure to sound the horn by a person driving a motor vehicle is not necessarily negligence and to sound a horn does not necessarily negative rashness or negligence in driving. Each case must be decided on its own facts. From the mere fact that a motorist strikes a person walking on the road, the presumption cannot be drawn that the accident was caused by the motorist's carelessness. Such a presumption is ill-founded as a great many such occurrences are due to accident. If the car was being driven at an excessive speed, that in itself would be evidence to show that there was negligence. But where the car was being driven at about 20-25 miles an hour such a speed cannot be said to argue *ipso facto* that there was negligence. A. I. R. 1939 Rang. 209=40 Cr.L.J. 701=182 Ind. Cas. 509.

—Ss. 338, 279—Sounding of horn proved—Conviction—Sustainability.

Accused taking his car in Court premises, reversing it and moving forward and in so doing, the left rear wheel running over the shoulder of a person sleeping under a tree—Evidence showing that accused had sounded the horn.

**Held**, accused could not be held to be negligent and could not be convicted under S. 338 read with S. 279, I.P.C. (1938) N.L.J. 226.

—S. 338—Driving motor car under influence of drink—Accident—Rashness and negligence of driver—Sentence.

Where it appeared that an accident was due mainly, if not entirely, to the rashness of the appellant in driving the motor car while drunk and getting on to the wrong side of the road while there were vehicles in front or otherwise to his negligence in not seeing the *tonga* in front of him, and not properly controlling the motor car so as to avoid a collision, and the accused was found guilty of both rashness and negligence and sentenced to three months' rigorous imprisonment and fine of Rs. 150:

**Held**, that the sentence was excessive and it might be reduced to a fine of Rs. 100 only, or in default, three months' rigorous imprisonment. A.I.R. 1933 Oudh 568=10 O.W.N. 1211=35 Cr.L.J. 296=147 Ind. Cas. 122.

—Ss. 338, 304-A, 279—No definite evidence of rashness or negligence—Conviction—Maintainability.

Rash and negligent driving of motor car resulting in collision with lorry and causing injuries to two persons one of whom died later—No definite evidence of rash and negligent driving—Accused cannot be convicted under Ss. 338, 279 and 304-A. A.I.R. 1933 Oudh 391=10 O.W.N. 823=34 Cr. L.J. 1154=146 Ind. Cas. 28.

—S. 338—Motor accident—Conviction—Maintainability.

Where it was found that the accused while driving a motor car at moderate speed and on the correct side

of the road ran over a boy who came in contact with the car while crossing the road.

**Held**: that the accused could not be convicted under S. 338. 115 Ind. Cas. 96=32 C. W. N. 612=30 Cr. L.J. 402=12 A.I.Cr.R. 259.

—S. 338—Sentence—Contributory negligence—Contributory negligence must be considered in determining sentence.

While contributory negligence would not be a defence entitling the petitioner to an acquittal it might be a factor for consideration in determining the sentence.

In the case of a person driving a motor car the car should always be kept in a state of control sufficient to enable the driver to avoid running into any passenger who may fail to step off the road, however annoying the dilatoriness of the foot passenger may be to the driver. 100 Ind. Cas. 831=28 P.L.R. 99=28 Cr. L.J. 351=7 A.I.Cr.R. 288=A.I.R. 1927 Lah. 165.

—S. 338—Grievous hurt—Act endangering life—Discharging gun.

Accused owning a paddy field in a jungle tract, discharged a gun in the direction of a footpath, close to his field, through which complainant was passing. The shot hit the complainant in the leg, which had to be cut off. The accused knew that the foot-path was generally used by the public.

**Held**, the accused was guilty of culpable negligence under S. 338, I.P.C. 13 Cr. L.J. 703=16 Ind. Cas. 511 (Mad.)

—S. 338—Grievous hurt—Giving blows in a riot.

In a riot the accused gave blows one of which fell on the temple of the deceased of which he died four days after. The accused did not commit culpable homicide but only an offence of grievous hurt. (1911) 2 M.W.N. 188=12 Cr.L.J. 528=12 Ind. Cas. 296.

—S. 338—Unsuccessful operation for cataract resulting in loss of sight.

One Suraj Bali operated upon a patient for cataract with the result that the patient lost the sight of her left eye. It was found, however, that the operation was performed with the consent of the patient, and in good faith and for her benefit, and that it was performed in accordance with the recognized Indian method of treatment for cataract.

**Held**, that Suraj Bali had not, on the facts found, committed any offence punishable under the Indian Penal Code. 1908 A.W.N. 91=5 A.L.J. 155.

Synopsis.

—S. 339.

1. Applicability and scope.
2. Interpretation.
3. Obstruction of vehicle.
4. Right in dispute—Forum.

1. Applicability and Scope.

—S. 339—Applicability — Preventing person from going in direction he wants.

The offence of wrongful restraint under S. 339, I.P. Code, is committed if a person is prevented from proceeding in the direction in which he wants to proceed. 49 Cr. L.J. 4198=A.I.R. 1948 Pat. 299.



—S. 339—Applicability and scope—Good faith—Obstruction in good faith under colour of legal right—No offence.

The defence that the accused is entitled to the exception to S. 339, Indian Penal Code must be clearly raised. Where the obstruction put up by the accused was put up in good faith because the accused believed himself to have a lawful right to obstruct the complainant from going along the passage.

**Held**, that the accused was not guilty of wrongful restraint. 41 C.L.J. 633=30 C.W.N. 192=A.I.R. 1925 Cal. 1214.

—S. 339—Applicability and scope—Landlord preventing a tenant holding over from going to premises—Specific Relief Act, S. 9.

A landlord prevented a tenant of his who was holding over, from entering the room which the tenant had rented. He was convicted of the offence of wrongful restraint under S. 339, I.P.C.

**Held**, that the conviction was right. A tenant holding over had a position recognised by the law, and he had a right to retain possession of the premises he occupied even against the landlord himself until dispossessed in due course of law. 43 Bom. 581=21 Bom. L.R. 261=20 Cr.L.J. 417=51 Ind. Cas. 193.

—S. 339—Applicability and scope—Making Pariahs to stand in the street.

It is no offence under S. 339 to cause pariahs to stand in the public street, though the complainant did not conduct the procession owing to their presence there. (1910) M.W.N. 72=7 M.L.T. 366=11 Cr.L.J. 263=5 Ind. Cas. 851.

—S. 339—Applicability and scope—Obstruction.

Projecting shed over a wall which does not prevent the owner of the wall from moving under it but which is merely an obstruction to white washing or repairing wall, does not amount to an offence under S. 339. 106 Ind. Cas. 111=29 Bom. L.R. 494=28 Cr.L.J. 1023=A.I.R. 1927 Bom. 369.

—S. 339 — Applicability and scope—Obstruction to lawful act.

S. 339 covers the case of a person reasonably wanting to go vertically upwards if he has a right to do this, and being prevented from so doing by a voluntary obstruction. 29 Bom. L.R. 494=28 Cr.L.J. 1023=A.I.R. 1927 Bom. 369=106 Ind. Cas. 111.

—Ss. 339 and 341—Applicability and scope—Mamul path—Public path—Ploughing up—Obstruction.

To justify a conviction under S. 341, I.P.C. it must be found that the person complaining has a right to proceed along the path and that he was obstructed from doing so. The mere ploughing up of a mamul path does not amount to an obstruction within the meaning of S. 339, I.P.C. 2 L.W. 1035=16 Cr.L.J. 701=30 Ind. Cas. 749.

—S. 339—Applicability and scope—Presence of restrained person.

There is nothing in S. 339, which requires the physical presence of the person obstructed at the moment of obstruction. 34 Mad. 547, Foll. 106 Ind. Cas. 111=29 Bom. L.R. 494=28 Cr.L.J. 1023=A.I.R. 1927 Bom. 369.

—S. 339—Applicability and scope—Effect of obstruction—Remote and indirect result.

S. 339 contemplates obstructions attributable directly to the person charged. The legislature did not intend to include in the section an act, which in its remote and indirect consequences might obstruct the free movement of a person. 5 M.L.T. 207=11 Cr.L.J. 192=4 Ind. Cas. 1117.

—Ss. 339 and 340—Applicability and scope—Wrongful restraint—Wrongful confinement.

Putting lock in the outer door of a house during the temporary absence of the inmates, and thereby obstructing them from entering the same will amount to wrongful restraint. Physical presence of the obstructor is not necessary for the offences of wrongful restraint or wrongful confinement. To constitute the offence, the obstructor must intend or know or have reason to believe it to be likely that the means adopted would cause obstruction to the complainant. 34 Mad. 547=(1910) M.W.N. 727=9 M.L.T. 103=11 Cr. L.J. 708=8 Ind. Cas. 757.

—S. 339—Applicability.

S. 339, relates to voluntary obstruction by a person, and not obviously to obstruction which are not voluntarily continued by the persons accused of the obstruction throughout the time the obstruction lasts. (1906) 9 Bom. L.R. 30=5 Cr.L.J. 97.

## 2. Interpretation.

—Ss. 339 and 341—Interpretation—Wrongful restraint—Proceeding in any direction—Meaning of.

The accused, who was the driver of a bus purposely made his bus stand across a road in such a manner as to prevent another bus which was coming behind to proceed further.

**Held**, proceeding in any direction, within the meaning of S. 339, I.P.C. must mean only proceeding in that direction and not in any other direction, much less in the reverse direction. It cannot be said that because the driver and passengers in the second bus could have got down from that bus and walked away in different direction, or gone in that bus to a different destination, in the reverse direction, there was therefore no wrongful restraint. Hence the conviction of the accused under S. 341 was justified. I.L.R. (1950) Mad. 858=1949 M.W.N. 838=A.I.R. 1950 Mad. 235=4 A.I. Cr. D. 131=51 Cr. L.J. 568=62 L.W. 864=(1949) 2 M.L.J. 703.

—Ss. 339 and 340—Interpretation.

“Proceed” includes proceeding by outside agency. The word is not limited to proceeding on one’s own legs or by physical means within one’s power. 62 C. 629=39 C.W.N. 396.

## 3. Obstruction of vehicle.

—Ss. 339 and 341—Voluntary obstruction of a vehicle in which a person is travelling—If amounts to wrongful restraint of that person—Whether person in vehicle being allowed to proceed on foot makes any difference.

P. W. 1 was driving a cart along a path passing in the front of the petitioner’s house. The petitioners stopped the cart and unyoked the bulls. P. W. 1 fell down when the bulls were unyoked and the bulls ran away and he thereafter proceeded on his way on foot.



**Held**, that the voluntary obstruction of a vehicle in which a person was travelling would amount to wrongful restraint of that person within the meaning of S. 339, I.P. Code. The fact that a person might get down and then be left at liberty to proceed on his way unmolested, would be immaterial. If he was prevented from proceeding at the moment of restraint the terms of the section are satisfied. I.I.R. (1947) Mad. 555=48 Cr. L.J. 459=229 Ind. Cas. 556=A.I.R. 1947 Mad. 124=1946 M.W.N. 666=59 L.W. 543=(1946) 2 M.L.J. 281.

**—S. 339—Voluntary obstruction of vehicle—Whether wrongful restraint.**

The voluntary obstruction of a vehicle cannot be held to amount to wrongful restraint within the meaning of S. 339, I.P.C. A.I.R. 1935 Cal. 252=39 C.W.N. 143=60 C.L.J. 472=36 Cr. L.J. 740 (1)=155 Ind. Cas. 444 (1).

**—S. 339—Voluntary obstruction of vehicle.**

Obstructing a marriage procession in a motor car amounts to wrongful restraint. 1934 M.W.N. 620.

**—S. 339—Obstruction of vehicle—Restraining horse—Horse on which a person is riding, stopped from proceeding—Restraint is wrongful.**

If a person is prevented from proceeding at the moment of restraint, the terms of S. 339 are satisfied.

If a horse on which a man is riding is prevented from proceeding, it is causing wrongful restraint to the rider and it is no defence to say that he might have got off the horse and walked in the same direction. 100 Ind. Cas. 544=28 Cr. L.J. 320=A.I.R. 1927 Mad. 506.

**—S. 339—Obstruction of vehicle.**

Although there is authority for the view that all that S. 339 protects is the obstruction of any person, and that it does not cover a case where he himself is free to proceed in a direction in which he has a right to proceed, but without any impediments (such as a cart) that he may have with him, this view of personal obstruction must obviously have some limits.

Where there was an obstruction to the complainant's proceeding with his bullocks in a direction in which he had a right to proceed with his bullocks.

**Held**, an offence under S. 39 was committed. 91 Ind. Cas. 811=27 Bom. L.R. 1419=27 Cr. L.J. 139=A.I.R. 1926 Bom. 118.

**—S. 339—Obstruction of vehicle—Personal offence—Obstruction to bullock cart—Wrongful restraint.**

Wrongful restraint is an offence against a person, so when a man is himself unobstructed but hindered from driving a bullock cart through a passage is not wrongfully restrained. Restraint must be complete and must not allow a man to proceed in any direction where he has right to do so. 15 Bom. L.R. 103=14 Cr. L.J. 177=19 Ind. Cas. 177.

**4. Right in dispute—Forum.**

**—Ss. 339, Excep. and 341—Prosecution for obstruction of private right of way—Accused denying such right—Failure by him to plead bona fide belief under Exception to S. 339—Effect of—Proper forum for such dispute.**

Where in a prosecution for an offence under S. 341, I. P. Code, for preventing the complainant from using a private pathway, the accused whose defence is that the complainant had no right of way fails to plead at

the earliest possible opportunity that he *bona fide* believed that he had a right to close the pathway and as such is protected by the exception to S. 339, I.P. Code, this failure on the part of the accused does not deprive him of the right to show that the evidence in the case does not exclude the existence of a belief in his mind which takes away his act from the definition of the offence. Moreover, the question in controversy cannot be decided properly in the summary trial on the criminal side and can be more appropriately decided by the Civil Court. A.I.R. 1950 Assam 82=51 Cr. L.J. 809.

**—S. 339—Right in dispute—Forum—Offence under—Landlord locking doors of privy and bathroom of tenant—Dispute if they are included in tenancy—Proper forum.**

A landlord who prevents a tenant from entering a privy and bathroom of which he is a tenant by locking their doors, technically commits an offence under S. 339, I.P. Code. Where there is a dispute as to whether the privy and bathroom are included in the tenancy, it can be tried far more suitably in the Civil Court than in a Criminal Court. A.I.R. 1950 Cal. 157=51 Cr. L.J. 668.

**—Ss. 339 and 341—Right in dispute—Forum—Obstruction to right of way not well—established.**

Where the accused obstructed the complainant from using his right of way over the field of the accused where the right of way was not sufficiently established, the accused cannot be found guilty under S. 341, unless *mala fides* of the accused and the right of way were sufficiently established. The suit should properly go to the Civil Court. 22 P.R. 1910 Cr.=121 P.L.R. 1910=11 Cr. L.J. 495=7 Ind. Cas. 493.

**—S. 340—Wrongful confinement.**

Informal detention of suspect by Police during the whole period of investigation without arrest is illegal and amounts to wrongful confinement in however technical sense it may be. A.I.R. 1940 Nag. 186=I.L.R. (1940) Nag. 232=41 Cr. L.J. 757=1940 N.L.J. 667=189 Ind. Cas. 591.

**—S. 340—Unlawful custody—Police Officer.**

The applicant was convicted on an offence under S. 224, Session Judge in appeal found that applicant was not in lawful custody, and acquitted him of the offence under S. 224.

**Held**, the constable was guilty of the offence of wrongful confinement. 85 Ind. Cas. 44=26 Cr. L.J. 428=A.I.R. 1923 All. 34.

**—S. 340—Wrongful confinement—What amounts to—obstruct—Meaning—Physical obstruction—Necessity for.**

**Per Fulton, J.**—To support a charge of wrongful confinement, proof of actual physical obstruction is not essential. It must be proved in each case that there was at least such an impression produced in the mind of the prisoner as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if he attempted to do so. The mere threat of some future harm in case of departure will not suffice if the prisoner knows that it is open to him to go away and refrain from doing so lest he may suffer such harm. But if the circumstances are such as to justify and to create the belief that he cannot depart without being seized immediately then it would be proper to hold that he was obstructed and confined. (1902) 4 Bom. L.R. 79.



## —S. 341. Synopsis.

1. Applicability and scope.
2. Essential for conviction.
3. Order to remove obstruction.
4. Procedure.
5. Punishment and sentence.
6. Miscellaneous.

—Ss. 341 and 448. Offences under—Complaint by sub-tenant against landlord—Landlord not aware of his existence. See PENAL CODE, Ss. 448 and 341. 53 C.W.N. 822.

## 1. Applicability and scope.

—Ss. 341 and 441—Applicability—Wrongful restraint and criminal trespass—Ingredient—Intent to annoy, insult or intimidate or to commit offence—Tenant—Locking up premises and going away—Non-payment of rent for long time—Tenant not heard of—Servant of landlord breaking open door in presence of master and police for resuming possession—Offence.

There can be a wrongful restraint only when a person voluntarily obstructs another. Nor can there be any criminal trespass unless the person entering or remaining on the premises intends to commit an offence or to intimidate or insult or annoy any person in possession of such property.

The petitioner was the darwan of the owner of certain premises let to another for a shop. The tenant left without intimation and there was no sign of him for several months together. He never paid rent to the landlord, but left locking the door of the premises. The landlord believing that the tenant had abandoned and gone away and seeking the assistance of and accompanied by police went to the premises with the petitioner. The latter under the orders of his master, the landlord, broke open the door of the premises. The tenant having preferred a complaint the petitioner was prosecuted and convicted under Ss. 453 and 341, I. P. Code. The petitioner pleaded that he was not guilty of any offence and that he carried out his master's orders.

**Held:** (1) that though it was no defence to a criminal charge to plead that the accused (petitioner) was acting under the orders of his master, yet the position of the accused person was important when the offence involved a certain specific intent;

(2) that there never was any intention to annoy, intimidate or insult the tenant, the basis of the action being the belief that the tenant had abandoned the premises, and the breaking open of the shop having taken place quite openly in the presence of the police, and the intention clearly was to open the premises so that the landlord could resume possession;

(3) that there was no wrongful restraint of the tenant when it was thought that he had left the premises and had abandoned them altogether;

(4) and that the petitioner was not, therefore, guilty of any offence. 52 C.W.N. 782=49 Cr. L.J. 753=A.I.R. 1949 Cal. 85.

—S. 341—Applicability and scope—Complainant on tumtum—Accused obstructing it and preventing complainant from proceeding on his way—Offence.

Where the complainant was proceeding on a road on tumtum and by obstructing the tumtum, the accused prevented the complainant from proceeding on his way and assaulted him;

**Held:** that the facts constituted the offence of wrongful restraint under S. 341. I.P.C. A.I.R. 1941 Pat. 384=7 B.R. 696=42 Cr. L.J. 526=194 Ind. Cas. 30.

—S. 341—Applicability and scope—Persons assisting Police must not interfere with right of other people. **Held:** that the persons assisting Police in finding out a kidnapped girl were not guilty.

Persons assisting the Police must be careful not to interfere with the rights of other people. Where, however, Police are searching for a girl who is alleged to have been kidnapped and the persons assisting the Police come across a covered bullock cart and stop the cart and accuse the owner of it of having kidnapped the girl and upon his denial, insist upon sending for the Police and when the Police arrive, the girl is not found in the cart on a search being made, it cannot be said that such persons intended any harm to the owner of the cart; their action is a *bona fide* attempt to prevent what they genuinely believed to be the taking away of the girl whom the Police were looking for. They are not, therefore, guilty of an offence under S. 341, I.P.C. A.I.R. 1939 Pat. 256=20 P.L.T. 467=5 B.R. 863=40 Cr.L.J. 720=182 Ind. Cas. 979.

—S. 341—Applicability and scope.

Wrongfully stopping a person by force is an offence. (1938) 2 M.L.J. 583 (1)=1938 M.W.N. 1010=48 L. W. 379.

—S. 341—Applicability and scope—Public street—One section of community cannot interdict another section from lawful use of public street.

When the streets are public streets vested in a municipality all members of the public have equal rights and one section of the community has no right to interdict another section of the community from the lawful use of the public streets: 30 Mad. 185 (P.C.); A.I.R. 1925 P.C. 36 and A.I.R. 1926 Mad. 830, Foll. 102 Ind. Cas. 481=50 Mad. 673=8 A.I.Cr.R. 194=25 M.L.W. 667=38 M.L.T. (H.C.) 307=1927 M.W.N. 279=28 Cr.L.J. 545=A.I.R. 1927 Mad. 938=52 M.L.J. 602.

—S. 341—Applicability and scope—Joint owner—Locking up shop—Offence.

Where one of two co-owners leased a shop to the complainant without the consent of the other co-owner and the latter put a lock on the shop, he cannot be convicted for an offence under S. 341 I.P.C. 20 Bom. L.R. 106=90 C.L.J. 351=44 Ind. Cas. 463.

—S. 341—Applicability and Scope—Prevention to egress.

P was presented as an emigrant at lessor's Binny and Co.'s Emigration depot where he received meals and money. When he desired to leave the depot, he was prevented from doing so by the accused.

**Held:** that an offence under S. 341 was committed. 21 M.L.J. 439=(1911) 1 M.W.N. 369=12 Cr.L.J. 212=10 Ind. Cas. 107.

—S. 341—Applicability and scope—Obstruction—*Bona fide* colour of title.

The voluntary obstruction of any person entering upon the land under a *bona fide* colour of title is not an offence under S. 341. 5 P.W.R. 1914 Cr.=34 P.L.R. 1914=15 Cr.L.J. 532=24 Ind. Cas. 844.

## 2. Essential for Conviction.

—S. 341—Essential for conviction—Applicability—Ingredients of offence—Blocking way up a staircase—Offence—What has to be proved.

Merely blocking the way up a staircase does not necessarily amount to an offence under S. 341, I. P.



Code. Before the person blocking the way can be convicted of the offence, it must be proved that the person blocking had no right over the staircase, as a tenant or owner or occupier and that the persons seeking to use the staircase had an easement over it to get on to the upper storey or roof, etc. In the absence of proof of these, the elements necessary to sustain a conviction under S. 341 cannot be said to be present. 83 C.L.J. 99=53 C.W.N. 236=A.I.R. 1949 Cal. 112=50 Cr. L.J. 211.

—S. 341—Essential for conviction.

Before convicting a person of wrongfully restraining the other from making use of a particular place or thing it is necessary for the Court to determine if that other person has right to use it. 34 C.W.N. 582=127 Ind. Cas. 554=A.I.R. 1930 Cal. 760.

—S. 341—Essential for conviction.

A conviction under S. 341 is bad where there was no physical restraint of complainant's person. 19 Cr. L.J. 445=44 Ind. Cas. 973 (Mad.).

—S. 341—Essential for conviction.

Restraint, to amount to an offence under S. 341, must be directed to a person and not anything else. 1 Weir 341; 19 Ind. Cas. 177, Foll. 16 Cr. L.J. 176=2 L.W. 185=(1915) M.W.N. 203=27 Ind. Cas. 560.

3. Order to remove obstruction.

—S. 341—Dispossession—Order of removal of obstruction—Cr.P.C., S. 522.

Held, by Maclean, C.J. and Princep and Ghose, JJ:—

That a Magistrate while convicting an accused under Ss. 341, 114, I.P.C. for wrongfully restraining a person by the erection of a hut or by any similar act of obstruction cannot pass an order under the section that the hut or other means of obstruction should be removed, 5 C.W.N. 432 dissented from.

Held, by Ameer Ali and Brett, JJ.—That a Magistrate has an inherent power to pass the order of removal of obstruction on the conviction under S. 341, I.P.C., irrespective of the power under S. 522, Cr.P.C. 5 C.W.N. 432, foll.

Held, Per Curiam:—That as in the present case the offence was, on the finding of the lower appellate Court, attended by criminal force and the complainant was dispossessed by reason of the obstruction complained of the order of the Magistrate may be sustained as one under S. 522, Cr.P.C. (1904) 8 C.W.N. 538=31 C. 691 (F.B.).

On reference from 5 C.W.N. 432 *supra*.

—S. 341—Wrongful restraint—Obstruction to right of way—Order to remove obstruction.

A criminal court which convicts a person of wrongful restraint by blocking up a way over which the complainant had a right to go has jurisdiction to order the removal of the obstruction as the necessary corollary of the conviction. Such order, however, is not passed under S. 522 of the Criminal Procedure Code, which deals with restoration of property. (1901) 5 C.W.N. 432. But see 8 C.W.N. 538=31 C. 691.

4. Procedure.

—Ss. 341, 506—Procedure—Accused challaned under S. 341—Charge framed under S. 506—Procedure, legality of.

Where a case was originally challaned under S. 341, I.P.C., but the Magistrate subsequently framed a charge

under S. 506, I.P.C., and the accused were not taken unawares as they and their counsel had heard all the evidence:

Held, that the procedure was not in any way irregular. A.I.R. 1931 Oudh 73=7 O.W.N. 1048=32 Cr.L.J. 330=129 Ind. Cas. 166.

—S. 341—Procedure.

Even if nothing more than an offence under S. 341 has been alleged, it is not advisable to try public servants, whose career may depend upon the result, summarily. 1932 M.W.N. 478.

5. Punishment and Sentence.

—S. 341—Punishment and sentence.

Offence under S. 341 involved an offence under S. 143—Separate fine under S. 341 is illegal. A.I.R. 1941 Mad. 445=1941 M.W.N. 221 (1)=(1941) 1 M.L.J. 362=53 L.W. 632.

—S. 341—Punishment and sentence.

Accused convicted under S. 448—Accused putting forward every fact required for conviction under S. 341.

Held, that if the charge were altered from one under S. 448 to one under S. 341, the accused could not be prejudiced. A.I.R. 1937 Rang. 250=38 Cr.L.J. 989=170 Ind. Cas. 909.

6. Miscellaneous.

—S. 341—Miscellaneous—Apprehension of violence—Any private individual can restrain a person when there is reasonable apprehension of violence from him.

It is very doubtful whether Regulations giving power to Village Magistrates to effect an arrest in the case of drunken and disorderly behaviour, were not really repealed by Act 17 of 1862. But the village Magistrate has the right which every citizen has to apprehend a person as to whom there is reasonable ground for supposing that he is about to commit a breach of the peace. 61 Ind. Cas. 652=44 Mad. 913=14 M.L.W. 189=22 Cr. L.J. 412=A.I.R. 1921 Mad. 458.

—S. 341—Miscellaneous—Compounding—Criminal P.C., S. 345 (1).

An offence of wrongful restraint is compoundable by the person restrained and it is not necessary that a composition should be arrived at after a complaint has been filed in Court: 41 Mad. 685, Rel. on, 101 Ind. Cas. 671=25 A.L.J. 396=8 L.R.A. Cr. 49=7 A.I.Cr.R. 339=28 Cr.L.J. 495=49 All. 484=A.I.R. 1927 All. 375.

—S. 342—Rioting—Acquittal—Further inquiry. See Cr.P.C., S. 437. 5 C.W.N. 72.

—S. 342. See S. 79. 6 C.W.N. 511=30 C. 95.

—S. 342. See S. 146.8 C. W.N. 483.

—S. 342. Offence under. See PENAL CODE, Ss. 186 and 342. (1949) 2 M.L.J. 335.

—S. 342—Abetment—Absence of accused, no defence if instigation proved.

It would be no defence against the charge under Ss. 342 and 114, Penal Code, for the accused to say that he was not present at the actual arrest, if in fact he was instrumental in getting the arrest, made and, if after it was made, he instigated the bailiff to wrongfully confine



a debtor, inspite of a protection order in his favour. 76 Ind.Cas. 234=18 M.L.W. 167=25 Cr.L.J. 138=A.I.R. 1924 Mad. 31.

—**S. 342—Detention for purpose of police enquiry.**

A Sub-Inspector conducting an investigation is within the law when he sends for a person to the police station who can in his opinion give information about a crime and a constable and Chowkidar, who did no more than bring such a person to the Sub-Inspector, and tell him to sit down until the Sub-Inspector sees him, are committing no offence whatever. Elements of offence under S. 342 indicated. 7 O.W.N. 957=A.I.R. 1930 Oudh 505.

—**S. 342—Law as to arrest—Right of citizen to arrest another—English Common Law cannot be invoked.**

On the night of 8th August, 1921 two Head Constables arrested one N as he was drunk and creating a disturbance in the Brahman Street of the village, and they took him to the station and confined him there, although one of them knew his name and address ;

**Held:** in view of Ss. 96, 97, 102 and 105 they were not guilty under S. 342. The Indian Penal Code and the Criminal Procedure Code specifically deal with the question of arrests and it is not therefore permissible to invoke the Common Law of England in the matter.

The decision in *In re Ramasami Aiyar*, 44 M. 913 is correct but the grounds of the decision are not correct. 73 Ind. Cas. 343=46 Mad. 605=24 Cr.L.J. 599=17 M.L.W. 592=32 M.L.T. 352=1923 M.W.N. 425=A.I.R. 1923 Mad. 523=44 M.L.J. 655 (F.B.).

—**S. 342—Legality of conviction.**

Conviction of some persons who, as minor offenders, are charged as engaged in a conspiracy to conceal a minor girl after abduction, under S. 368 read with S. 109, after having acquitted the principal offenders under S. 342 is not sustainable. 33 C.W.N. 891=1929 Cr. C. 479=A.I.R. 1929 Cal. 767.

—**S. 342—Legality of arrest.**

A warrant for H's arrest was issued and the bailiff endorsed it for service to the process-server. H was arrested but was released by the Judge under S. 135, Civil P. C. The process-server had returned the warrant the same day to the bailiff, without any endorsement on it, and the bailiff, believing that it was executed merely returned the warrant to the process-server for want of his report, as he had made no report of execution. On this the process-server, instead of endorsing execution on the warrant, re-arrested H next day:

**Held,** that the second arrest was illegal. When the judgment-debtor was arrested and brought before the Court, the process had been executed, that is to say, the arrest had been carried out, though it may not have been carried out in accordance with law. There was also another reason why the second arrest was unlawful. The bailiff had power to delegate the execution of the warrant to the process-server and did so in the first instance. But on the second occasion, the bailiff did not delegate his authority to arrest to the process-server, but merely returned the warrant to him for endorsement. In the circumstances the endorsement for which the process was returned must have been the endorsement of execution, and could not be endorsement of non-execution. In any case, it was only returned for endorsement and not for further execution. In these circumstances, the re-arrest was unlawful. A.I.R. 1940 Rang. 112=I.L.R. (1940) Rang. 253 = 41 Cr.L.J. 567 = 188 Ind. Cas. 303.

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—**S. 342—Legality of arrest—Civil Court peon arresting judgment-debtor under valid warrant in discharge of duty—Subsequent release on ground of his being exempted from arrest under S. 135 (2), Criminal P. C.—Peon, if guilty under S. 342.**

Where a Civil Court peon arrested a judgment-debtor on the identification of the decree-holder in discharge of his duty under a valid warrant and on the representation of the judgment-debtor that he was exempted from arrest under S. 135 (2), Criminal P. C., his release was ordered although he had to wait in the Court for some time as the Court was engaged in another case:

**Held,** the peon was justified in keeping the judgment-debtor until the Munsif was at leisure to attend to his case and that as the peon acted in the discharge of his duty in arresting the judgment-debtor, it could not be said that he acted criminally and he was not guilty of an offence under S. 342, I.P.C. A.I.R. 1935 Cal. 551=39 C.W.N. 318=36 Cr.L.J. 1252=157 Ind. Cas. 1004.

—**Ss. 342, 224, 225—Legality of arrest.**

Where the accused are arrested under an invalid warrant they are entitled to resist or escape from a custody which is not strictly lawful, but where they cause hurt to the constable who, acting in good faith under colour of office, arrests them, and wrongly confine him, the accused are punishable for rioting which they indulge in with the object of assaulting the constable and for his wrongful confinement. A.I.R. 1932 Pat. 171=33 Cr.L.J. 706=13 P.L.T. 135=138 Ind. Cas. 844.

—**S. 342—Legality of arrest.**

Where, under an order of the Commissioner of Police which was published in the Calcutta Police Gazette and which had been in force for a considerable time, the Deputy Commissioner made an order for the confinement of a Head Constable and it was afterwards discovered the order published in the Gazette had not been granted the leave required under S. 9 of the Calcutta Police Act.

**Held,** in a complaint by the Head Constable against the Deputy Commissioner for wrongful confinement that the accused must be acquitted. 59 Ind. Cas. 37=47 Cal. 818=22 Cr.L.J. 5.

—**S. 342—Legality of arrest—Wrongful confinement—Execution of a decree—Arrest of judgment-debtor while returning from Court—Liability of Court Officer—Sentence.**

A decree-holder is guilty under S. 342, if he causes arrest of the judgment-debtor while returning from Court under circumstances mentioned in S. 135, C. P. Code and the Court Officer who arrests or makes over the warrant of arrest to his subordinate for compliance is also guilty along with the decree-holder. The fact that the judgment-debtor when returning from Court stopped in the way for some private work does not deprive him of the privilege afforded by law. 121 P.L.R. 1916 Cr.=17 Cr.L.J. 525=36 Ind. Cas. 493.

—**S. 342—Legality of arrest—Wrongful confinement—Confinement by Amin of judgment-debtors—Amin's rights and liabilities.**

In the present state of the law in India, an arresting officer (Amin) who confines the judgment-debtor in the decree-holder's house while waiting to produce him before the Court is not guilty of wrongful confinement. A warrant was issued on the 15th April, 1905 addressed to the Nazir, directing him to arrest the judgment-debtor and to bring him before the Court with all convenient speed. The warrant was made returnable on or before the 14th June, 1905. The Nazir entrusted the warrant



to the Amin and the Amin arrested the judgment-debtor at 9 A.M., on the 22nd of April, during the Easter Holidays. The Court opened after the holidays, only on the 25th April. The Amin was found to have taken the judgment-debtor to the decree-holder's house and confined him there from 9 A.M., on the 22nd and again from 10 P.M. to 7-30 P.M., on the following morning, when he was taken before the Nazir.

**Held**, that the Amin was not guilty of any offence under S. 342.

**Held**, also that the legal duty of the Amin was to produce the judgment-debtor at the next sitting of the Court and in the meantime he was responsible for his safe custody and liable among other things to a suit by the decree-holder if he allowed the judgment-debtor to escape, and consequently, in the absence of any rule of law prescribing his powers, he can confine the judgment-debtor in any manner he chooses and is not bound to keep him in what is called "free custody." (1906) 16 M.L.J. 530=30 M. 179.

—S. 342—'Mens rea'.

**Mens rea** does not enter into offence under S. 342 at all. 30 C.W.N. 751=1929 Cr. C. 366=A.I.R. 1929 Cal. 730.

—S. 342—Offence under.

Where the allegation is that a certain person was wrongfully confined by a police officer the offence falls under S. 342. 1930 Cr. C. 1111=A.I.R. 1930 Cal. 711=34 C.W.N. 556=128 Ind. Cas. 208.

—S. 342—Offence under.

Where a person takes a woman in broad daylight and confines her wrongfully but not secretly, he commits an offence under S. 342 and not under S. 365: A.I.R. 1925 Lah. 614, Foll. 109 Ind. Cas. 677=10 A.I. Cr.R. 277=29 Cr.L.J. 597 (Lah.)

—S. 342—Offence under.

When there is nothing to show that the whereabouts of the person confined were concealed by the accused from the other relations or from the person interested in the person confined, the offence amounts to one of wrongful confinement under S. 342 and not under 365. 92 Ind. Cas. 213=7 L.L.J. 520=26 P.L.R. 733=27 Cr.L.J. 229=A.I.R. 1925 Lah. 614.

—Ss. 342, 114—Offence under—Confinement of a prisoner in a jail within a cell to compel him to undergo medical treatment.

Confinement of an offender already undergoing imprisonment in a cell within the jail for the purpose of administering enema against his will amounts to wrongful confinement and is not protected by S. 79. (1902) 6 C.W.N. 511=30 Cal. 95.

—Ss. 342, 341—Sanction—Wrongful confinement—Accused Police Officers pleading that they were acting under Ch. IX, Criminal P. C.—Sanction of Local Government, necessity of—Criminal P. C., S. 132.

Section 132, Criminal P. C., is a bar against the trial of the accused who are Police Officers without the previous sanction of the Local Government for offences under Ss. 341, 342 for wrongful confinement, where they plead that they were acting under Chap. IX, Criminal P. C. 1937 M.W.N. 1243.

—S. 342—Scope.

Section 347, I. P. C., includes offence under S. 342. A.I.R. 1941 Sind 36=42 Cr. L.J. 460=193 Ind. Cas. 454.

—S. 342—Submission by complainant.

Submission by the complainant to arrest does not detract from the accused's acts or diminish its legal effect. The compelling of a person to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action is an imprisonment on the part of him who exercises that exterior will. 2 M.H.C. 396, Rel. on. 30 C.W.N. 751=1929 Cr. C. 366=A.I.R. 1929 Cal. 730.

—S. 342—Summary trial.

An offence under S. 342, I. P. C. is not triable summarily. 1932 M.W.N. 478.

—Ss. 342, 504—Summary trial.

Offences under Ss. 342 and 504 are not triable as summary cases and the acquittal of such offences by a Magistrate under S. 215 (of 263) of the Criminal Procedure Code, is illegal and must be set aside. (1904) 15 M.L.J. 225.

—S. 343—Wrongful confinement—Brothel—Prostitutes.

Accused No. 1 brought his mistress from Kolhapur and kept her with accused No. 2 a brothelhouse-keeper in Bombay. The woman was made to live as a prostitute in the house, the entrance to which was guarded and a watch was kept over her movements. Occasionally she was allowed to go out under surveillance.

**Held**, that both accused were guilty of wrongfully confining the woman. 42 Bom. 181=19 Cr. L.J. 258=2 Bom. L.R. 79=44 Ind. Cas. 114.

—S. 345—Compounding.

Under S. 345 the only person who is authorised to compound an offence under S. 498 is the injured husband and hence an order of acquittal based on compromise entered into by any other person is erroneous. 74 Ind. Cas. 444=24 Cr. L.J. 780=A.I.R. 1924 Lah. 330.

—S. 347—Scope—Ss. 347, 342—Section 347 includes offence under S. 342.

The offence under S. 342, I.P.C., is included in the offence under S. 347. A.I.R. 1941 Sind 36=42 Cr. L.J. 460=193 Ind. Cas. 454.

—Ss. 347, 342—Applicability and Scope.

Police Sub-Inspector wrongfully confining persons on charge of gambling and extorting money from them by putting them under fear of prosecution—Offence falls under S. 220 and not under S. 347 or 342. A.I.R. 1941 Sind 36=42 Cr. L.J. 460=193 Ind. Cas. 454.

—S. 347—Thumb-impressions on blank pieces of paper—Whether 'valuable security'.

In regard to a document, the affixing of a thumb-impression to a paper is authority to the holder of the same to make the document into a valuable security.

Where the accused were found to have intentionally put the executant in fear of injury to himself and thus dishonestly to have induced him to place his thumb-impression on pieces of blank paper:

**Held** that, the documents thus made to be executed were valuable securities and the accused were guilty under S. 347, I.P.C. A.I.R. 1932 Pat. 335=13 P.L.T. 588=34 Cr. L.J. 81=140 Ind. Cas. 752.



—S. 347—Elements of offence.

Where it was alleged that the police officer illegally detained a person with the object of extorting money but the Court found that no money passed.

**Held:** that the elements of an offence under S. 347 were wanting. 7 O.W.N. 957=A.I.R. 1930 Oudh 505.

—S. 347—Absence of proof.

Head constable's liabilities for abetment of wrongful confinement by Chowkidars :—Where a Head Constable sent two Chowkidars in charge of a person to procure money promised by the latter in consideration of the Head Constable's dropping a charge and on the way it was alleged that the Chowkidars wrongfully confined the person:—

**Held,** that in the absence of proof that the Head Constable gave specific orders to that end, it is impossible to hold him guilty of abetment of the specific acts of wrongful confinement. (1904) 31 C. 710 (D.B.).

—S. 348—Detention by Police.

Police Officer detaining person not concerned with investigation for more than 24 hours is guilty under S. 348. A.I.R. 1941 Mad. 720=54 M.L.W. 81=43 Cr. L.J. 3=1941 M.W.N. 505=197 Ind. Cas. 81.

—S. 348—Detention by Police.

Where the detention by the police is serious and protracted enough to amount in law to a real unauthorised prevention from proceeding beyond certain circumscribing limits the offence of wrongful confinement is complete. Limits to detention by police for purposes of investigation indicated. 1930 M.W.N. 723.

—S. 348—Interpretation—"To satisfy a claim or demand", if limited to claim or demand to property—Claim to restitution of conjugal rights—Whether included in S. 348.

The words "to satisfy a claim or demand" in S. 348, I.P.C. cannot be limited to a claim or demand to property. A claim to restitution of conjugal rights falls within these words of the section. A.I.R. 1936 Pesh. 19=1937 Cr. L.J. 344=160 Ind. Cas. 668.

—S. 349—Criminal force, what is.

Where it was proved that the complainant who had halted in front of the ploughs was obliged to run away by the reason of the accused's rushing at him with sticks and lathis and using threats towards him.

**Held:** that it was a resort to criminal force as defined in sections 349 and 350 of the Indian Penal Code. 74 Ind. Cas. 1049=45 All. 25=24 Cr. L.J. 357=A.I.R. 1923 All. 333.

—S. 349—Force—Meaning and extent.

The term 'force' in S. 349 is force used in connection with human body. 18 C.W.N. 1150=15 Cr. L.J. 720=26 Ind. Cas. 168.

—S. 349—Raising lathi to strike—Whether criminal force.

Where the accused raised lathis to strike a person who had to flee to save himself, they were guilty of using criminal force. 12 A.L.J. 154=15 Cr. L.J. 231=23 Ind. Cas. 183.

—S. 350—Criminal force definition of—Cr. P.C. S. 522—See C.R. P. C., S. 522. 5 C.W.N. 250.

—S. 350—Essential and scope—Section contemplates force used to person.

"Criminal force" as defined in S. 350, I. P. C., contemplates force used to a person and not to a thing. A.I.R. 1940 Pesh. 51=42 Cr. L.J. 272 (1)=192 Ind. Cas. 282.

—S. 350—Breaking of lock.

Breaking open of a lock is not use of criminal force. 105 Ind. Cas. 676=26 P.L.R. 506=28 Cr. L.J. 964=A.I.R. 1927 Lah. 830.

—S. 351—Assault—Gesture constituting an assault.

Where a person lifts a *lota* to hit another, that gesture is enough to constitute the act of assault under S. 351 of the Penal Code. 4 A.I.Cr.D. 472.

—S. 351—Assault—Pointing a gun at person is assault.

Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse it is an unlawful act. A.I.R. 1946 P.C. 20=59 M.L.W. 105=1946 M.W.N. 186=12 B.R. 442=50 C.W.N. 362=47 Cr. L.J. 569=(1946) 1 M.L.J. 212=223 Ind. Cas. 153 (P.C.)

—Ss. 351, 336—Assault.

Accused throwing bricks into another's house—Offence under S. 336—Accused could also be held liable for assault under S. 352 as throwing of bricks would be a gesture which would cause apprehension that criminal force was about to be used. A.I.R. 1932 All. 322=1932 A.L.J. 224=33 Cr. L.J. 889=140 Ind. Cas. 99.

—S. 351—Assault.

An internal medical examination of a lady, if not voluntarily submitted to by her would amount to assault and battery. A.I.R. 1932 All. 524=1932 A.L.J. 221=136 Ind. Cas. 367.

—S. 351—Assault—Surrounding constable in a threatening manner.

One of the accused hit a constable and the others surrounded the constable in a threatening manner.

**Held,** that the others who merely surrounded the constable should not be convicted of the assault. 8 M.L.T. 118=11 Cr. L.J. 483=7 Ind. Cas. 416.

—S. 351—Assault, what is—A threat to use force if amounts to assault.

A mere threat to use force if a person persists in a course of conduct, does not amount to assault. 30 C. 97, Rel. on. 5 S.L.R. 140=13 Ind. Cas. 237.

—Ss. 351, 354—Assault—Assault to deter a public servant from the discharge of his duty.

The fact that mere preparation to do an act taken with words uttered would cause a person to apprehend criminal force if he were to persist in a particular course of conduct which itself the accused was not bound to submit to, will not amount to assault. (1902) 30 C. 97. =6 C.W.N. 342.

—S. 351—Person in uniform has no more right to assault than anyone else.

A person in uniform, be he officer, N. C. O. or private, is no more than anyone else entitled to assault another subject of the King whether in peace or time of war. A.I.R. 1945 P.C. 46=11 B.R. 437=46 Cr. L.J. 620=1945 M.W.N. 47=(1945) 2 M.L.J. 446=219<sup>er</sup> Ind. Cas. 373 (P.C.)



# S. 352.

## Synopsis

1. Applicability.
2. Assault—what amounts to
3. Charge and conviction.
4. Sentence.
5. Unauthorised act of public servant.
6. Miscellaneous.

—Ss. 352, 353—Resistance to public servant—Complaint of Civil Court—Sanction. See CR. P.C., S. 476. 8 C.W.N. 586=31 C. 664.

## 1. Applicability.

### —S. 352—Applicability.

Where the victim is assaulted by the accused and his thumb impression forcibly taken upon a blank piece of paper, the offence is no more than the use of criminal force or an assault punishable under S. 352. A.I.R. 1941 Pat. 129=21 P.L.T. 970=7 B.R. 514=42 Cr. L.J. 361=193 Ind. Cas. 241.

—Ss. 352, 111, 302—Applicability—Master ordering servant to chastise or beat deceased—Servant holding deceased but master murdering deceased—Offence of servant.

A person who unknowingly assists in the commission of a crime is not himself guilty of that crime or of aiding or abetting it. Where, therefore, the master ordered the servant to chastise or beat the deceased and in obedience to that order, the servant caught him and held him for a beating by the master who, instead of beating him, suddenly produced a spearhead from his pocket and plunged it into the deceased:

**Held**, that it could not be said that the servant knowingly held the deceased for any purpose other than chastisement and he was not guilty of the abetment of the murderous attack by the master but only guilty of abetment of ordinary assault punishable under S. 352, I.P.C. A.I.R. 1935 All. 346 (2)=57 All. 717=1935 A.W.R. 64=1935 A.L.J. 54=36 Cr. L.J. 438=153 Ind. Cas. 999 (2).

—S. 352—Applicability—Warrant of Civil Court—Judgment-debtor absent—Pardanashin wife of judgment-debtor in the house—Judgment-creditor pushing open door regardless of warning—Physical and mental pain caused to lady—Offence—Civil P.C., S. 62—Applicability of.

Where a warrant of the Court is being executed at the instance of the Judgment-creditor and the judgment-debtor is not in his house but his **pardanashin** wife alone is there and the creditor is warned that she will resent intrusion, the creditor is not entitled to push open the door, and is liable under S. 352, I.P.C., if the consequences of the push given by him cause great pain and distress to the lady, both mental and physical. Section 62, Civil P. C. applies to the case and the bailiff is the person who is to take such action as is necessary under S. 62 and not the judgment-creditor. A.I.R. 1934 Sind 52=34 Cr. L.J. 963=145 Ind. Cas. 259.

### —S. 352—Applicability.

Persons may riot without actually committing an offence under S. 352 and the theory that S. 147 embraces S. 352 is fallacious. 106 Ind. Cas. 338=39 M.L.T. 109=29 Cr. L.J. 2=A.I.R. 1928 Mad. 21.

—Ss. 352, 307—Applicability—Pulling trigger of unloaded gun—Not an attempt to murder but is only an assault.

Complainant was seated on the verandah of his house when the accused rushed towards him from the road, levelled a gun to him and pulled the trigger. There was no report or discharge. Complainant took fright ran out of the house but stumbled and fell a short distance away. The accused followed up and, aiming at the prostrate complainant, pulled the trigger of this gun a second time. Again there was no result. Then the complainant got up and escaped. The appellant also fled and was not arrested till some days later. The gun had not been found and there was no evidence to show that it was loaded at the time when the complainant was attacked.

**Held**, that the conviction under S. 307, cannot be sustained, but that under S. 352, the accused was guilty of an assault. 74 Ind. Cas. 1042=1 Rang. 209=2 Bur. L.J. 76=24 Cr. L.J. 850=A.I.R. 1923 Rang. 251.

## 2. Assault—What amounts to.

### —S. 352—Assault—What amounts to.

If the accused did in the circumstances alleged, put out his hand towards the woman in a menacing manner so as to cause her to apprehend that he was about to use criminal force, his act would constitute an assault. It would not be necessary to establish that he actually had any particular implement in his hand. A.I.R. 1944 Sind 19=45 Cr. L.J. 247=211 Ind. Cas. 88.

—S. 352—Assault—What amounts to—Trespass in pleader's room—Turning out without violence, if amounts to assault.

A pleader who turned out a person who had trespassed into the pleader's room in a District Court without, however, using violence did not thereby exceed his rights and no offence under S. 352 was committed. 15 Bom. L.R. 1039=15 Cr. L.J. 14=22 Ind. Cas. 158.

## 3. Charge and Conviction.

### —Ss. 352, 323—Charge and conviction.

The conviction under S. 75, Madras City Police Act is no bar to the trial for an offence under Ss. 323 and 352, I.P.C. A.I.R. 1940 Mad. 224=50 L.W. 800 (1)=(1939) 2 M.L.J. 814=1940 M.W.N. 172 (1)=41 Cr. L.J. 401 (1)=187 Ind. Cas. 82.

### —S. 352—Charge and conviction.

The accused was summoned to answer a charge under S. 426 only and was convicted and sentenced under that section by trial Magistrate. There was nothing to show that he was ever informed by the Magistrate that he had to defend himself against in an offence of assault also:

**Held**, the alteration of the conviction to one under S. 352 in appeal could not be maintained. A.I.R. 1936 Pat. 536=17 P.L.T. 572=3 B.R. 62=37 Cr. L.J. 1156 (1)=165 Ind. Cas. 600.

### —S. 352—Charge and conviction.

Where an accused is sent up on a police report for trial for an offence punishable under S. 122 of the Bombay City Police Act the trying Magistrate can alter the charge and convict him of an offence



under S. 352, I.P.C. 36 Cal. 869, Foll. 93 Ind. Cas. 896=28 Bom. L.R. 291=27 Cr. L.J. 496=A.I.R. 1926 Bom. 255.

—S. 352—Charge and conviction—Charge under S. 147—Conviction under S. 352 can be given but not for abetment of assaults.

Criminal force being an element of the offence under S. 146, it must be taken to be capable of carrying conviction under S. 352. A different *mens rea* is not necessary in S. 146, Penal Code, as contrasted with S. 352. In a charge under S. 147, the conviction can be had under S. 352.

The conviction of the abetment of assault on a charge under S. 147, I.P.C. cannot stand. 33 Mad. 264, followed. 65 Ind. Cas. 862=15 Mad. L.W. 583=1922 M.W.N. 182=23 Cr. L.J. 206=A.I.R. 1922 Mad. 110.

—S. 352—Charge and conviction—No hurt but criminal force used to public servant charge was altered from Ss. 323 to 352.

Where there is nothing to show that any bodily pain, disease or infirmity was caused to anybody or that any act was done with the intention of doing so, but where the accused clearly used criminal force, the Court on reference altered the conviction under S. 323 to one under S. 352 especially in view of the fact that the accused intended to prevent the warrant being executed but which happened to be technically not legal. 71 Ind. Cas. 503=45 All. 142=20 A.L.J. 921=24 Cr.L.J. 151=A.I.R. 1923 All. 87.

#### 4. Sentence.

—S. 352— Sentence.

An assault on a citizen for appealing to the police needs a deterrent sentence. 93 Ind. Cas. 896=28 Bom. L.R. 291=27 Cr. L.J. 496=A.I.R. 1926 Bom. 255.

#### 5. Unauthorised act of public servant.

—Ss. 352 and 353—Applicability—Unauthorised act of public servant—Police party effecting unlawful seizure of goods under defective process of attachment—Absence of good faith—Resistance to seizure with force—Offence.

Where it is found that a police party attempting to effect an attachment had no right to make the attachment, that the police officers were not acting in good faith, and that the process of attachment was defective in many respects, the protection afforded to them by S. 99, I.P. Code, disappears, and the persons from whose possession the property is being seized are entitled to resist the seizure of their goods. They have every right to resist unlawful seizure of their goods and to use minimum force to prevent such unlawful seizure. They cannot therefore be convicted of an offence under S. 352, I.P. Code or S. 353, I.P. Code. 228 Ind. Cas. 73=13 B.R. 133=48 Cr. L.J. 60=A.I.R. 1947 Pat. 232.

—Ss. 352 and 353—Unauthorised act of public servant—Public servant present at search but not in execution of his duty—Assault on him—Offence does not fall under S. 353 but under S. 352.

If the acts of the public servant are not strictly justifiable, if he is not discharging a duty imposed on him by law, if he is not doing what it is his duty to do as a public servant, an assault on him does not fall under S. 353 but under S. 352, Penal Code.

A Tahsildar made a report to the Sub-Divisional Magistrate of an offence under the Defence of India Rules against A for giving a false declaration of the quantity of wheat in his possession and proposing the search of his house. The Sub-Divisional Magistrate directed the Tahsildar to report the matter to the Station-house Officer under Defence of India Rule 81 (4). This was done. When the investigating officer was making a search of the house of A, the Tahsildar was present at the search, but he had no authority to issue a search-warrant either under S. 105, Criminal P. C., or under Defence of India Rule 124 (1). At the time of the search the accused assaulted the Tahsildar :

**Held**, that the Tahsildar must be deemed to have been present at the search as a public servant but not a public servant in execution of his duty as such public servant. The offence committed was, therefore, under S. 352 and not under S. 353. A.I.R. 1946 Nag. 261=I.L.R. (1946) Nag. 395=1946 N.L.J. 307=224 Ind. Cas. 458.

—Ss. 352, 353 and 186—Unauthorised act of public servant.

Accused while carrying *juar* crop in contravention of C.P. and Berar Food Grains Export Restriction Order, 1943, obstructed by public servant—Accused beating public servant with fists—Public servant not empowered to use force to prevent contravention of order.

**Held**, public servant was not acting in discharge of his duty as public servant—Offence committed is one under S. 352 and not under Ss. 186 or 353. 1946 N. L. J. 302=24 Ind. Cas. 454=I.L.R. (1946) Nag. 714=A.I.R. 1947 Nag. 60.

—Ss. 352, 97 and 99—Unauthorised act of public servant—Unauthorised search attempted by Sub-Inspector—Accused armed with lathi raising same to strike Sub-Inspector.

The Sub-Inspector who was not in charge of Police Station unauthorisedly proposed to search the house of X and his brothers. The latter refused to allow the search to be made. They were armed with lathis and assumed a threatening attitude. S actually raised his lathi to strike the Sub-Inspector :

**Held**, that X was guilty under S. 352. He had no right of private defence, not because the Sub-Inspector could invoke S. 99, but because X was not entitled to invoke S. 97. The Sub-Inspector could not be said to be acting in good faith under colour of his office. A.I.R. 1944 Pat. 222=11 B.R. 53=15 Cr.L.J. 806=215 Ind. Cas. 108.

—Ss. 352, 353—Unauthorised act of public servant.

Bombay Weights and Measures Act (15 of 1932) — Section 22 and Rules under Act do not empower



manual assistant to inspect weights and measures—Milk man going on cycle stopped by manual assistant and his measures inspected—Obstruction to the assistant is not an offence under S. 352 or S. 353. A.I.R. 1944 Sind 89 = 45 Cr.L.J. 550 = 212 Ind. Cas. 163.

—S. 352—Unauthorised act of public servant.

Accused assaulting Police Officers arresting accused in good faith under colour of their office are guilty under S. 352. A.I.R. 1940 Mad. 18 = 1939 M. W. N. 1004 = 50 L.W. 763 = (1939) 2 M.L.J. 776 = 41 Cr.L.J. 250 = 186 Ind. Cas. 103.

—Ss. 352, 353—Unauthorised act of public servant—assault on amin executing warrant for possession—Offence.

Where an **amin** who in execution of a warrant, breaks open the lock and delivers the possession to the purchaser is assaulted and pushed out by the accused, the offence committed is one under S. 352 and not under S. 353. 1937 M.W.N. 176.

—Ss. 352, 353—Unauthorised act of public servant—Demand of tax by peons without formal writ of lawful authority—Assault—Offence.

A member of a Sanitation Committee submitted to the **Tahsildar** a list of persons who had made default in payment of sanitation tax. The **Tahsildar** endorsed this with an order that the **jamadar** should appoint a suitable **chaprasi** to realise the taxes due. Two peons accompanied by a **chowkidar** went round with the endorsed list and when they approached the accused the latter tore up the list and buffeted the peons out of the premises knocking off the turban of one of them. The accused were charged and convicted under S. 353, I.P.C.

**Held**, (i) that inasmuch as there was no formal writ at all and there was nothing to show that the tax had been demanded by the order of the Board or certified by any authority to be due, the accused were entitled to result the demand and were not guilty of an offence under S. 353, I.P.C.

(ii) that the accused were, however, not justified in assaulting the peons and were, therefore, guilty under S. 352, I.P.C. A.I.R. 1931 Lah. 524 = 32 Cr. L.J. 853 = 132 Ind. Cas. 214.

—Ss. 352, 353—Unauthorised act of public servant.

In a revenue recovery where tom-tomming is not required, a person assaulting the man doing the job is guilty under S. 352 and not under S. 353. 1935 M. W.N. 1337 (2).

—S. 352—Unauthorised act of public servant.

Search by Police Officer—Requirements of S. 165, Criminal P.C. not complied with—No ground for holding that there was anything to prevent him from complying—Accused pushing back to prevent him from making the search:

**Held**, that the Police Officer was not acting in good faith within the meaning of S. 52, I.P.C. and the accused was not guilty of an offence under S. 352. A.I.R. 1932 Pat. 66 = 10 Pat. 821 = 13 P.L.T. 62 = 33 Cr.L.J. 233 = 136 Ind. Cas. 60.

—S. 352—Unauthorised act of public servant.

Where it is found that the Sub-Inspector admittedly had not right to enter or attempt to search a house, a resistance to the search is no offence under section 352. 71 Ind. Cas. 996 = 24 Cr.L.J. 276 = A. I. R. 1923 All. 433.

6. Miscellaneous.

—S. 352—Miscellaneous.

Voluntary hurt to process-server while discharging his duty—Conviction by Taluk Magistrate under Ss. 225, 323 and 353—Objection before Joint Magistrate that the facts disclosed made the case not only one coming under S. 353 but also under S. 352 which was not cognizable by Taluk Magistrate—Joint Magistrate ordering retrial:

**Held**, that as the evidence disclosed a voluntary hurt to a public servant while he was discharging his duty, the Joint Magistrate's order was not wrong. (1939) 2 M.L.J. 404 = 1939 M.W.N. 518.

—S. 352—Miscellaneous.

Although, for a husband to take his wife would not be an offence, he has no legal right to cause injury, fear, and annoyance to her by using criminal force and his right can be enforced only by having recourse to the Court and not by use of force. A right must not be enforced by the use of criminal force and where five or more persons employ criminal force for the enforcement of a right, they constitute an unlawful assembly. A.I.R. 1935 All. 916 = 1935 A.L.J. 1096 = 1935 A.W.R. 1081 = 37 Cr.L.J. 35 = 159 Ind. Cas. 183.

—S. 352—Miscellaneous—Evidence—Assault in daylight before Tahsildar's house—Assault proved by independent witnesses—No evidence in defence—Weight to be attached to eye-witnesses.

It is true that the accused person are under no obligation, legal or moral, to prove how the crime was committed, but where a murderous assault was committed in daylight in front of the **Tahsildar's** headquarters and a number of independent witnesses have proved how the accused committed the murderous assault on their victim and how the assailants who were armed with pistols twice fired at him and each shot hit the mark, then the fact that the accused produced no evidence in their defence and are unable to produce any evidence in support of their alleged innocence is a factor which might will be taken into consideration in deciding what weight is to be attached to the evidence of the eye-witnesses, who prove the guilt of these accused. A.I.R. 1934 Oudh 401 = 11 O.W.N. 909 = 35 Cr. L.J. 1244 = 151 Ind. Cas. 179.



S. 353 :

**Synopsis.**

See also S. 352. INDIAN PENAL CODE.

1. Assaulting public servant.
2. Essentials for conviction.
3. Interpretation and scope.
4. Obstruction.
5. Punishment and sentence.

See also S. 353 Indian Penal Code—  
What amounts to assault.

6. Resistance.
7. Use of criminal force.
8. What amounts to assault.
9. Miscellaneous.

—S. 353. See also S. 146. 5 C.W.N. 134=28 C. 411.

—S. 353. See also S. 225. I.L.R. 27 All. 491=1905 A.W.N. 66.

—S. 353—Criminal force — Arrest — Warrant — Endorsement by initials. See also S. 224. 5 C.W.N. 447.

—S. 353—Warrant — Misdescription — Entity — Onus. See also S. 225 (B). 5 C.W.N. 413=28 C. 399.

**1. Assaulting public servant.**

—S. 353—Applicability—Assaulting public servant—Submission to arrest—Person proceeding to police station on direction by police officer—Attempt to escape—Assault on officer when latter tries to prevent escape—Offence.

A police officer can effect an arrest without touching the body of the person to be arrested ; if the person to be arrested submits to the arrest or custody, *e.g.*, on the police officer's orders proceeds to the police station, such submission is a submission to the arrest, when that police officer is entitled to arrest them and take them to the police station. If, thereafter, the arrested man endeavours to escape and assaults the officer when the latter prevents him from escaping, he commits the offence punishable under S. 353, Indian Penal Code. 49 Cr.L.J. 22=A.I.R. 1948 Cal. 68.

—S. 353—Assaulting public servant not discharging duty imposed by law—Offence committed.

The words "in the discharge of his duty as such public servant" in S. 353, Indian Penal Code, mean in the discharge of a duty imposed by law on such public servant and do not cover an act done by him in good faith under colour of his office. If the acts of the public servant are not strictly justifiable, if he is not discharging a duty imposed on him by law, if he is not doing what it is his duty to do as public servant, the offence does not fall under S. 353 but under S. 352, Indian Penal Code. I.L.R. (1946) Nag. 395=224 Ind. Cas. 458=47 Cr.L.J. 638=1946 N.L.J. 307=A.I.R. 1946 Nag. 261.

—S. 353—Assaulting public servant—Sub-Inspector not in charge of Police Station attempting to search without warrant—Other defects against legality of search—Accused assuming threatening attitude—Offence.

The following were the main defects against the legality of the search which the Sub-Inspector was

proposing to conduct : (i) he had no warrant (ii) he was not an officer in charge of a Police Station ; (iii) he was not an officer investigating into an offence which he was authorised to investigate ; (iv) he did not record in writing his grounds for wishing to make a search ; (v) he did not specify the thing for which search was to be made :

**Held**, that the Sub-Inspector was not acting in the lawful discharge of his duty or in the execution of his duty as a Sub-Inspector so as to bring the acts of the accused persons who assumed threatening attitude within the mischief of S. 353. A.I.R. 1944 Pat. 222=11 B.R. 53=45 Cr.L.J. 806=215 Ind. Cas. 108.

## —S. 353—Assaulting public servant.

Sub-Inspector suspecting accused to be in possession of papers "connected with Congress" attempting to search him on railway platform—Refusal by accused to allow search—Sub-Inspector attempting to take accused's *jhola* by force—Accused catching hold of Sub-Inspector's hand whereupon accused thrown down and beaten by Sub-Inspector :

**Held**, that the accused was not guilty under S. 353. A.I.R. 1942 All. 424=1942 A.L.J. 528=44 Cr.L.J. 67=I.L.R. (1942) All. 914=1942 A.W.R. 300=203 Ind. Cas. 467.

—S. 353—Assaulting public servant—Striking a pot carried by public servant in discharge of his duties—Offence.

To strike a pot of *lahn* which a man is carrying and which is in contact with that man's body constitutes the offence of criminal force if it is done to cause him fear, annoyance, etc., and if that person is a public servant in the discharge of his duties, the offence is punishable under S. 353, Indian Penal Code. A.I.R. 1941 Lah. 297=I.L.R. (1941) Lah. 370=43 P.L.R. 536=42 Cr.L.J. 812=196 Ind. Cas. 106.

—S. 353—Assaulting public servant—Execution of warrant which is, on its face, legal and issued under S. 88, Criminal Procedure Code—Sub-Inspector attached while executing it—Offence under S. 353, if committed.

When a warrant under S. 88, Criminal Procedure Code, is issued, it is presumed that a proclamation under S. 87 has already been issued, the presumption of law being that the acts of a Court must be presumed to have been duly performed. Even if it were presumed that a proclamation had not been issued under S. 87, Criminal Procedure Code, it would not justify the conclusion that the Sub-Inspector and the constables were not acting in execution of their duty as public servants when they went to execute the warrant which was not illegal and if he is attacked while executing the warrant, the person attacking can be convicted under S. 353, Indian Penal Code. A.I.R. 1938 All. 220=1938 A.L.J. 137=1938 A.W.R. 124=39 Cr.L.J. 570=I.L.R. (1938) All. 386=174 Ind. Cas. 861.

—S. 353—Assaulting public servant—Search under S. 74, Bihar and Orissa Excise Act (II of 1915) by Excise Sub-Inspector—No reasons recorded—Accused assaulting—Offence.

The recording of reason before search is provided for both under the Criminal Procedure Code, and under the Bihar and Orissa Excise Act, and is intended to protect the liberty of citizens and avoid useless and unjustified searches. If an officer, before proceeding to search, has to record his reason, he will have to apply his mind to the facts and the sufficiency of the information on the basis of which he wants



to search. Where no reasons are recorded as required by S. 74, Bihar and Orissa Excise Act, and the Excise Sub-Inspector searching the house is assaulted by the accused, the accused cannot be convicted under S. 353, Indian Penal Code, since the Sub-Inspector cannot be said to be acting in exercise of his powers. A.I.R. 1937 Pat. 501=18 P.L.T. 398=3 B.R. 736=38 Cr.L.J. 982=170 Ind. Cas. 784.

—S. 353—Assaulting public servant.

Government Notification No. 332-341-XII, dated 29th January, 1931—*Tahsildar* removing unauthorised encroachments—*Tahsildar* acting in execution of duty as public servant—Assault on *Tahsildar* while doing so is an offence under S. 353. A.I.R. 1933 Nag. 295=35 Cr.L.J. 746=148 Ind. Cas. 803.

—S. 353—Assaulting public servant—Exercise of official duties in grossly illegal and outrageous manner—Accused—Offence.

Where an officer exercises his official duties in a grossly illegal and outrageous manner, he cannot be deemed to be a public servant in the execution of his duty, so as to bring an assault against such officer within the purview of S. 353, Indian Penal Code. A.I.R. 1931 Rang. 169=32 Cr.L.J. 939=132 Ind. Cas. 711.

—S. 353—Assault on police.

Where a police officer was deputed in a private place to control the traffic on the road leading from that private place to the public road and he was assaulted while so discharging his duty.

Held, the police officer was acting in the lawful discharge of his duty and the accused was guilty of an offence under S. 353. 111 Ind. Cas. 665=29 Cr.L.J. 905=A.I.R. 1928 Lah. 230.

—S. 353—Assaulting public servant—Illegal warrant—Arrest on illegal warrant—Assault by person on the officer arresting—No offence under S. 353 is committed.

Two persons were improperly arrested on an illegal warrant by a forest watcher and they were marched from the place of arrest along public road evidently to the police station. The accused came on the scene and asked: "What is the meaning of the extraordinary warrant?" or, "What is this extraordinary procedure?", or words to that effect, and seeing two of the men under actual arrest, that is, under wrongful confinement, he gave a slap on the cheek.

Held, that no offence under S. 353, was committed, and that at best it was a trivial offence. 109 Ind. Cas. 365=51 Mad. 873=1 M.Cr.C. 115=29 Cr.L.J. 541=28 M.L.W. 141=1928 M.W.N. 310=A.I.R. 1928 Mad. 624=55 M.L.J. 220.

—S. 353—Assaulting public servant—Unlawful assembly.

Where the common object of the unlawful assembly was to compel by criminal force the excise officers to stop the house searches and this was effected by smashing up the handis, and when the excise officers expostulated with the rioters, they proceeded to attack them:

Held, that the members thereof were liable to be convicted both under S. 147 and Ss. 353, 354. 41 Cal. 836, Foll. 106 Ind. Cas. 591=6 Pat. 828=29 Cr.L.J. 79=9 A.I.Cr.R. 256=9 P.L.T. 167=A.I.R. 1928 Pat. 115.

—S. 353—Assaulting public servant—On duty.

Although a Police Officer may be outside the area of his jurisdiction, he is bound within the limits of

the district for which he is appointed to aid another Police Officer when called on by him to do so or to keep order as required under Ss. 51 (e) and 53 of the Bombay District Police Act. Therefore, any person assaulting a Police Officer while he is engaged in discharging the duty under Ss. 51 (e) and 53 is guilty of an offence under S. 353, Penal Code. 88 Ind. Cas. 15=26 Cr.L.J. 1071=18 S.L.R. 221=A.I.R. 1925 Sind 280.

—S. 353—Assaulting public servant—Police on guard—Police on guard is a public servant in the discharge of his duty.

A constable was on duty at the judicial lock-up and while he was patrolling, the accused came up and entered into a conversation with certain under-trial prisoners who were detained in the lock-up. The constable prevented the accused from talking with the prisoners. Thereupon the accused not only abused the constable but also threw his shoe at him.

Held, that accused was guilty of an offence under S. 353, Indian Penal Code. 76 Ind. Cas. 29=4 Lah. 448=25 Cr.L.J. 93=A.I.R. 1924 Lah. 257.

—S. 353—Assaulting public servant—No offence.

Assault by the lessee of the defaulter (pattadar) who had failed to pay the water-tax, on the officer executing the warrant authorising distraint of the defaulter's property is no offence under S. 353. 83 Ind. Cas. 1007=20 M.L.W. 669=26 Cr.L.J. 223=A.I.R. 1924 Mad. 895=47 M.L.J. 447.

—S. 353—Assaulting public servant.

Where the date fixed for the return of the warrant had already expired on the day that the process-server went to execute it.

Held, that he was not acting in the execution of his duty and the conviction under section 353 for assaulting him was bad. 76 Ind. Cas. 655=19 N.L.R. 183=25 Cr.L.J. 223=A.I.R. 1924 Nag. 68.

—S. 353—Assault on Amin.

Where the time fixed by the Munsif for the return of the warrant had not expired but only the time given by the Nazir for the earlier return of the warrant as a matter of office routine had expired.

Held, the warrant had not become time-barred and the accused assaulting the Amin while executing it was guilty under S. 353. 40 C. 849, Foll. 75 Ind. Cas. 768=32 M.L.T. 248=1923 M.W.N. 444=25 Cr.L.J. 64=A.I.R. 1923 Mad. 687=45 M.L.J. 74.

—S. 353—Assaulting public servant—Discharge of duty.

Where the accused assaulted *Tahsil* peons ordered to procure camels and to persuade the owners to take them to the *Tahsil*.

Held, that offence under S. 353 was not committed in absence of evidence to show for what purpose the camels were sent for. As otherwise there is no evidence to show that the peons were acting in the discharge of their duties. Conviction was altered to one under S. 323. 59 Ind. Cas. 321=22 Cr.L.J. 65=L.R. IA. (Cr.) 162.

—S. 353—Assaulting public servant—Searching house of person suspected of theft—Assault.

A Police Inspector searching the house of a person, suspected of having committed a theft was assaulted by his brother.



**Held**, that the accused's brother being a suspect at the time of the attempted search, the search was not illegal and was justified under Ss. 95 and 165 of the Criminal Procedure Code. The accused was therefore guilty of an offence under S. 353, Indian Penal Code. 17 A.L.J. 115=20 Cr.L.J. 174=49 Ind. Cas. 494.

**—S. 353—Assaulting public servant—Police constable—Discharge of duty.**

A police constable arresting a person without written order is not acting in the discharge of his duty and an assault on him is not an offence under S. 353. 20 Cr.L.J. 48=48 Ind. Cas. 688 (Nag.).

**—Ss. 353 and 147—Assaulting public servant—Officer executing orders under Repealed Act.**

The mere fact of a public servant executing an order of the Court under a Repealed Act, will not exonerate a person from liability under S. 353, Indian Penal Code, if the Court has jurisdiction to pass such an order. It is no excuse for a person assaulting the public servant that he is not attired in his departmental livery, if the person knows at the time that he is discharging his duties as a public servant. 13 N.L.R. 87=18 Cr.L.J. 689=40 Ind. Cas. 689.

**—Ss. 353 and 358—Assaulting public servant—Illegal distraint—Assault while distraining—Offence.**

An assault of a person illegally distraining under S. 82 (2) of the Madras Local Boards Act is not an offence under S. 353 but could come under S. 358. 14 M. 467, Foll. 16 M.L.T. 429=15 Cr.L.J. 637=25 Ind. Cas. 837.

**—S. 353—Assaulting public servant on duty—Search of accused's house.**

An assault by the accused on a public officer conducting a search of the accused's house for specific stolen property and not a general search is an offence under S. 353, Indian Penal Code. 41 Cal. 261=14 Cr.L.J. 405=17 C.W.N. 1209=20 Ind. Cas. 229.

**—S. 353—Assault on public servant executing orders of his superiors.**

An assault made on a public servant acting under the orders of his superiors is punishable under S. 353 whether those orders were right or wrong. 183 P.L.R. 1913=19 P.W.R. 1913 (Cr.)=14 Cr.L.J. 141=18 Ind. Cas. 893.

**—S. 353—Assaulting public servant—Malguzar, duty of.**

The assaulting of a malguzar who was holding an inquiry in the matter of damage done to Government forest, is not an offence under S. 353 as such inquiry is not one of his legitimate duties. 12 Cr.L.J. 112=9 Ind. Cas. 669 (All.).

**—Ss. 353 and 225-B—Assaulting public officer in execution of his duties—Warrant of arrest, or contents of it to be made known before arrest is legal.**

To make an arrest under a warrant issued in execution of a civil court's decree valid, it may not be necessary to show the warrant to the person to be arrested, but it is the duty of the bailiff to acquaint the person with the contents of the warrant when he insists him and that he was authorized to arrest him, and if the accused then wants to see the warrant, it would be the duty of the bailiff to show it to him. When a warrant is not shown to the person arrested, nor are the contents of the warrant notified to him before

or at the time of the arrest, there is no lawful arrest. (1901) 5 C.W.N. 843.

**2. Essentials for Conviction.**

**—Ss. 353, 352 and 99—Officer making search not acting lawfully—Conviction, if maintainable.**

[Essentials for conviction under S. 353 explained.]

The test in such cases is whether the officer at the time of the assault was lawfully discharging a duty imposed on him by law as such. If the officer making search is not acting lawfully, conviction cannot stand. If the acts of the public servant are not strictly justifiable; if he is not discharging a duty imposed on him by law, if he is not doing what it is his duty to do as a public servant, the offence does not fall under S. 353. It falls under S. 352. Section 99 does not cure the defect caused by the irregularity. The effect of S. 99 is merely to remove certain rights of private defence.

Before proceeding to convict an accused under S. 353, a Magistrate should deal with the question of guilty knowledge on the part of the accused and the question as to whether they knew that the person assaulted was a public servant. A.I.R. 1933 Sind 174=34 Cr. L.J. 1147=27 S.L.R. 209=146 Ind. Cas. 43.

**—S. 353—Essentials for Conviction—Facts required to be proved.**

For a conviction under S. 353 the prosecution must prove that the person assaulted is a public servant and that the assault was made on him while he was discharging his duties as such. 15 A.L.J. 565=18 Cr. L.J. 803=41 Ind. Cas. 323.

**3. Interpretation and Scope.**

**—S. 353—Interpretation—"Public servant".**

Officer exercising his duties illegally—Assault against him—Is not an offence under S. 353 as he cannot be deemed to be "public servant." 4 A.I.Cr. D. 472.

**—S. 353—Interpretation—"Discharge of his duty, etc."—Meaning of—Act done in good faith and colour of office.**

The expression "discharge of his duty as such public servant" in S. 353, Indian Penal Code, means discharge of a duty imposed by law on such public servant in the particular case, and does not cover an act done by him in good faith and under colour of his office. I.L.R. (1946) Nag. 714=47 Cr. L.J. 636=224 Ind. Cas. 454=1946 N.L.J. 302=A.I.R. 1947 Nag. 60.

**—S. 353—Interpretation—"In execution of his duty".**

A bill-collector of a Union Board is a public servant but he cannot be said to be engaged in lawful discharge of his duty when he attempts to enforce a warrant for an amount in excess of what could be recovered by distress. 1936 M.W.N. 638.

**—S. 353—"Public servant"—Interpretation.**

Warrant which does not authorise any particular person by name or even by office and which is signed by the head accountant is illegal, and the person executing it cannot be said to be acting as a public servant. 1933 M.W.N. 725.

**—S. 353—Interpretation—"In consequence of."**

The expression "in consequence of" as used in S. 353 includes the motive which actuated the assault



as well as the cause of such assault. 99 Ind. Cas. 935=28 Cr. L.J. 199=A.I.R. 1927 Lah. 162.

—S. 353—Interpretation—“Public servant”  
—Absence of name of person to be arrested vitiates warrant and the arresting person is not a public servant.

The name of the witness to be arrested is the most essential part of the warrant and where that was lacking.

Held, the peon acted without jurisdiction and consequently was not a public servant within the meaning of Section 353.

Held, further the warrant clearly was bad. 83 Ind. Cas. 481=51 Cal. 902=39 C.L.J. 462=26 Cr. L.J. 2=A.I.R. 1924 Cal. 950.

—S. 353—Interpretation—“Duty as such public servant”—Meaning.

The words ‘duty as such public servant’ in S. 353 mean duty imposed by law on such public servant and do not include acts done in good faith under colour of his office. 38 P.W.R. 1913 (Cr.)=325 P.L.R. 1913=14 Cr. L.J. 512=20 Ind. Cas. 992.

—S. 353—Interpretation—Criminal force to deter a public servant in discharge of his duty—“In the execution of his duty”.

A person who prevents a vaccinator from vaccinating a child, in a place where vaccination has not been made compulsory, cannot be said to be committing an offence under S. 353. A vaccinator who vaccinates in a place where vaccination is not compulsory is not discharging any duty under the law when attempting to vaccinate a child therein. (1908) 19 M.L.J. 238=4 Ind. Cas. 1166.

#### 4. Obstruction.

—S. 353—Obstruction—Public Gambling Act (III of 1867), S. 13—Right to apprehend gamblers without warrant—Obstruction by use of criminal force—Offence.

Where a Police constable W was informed by certain constables that gambling was going on in a public place and he was asked to accompany them and assist in arresting the gamblers, and when the party was some paces from the place where the gambling was going on, the accused rushed forward and grappled with W shouting all the time to his companions to run away :

Held, that when W was informed of the gambling, he had every reason to believe that the information was correct and being a Police officer, he was under the law entitled to apprehend the gamblers without warrant and was prevented by the accused from proceeding in that direction by use of criminal force and the accused having thus deterred W from discharging his duty which was to arrest the gamblers, an offence under S. 353, Indian Penal Code, was committed. A.I.R. 1935 All. 516=1935 A.W.R. 469=36 Cr. L.J. 558=154 Ind. Cas. 740.

—S. 353—Obstruction.

Where a warrant that has been issued is illegal, the Officer executing the warrant is not acting in the discharge of his duty and if the judgment-debtor obstructs, he cannot be convicted under S. 353. A.I.R. 1932 All. 227=(1932) A.L.J. 179=33 Cr. L.J. 887=140 Ind. Cas. 118.

—S. 353—Obstruction—Search without warrant—Obstruction to police officers entering house without search warrant—No harm beyond push—No offence is committed.

Where a Sub-Inspector and a constable acting under him enter the house of the accused without being in possession of a search warrant it is more than doubtful whether it could be said that they were

engaged in the execution of their duty as public servants. They are technically guilty of a house-trespass and the accused has a right to resent the invasion of his house. When no harm beyond a push appears to have been sustained by the constable, no offence can be said to be committed under S. 353. 13 A.L.J. 691, Rel. on 120 Ind. Cas. 113=30 Cr. L.J. 1145=1929 Cr. C. 495=13 A.I.Cr. R. 142=A.I.R. 1929 All. 903.

—S. 353—Obstruction—Criminal Procedure Code, S. 54 (1) Arrest by Police constable without warrant—Credible information by Police—Commission of cognizable offence—Obstruction to arrest if an offence.

Where a police constable arrests a person without a warrant on information received by him about the commission of a cognizable offence in respect of which a warrant has been also issued against him, a third person obstructing the constable in effecting the arrest commits an offence under S. 353 of the Indian Penal Code. 36 All. 6=11 A.L.J. 957=15 Cr. L.J. 179=22 Ind. Cas. 755.

—S. 353—Obstruction—Obstructing a public servant in the discharge of his duty—Criminal Procedure Code, S. 165 (3).

At the search of accused's house by the head constable under orders of the Sub-Inspector, the accused assaulted the constable and did not allow him to enter the house.

Held, that the accused was guilty under S. 353, Indian Penal Code, as the head constable, in conducting the search, was obeying the orders of his superior officer, and that S. 165 (3) of the Criminal Procedure Code did not apply. 9 M.L.T. 168=11 Cr.L.J. 727=8 Ind. Cas. 881.

—S. 353—Obstruction—Obstructing a vaccinator—Vaccination not compulsory.

Preventing a vaccinator from vaccinating a child against the wishes of its parents in a place where vaccination has not yet been made compulsory is no offence since the vaccinator under the circumstances cannot be said to be discharging any duty under the law. 19 M.L.J. 238=11 Cr.L.J. 200=4 Ind. Cas. 1166.

—Ss. 353 and 149—Obstruction—Execution after date fixed in warrant—Obstruction to commission with a warrant for execution.

A judgment-debtor who obstructed a commission executing the decree after the date fixed therein is not guilty of an offence under S. 353 or 149. (1904) 31 Cal. 424.

#### 5. Punishment and sentence.

—S. 353—Punishment and sentence—Assaulting Police constable in uniform.

To assault a constable in uniform, purporting to act in the execution of his duty with due moderation, and to declare that he did not care for the authority of the Police constable, is not a matter which should be treated lightly.

[The conviction under Ss. 225 and 353 was altered to one under S. 323 of the Indian Penal Code as the blows to the constable must have caused bodily pain.] A.I.R. 1939 Nag. 95=I.L.R. (1939) Nag. 488=1939 N.L.J. 101=40 Cr.L.J. 905=184 Ind. Cas. 231.

—S. 353—Punishment and sentence—Obstruction to attachment in execution—Use of criminal force.

Obstruction to attachment in execution must be severely dealt with, especially when there has been



any use of criminal force in furtherance of the obstruction. A.I.R. 1933 Nag. 392=35 Cr. L.J. 447=147 Ind. Cas. 702 (1).

**—S. 353—Punishment and sentence—Resistance to the process-server in the most open way—Deterrent punishment should not be given.**

Very many people are disposed to resist process-servers when their property is attached, and it is necessary to pass deterrent sentences even where such persons are not sure that the attachment is legal. But where the accused acted in the most open way and made an endorsement that he had resisted the process-server.

**Held**, a very heavy punishment was not required in order to deter persons from taking such action as the resistance offered was merely a technical assault. It would be different if the action was such that the chance of detection and punishment was very small. 111 Ind. Cas. 576=29 Cr. L.J. 896=A.I.R. 1928 Nag. 135.

**—S. 353—Punishment and sentence.**

Assaults on public servants cannot be lightly treated. 99 Ind. Cas. 935=28 Cr. L.J. 199=A.I.R. 1927 Lah. 162.

**6. Resistance.**

**—S. 353—Applicability—Resistance—Warrant of attachment before judgment of property on person of defendant—Power of bailiff to use violence—Resistance by defendant—Offence—Civil Procedure Code, O. 21, R. 43.**

O. 21, R. 43, Civil Procedure Code, does not justify the seizure by violence of property, such as money, from the person of the judgment-debtor in pursuance of an order for attachment before judgment. If he lays violent hands on the person of a defendant or judgment-debtor and attempts to seize currency notes in his possession, he cannot be regarded as doing an act in the discharge of his duty within the meaning of S. 353, Indian Penal Code. If the judgment-debtor resists such unlawful trespass on his person and has to use criminal force, he cannot be held guilty of an offence under S. 353, Indian Penal Code. I.L.R. (1946) Kar. 57=A.I.R. 1946 Sind 166=228 Ind. Cas. 4=48 Cr. L.J. 35.

**—S. 353—Resistance.**

"The discharge of his duty as such public servant"—Local official using force to secure compliance with Food Grains Export Restriction Order—Resistance—Offence. See PENAL CODE Ss. 186 AND 353. 224 Ind. Cas. 454=I.L.R. (1946) Nag. 714=1946 N.L.J. 302=A.I.R. 1947 Nag. 60.

**—S. 353—Resistance.**

When the order calling out the members of the Civic Guard on duty was not notified in the *Calcutta Police Gazette* as required by R. 7 framed under S. 8 of Civic Guards Ordinance III of 1940, the members cannot be said to have been called out on duty within S. 4 of the Ordinance and hence resistance to arrest attempted to be made by them cannot constitute an offence under S. 353, Indian Penal Code. A.I.R. 1944 Cal. 79=45 Cr. L.J. 384=48 C.W.N. 138=I.L.R. (1944) 1 Cal. 456=211 Ind. Cas. 392.

**—Ss. 353 and 99—Resistance—Amin executing expired warrant after time fixed—Resistance—Right of private defence—Amin, if acts in "good faith."**

When the date fixed in a warrant of attachment has expired, the warrant is no longer in force and capable

of execution and if any person offers resistance to its execution purporting to be made under the time expired warrant, he is not guilty of any offence. A.I.R. 1942 Oudh 57=1942 O.W.N. 1175=43 Cr. L.J. 60=1941 A.W.R. 334=17 Luck. 311=196 Ind. Cas. 731.

**—Ss. 353, 147 and 99—Resistance.**

Magistrate directing proceedings under S. 147, Criminal Procedure Code and ordering "local Police to see that *status quo* is maintained"—Police going on scene and entering building of petitioner and attempting to demolish wall which was alleged to have blocked drain—Petitioners resisting attempt—Offences under Ss. 147, and 353, Indian Penal Code held not committed—Section 99, Indian Penal Code did not apply. A.I.R. 1941 Pat. 560=7 B.R. 945=42 Cr. L.J. 753=23 P.L.T. 232=195 Ind. Cas. 593.

**—S. 353—Resistance—Order allowing attachment of movable property of judgment-debtor wherever found—Resistance—Whether offence.**

An order allowing attachment of the movable property of the judgment-debtor wherever found is illegal and resistance to such an attachment is not an offence under S. 353, Indian Penal Code. A.I.R. 1941 Rang. 347=1941 Rang. L.R. 592=43 Cr. L.J. 292=197 Ind. Cas. 886.

**—S. 353—Resistance.**

Sub-Inspector directing constable, on complaint to him of cognisable offence to bring offender before him—Arrest of offender without written order—Resistance to arrest:

**Held**, that the offender who refuses to submit and those who prevent the constables from carrying out the arrest are guilty under S. 353. A.I.R. 1937 Bom. 56=38 Bom. L.R. 971=38 Cr. L.J. 257=I.L.R. (1937) Bom. 127=166 Ind. Cas. 632.

**—Ss. 353 and 352—Resistance.**

U.P. Municipalities Act, Ss. 166, 168 and 169—Defaulters in tax—Warrant of distress issued by chairman on his own initiative—Warrant held, was of doubtful legality—Superintendent signing bill and notice of demand against defaulters—Superintendent not authorised—Bill and notice, held invalid and warrant of distress was bad—Resistance to execution by Superintendent of such warrant—Conviction of accused under S. 353, Indian Penal Code, should be altered to one under S. 352, Indian Penal Code. A.I.R. 1936 All. 74=37 Cr. L.J. 382=1936 A.L.J. 427=160 Ind. Cas. 1089.

**—S. 353—Resistance—Execution warrant not complying with Civil Procedure Code, O. 21, R. 24 (3)—Resistance to such warrant, if an offence.**

If, in an execution warrant sought to be executed the date on or before which it is to be executed and the date on or before which it is to be returned to the Court is not specified, the warrant is bad. Thus the warrant being illegal, a person resisting its execution by the *Amin* commits no offence under S. 353, Indian Penal Code. A.I.R. 1934 All. 1016=36 Cr. L.J. 295=153 Ind. Cas. 157.

**—S. 353—Resistance.**

Resistance to warrant of arrest—Warrant signed by Deputy Nazir not duly authorised—Accused held were not guilty either under S. 325-B or S. 353, Indian Penal Code, as the warrants were illegal. A.I.R. 1934 Mad. 206=39 L.W. 388=35 Cr. L.J. 782=66 M.L.J. 408=(1934) M.W.N. 399=148 Ind. Cas. 818 (2).



**—S. 353—Resistance.**

In execution of a distraint warrant, attachment of doors of a house is illegal and a person is justified in resisting the attachment. 1933 M.W.N. 725.

**—S. 353—Resistance to execution.**

When a Court peon who was executing a warrant of arrest was resisted by the accused :

**Held**, that the accused committed an offence under S. 353, Indian Penal Code. A.I.R. 1931 Cal. 443 = 35 C.W.N. 228 = 32 Cr. L.J. 886 = 58 C. 940 = 132 Ind. Cas. 244.

**—S. 353—Resistance to illegal warrant—No offence—Warrant to attach supratdar's property is illegal.**

Where the *supratdar* of the attached property of a judgment-debtor, failed to deliver it when called upon to do so, and the executing court, therefore, issued a warrant of attachment of his moveable property and with this warrant the bailiff along with some seven men went to his residence and there attached his cattle, and the accused rescued the same, and caused slight injuries while so rescuing.

**Held**, that a *supratdar* is not a receiver appointed by court and therefore, the provisions of the Code of Civil Procedure relating to a Receiver appointed by court do not apply to a *supratdar*. Therefore, the warrant was illegal and the *supratdar* and his partisans were competent to resist the removal of his cattle from his house, and were not guilty of any offence if in the exercise of that right they inflicted slight injuries to the companions of the bailiff. 11 C.W.N. 836, Foll. 75 Ind. Cas. 731 = 25 Cr. L.J. 43 = A.I.R. 1924 Lah. 667.

**—S. 353—Resistance to illegal act—Resistance to public officer acting in good faith though the act be illegal or irregular is offence.**

Where two bailiffs went together to the house of the petitioner who knew that they were bailiffs and had come to attach his property in execution of the warrant and where the Civil Nazir stated that his instructions to the bailiffs were that they both should work together in executing the warrant and the accused whose property was to be attached under the warrant, assaulted one of the bailiffs whose name in the warrant was not endorsed and prevented him from attaching his property.

**Held**, that the bailiff was acting in good faith as a public servant and the accused was, therefore, guilty of an offence under S. 353. 21 M. 296, Foll. 76 Ind. Cas. 186 = 25 Cr. L.J. 122 = A.I.R. 1924 Lah. 632.

**—S. 353—Resistance to Revenue Inspector in execution of distraint for arrears of revenue is an offence though warrant of distraint is addressed only to village headman, his subordinate.**

Where the warrant of distraint was addressed to the village headman and not to the Revenue Inspector who was supervising the work of the village headman, as it was his duty to do, and who had been specially enjoined by his superior the Tahsildar to attend to the work of distraint.

**Held**, that resistance to the Revenue Inspector constituted an offence under S. 353. 76 Ind. Cas. 962 = 1924 M.W.N. 50 = 25 Cr. L.J. 290 = A.I.R. 1924 Mad. 539 = 46 M.L.J. 45.

**—S. 353—Resistance—Illegal act—Distress warrant by Collector to Police Officer is illegal.**

The Collector has no authority to issue distress warrant for the realisation of arrears of income-tax

under S. 46(3) to an officer of the Police and the police officer executing such a warrant cannot be said to be acting in execution of his duty as a police officer. On this ground therefore the charge under Section 353 must fail if there was resistance to the police officer. 72 Ind. Cas. 954 = 4 P.L.T. 171 = 1923 P.H.C.C. 111 = 1 Pat. L.R. (Cr.) 68 = 24 Cr. L.J. 490 = A.I.R. 1923 Pat. 338.

**—Ss. 353, 149 and 147—Resistance to Amin—Notice not shown.**

An amin directed to survey certain land under S. 45 of the Bengal Survey Act with a notice fixing time for completion, which time was extended subsequently by the Collector, is not bound to show notice to anybody so that any resistance offered on the ground that the date fixed in the notice had expired is unjustifiable. S. 45 of the Bengal Survey Act does not require any publication of the proclamation which is required under Ss. 4 and 5 of Act prior to demarcation of land. 2 Pat. L.J. 18 = 18 Cr. L.J. 360 = 3 Pat. L.W. 429 = 38 Ind. Cas. 744.

**—S. 353—Resistance to search and assault—Criminal Procedure Code, Ss. 165 (3) and 166, not complied with—No offence.**

A Police Sub-Inspector sent an intimation to another officer that he intended to search a house within the jurisdiction of the latter and secured the presence of the constable to help him in the search, the constable had no authority either verbal or written from his Sub-Inspector.

**Held**, that Ss. 165 (3) and 166, Criminal Procedure Code, not having been complied with, no offence was committed by resistance to the search. 13 A.L.J. 691 = 16 Cr. L.J. 589 = 30 Ind. Cas. 141.

**7. Use of Criminal force.****—S. 353—Using criminal force to constables interfering in cases of breaches of peace—Persons illegally taken into custody pelting stones at the constables in revenge after they had escaped from such custody—Offence.**

While under our law, a person is entitled to inflict the necessary minimum injuries, even on constables and other public officers illegally arresting him, in order to release himself from such unlawful custody, he is not given any right to beat them or pelt stones at them or use criminal force towards them in revenge after escaping from their custody.

"Constables" are under S. 21 of the Madras District Police Act, always on duty when interfering in breaches of the public peace within their station limits and jurisdiction whether in *mufti* or in uniform, though they may not be entitled to arrest the persons committing an affray as it is a non-cognizable offence. If as a result of their warnings to persons committing an affray to desist from committing the affray, they are subjected to criminal force by pelting stones after the persons have escaped from their custody and there is no need to inflict any criminal force on them for the purpose of such escape, an offence under S. 353, Penal Code, will be made out against such persons. I.L.R. (1950) Mad. 1035 = 63 L.W. 18 = 1950 M.W.N. 34 = A.I.R. 1950 Mad. 365 = 51 Cr. L.J. 604 = 4 A.I.Cr.D. 306 = (1950) 1 M.L.J. 27.

**—Ss. 353 and 352—Use of Criminal force—Offence under—Head constable having no written warrant trying to arrest a person—Use of criminal force against.**

Where a head constable attempts to arrest a person on suspicion without the necessary warrant in writing



required by S. 56 (1) of the Criminal Procedure Code, the use of criminal force by the person suspected against the head constable will not amount to an offence under S. 353 of the Penal Code. If the action of the public servant was not valid in law, using criminal force, against him would not amount to an offence under S. 353. Where the head constable did not purport to arrest on his own account it cannot be contended that an offence under S. 353 was committed as the officer could arrest a person suspected of a cognisable offence without a warrant. In the circumstances even if a relation of the person sought to be arrested tries to prevent the arrest by using force or threatening to use force, such an act cannot come within the ambit of S. 352 of the Penal Code. 61. L.W. 363=1948 M.W.N. 356=A.I.R. 1948 Mad. 472=49 Cr.L.J. 705=(1948) 1 M.L.J. 377.

#### 8. What amounts to assault.

—S. 353—Accused surrounded by police for being arrested as offender—Accused running away taking gun in hand and escaping without aiming gun—Offence.

Where a police party go to the house of the accused to arrest him as an offender in a cognisable crime, but he picks up a gun in his hand and escapes by running away without actually attempting to shoot at the police or aiming his gun at them, he cannot be said to have assaulted the police so as to render him liable to conviction under S. 353, Indian Penal Code. A.I.R. 1950 Kut. 23.

—Ss. 353, 351 and 349—What amounts to assault—‘Assault,’ ingredients of—Apprehension arising not from person making gesture or preparation but from somebody else—Whether assault causing change in position of human being—If ‘force’ used—Accused’s men moving near complainant at a gesture from accused—Accused, if guilty under S. 353.

According to the definition of ‘assault’ under S. 351, Indian Penal Code, the apprehension of the use of criminal force must be from the person making the gesture or preparation, and if that apprehension arises not from that person but from somebody else, it does not amount to assault on the part of that person. As, according to S. 349, force cannot be said to be used by one person to another by causing change in the position of another human being, where the accused’s men moved towards the complainant at a gesture from the accused, it cannot be said that the accused was guilty under S. 353. A.I.R. 1939 Oudh 81=1939 O.W.N. 63=1939 A.W.R. 39=40 Cr.L.J. 221=14 Luck. 409=179 Ind. Cas. 498.

—Ss. 353 and 143—U. P. Municipalities Act (II of 1916), Ss. 295, 314, 244 (1)—What amounts to assault—Medical Officer and Sanitary Inspector ordering accused to remove ice kept for sale as unfit for use—Accused adopting threatening attitude towards them—Assault, if committed.

Where what the accused did was more than mere obstruction or molestation in that they adopted a threatening attitude towards the Medical Officer and Sanitary Inspector on their ordering the removal of the ice kept by the accused as being unfit for use and in consequence, the Medical Officer and Sanitary Inspector had to leave the place :

**Held**, that the accused committed an assault as defined in the Indian Penal Code and S. 314, U.P. Municipalities Act, had no application to the case and hence there was no illegality in the prosecution of the accused under S. 353, Indian Penal Code.

**Held**, also, that it was proved that power under S. 244(1), Municipalities Act, had been delegated by the Executive Officer with the sanction of the chairman to the Medical Officer of Health and hence it could not be said that the Medical Officer was exceeding his legal powers when he wanted to remove the ice from the accused’s shop. A.I.R. 1936 Oudh 20=1935 O.W.N. 1124=36 Cr.L.J. 1386=158 Ind. Cas. 481.

—S. 353—What amounts to assault—Use of abusive language—Threatening with lathi in heat of temper—Sentence.

Whether a particular act amounts or does not amount to an assault depends upon the circumstances of each particular case. A particular act may not amount to an assault in one case, but the same act taken along with the other surrounding circumstances may amount to an assault in another case. Where, therefore, the accused interposed between the attaching officer and the cattle which he was proceeding to attach and being removed under the orders of the officer, he indulged in the use of abusive language and thereafter went away threatening that he would return and teach them a lesson and soon afterwards he came back with a *lathi* with companions and came sufficiently close to the officers to raise in their minds a reasonable apprehension that actual force was likely to be used :

**Held**, that the act of the accused came within the definition of assault.

**Held**, also that as the accused’s subsequent appearance on the scene was in the heat of the moment and soon realising the situation he ran away from the spot and no violence or force was used by him, a sentence of fine would meet the ends of justice. A.I.R. 1935 Pat. 214=1 B.R. 446=16 P.L.T. 295=26 Cr. L.J. 714=155 Ind. Cas. 421 (2).

#### 9. Miscellaneous.

—Ss. 353 and 185—Miscellaneous.

Sections 353 and 185 do not pre-suppose the existence of a legal warrant. A.I.R. 1938 Mad. 659=1938 M.W.N. 418=47 L.W. 673=39 Cr.L.J. 879=177 Ind. Cas. 448.

—Ss. 354 and 366—Applicability.

The mere act of assault and outraging the modesty of a woman are covered by S. 354 and not by S. 366. A.I.R. 1934 Pesh. 69=35 Cr.L.J. 1273=151 Ind. Cas. 103.

—S. 354—Applicability—Offence under S. 354—Whether can be committed on girl of five and a half years of age.

While a girl of five and a half years of age was playing about, the accused put his finger into her private parts and caused a mark on them. A little while after the girl complained of a burning pain in her private parts and her mother saw a red mark there. The girl told her mother that it was caused by the accused. The accused was charged and convicted for having outraged the modesty of the girl :

**Held**, Per *Jack, J.*—Under S. 354 it must be shown that the assault was made intending to outrage or knowing it to be likely to outrage the modesty of the girl. The conduct of the girl showed that in fact her modesty was not outraged, and in view of the nature of the offence the sentence should be maintained but under S. 323, Indian Penal Code.

Per *M. C. Ghose, J.*—On the facts found, S. 354 was applicable and that such action on the part of a man as has been committed by the accused would tend to destroy the formation of a sense of modesty in the



girl. A.I.R. 1933 Cal. 142=34 Cr. L.J. 303=142 Ind. Cas. 297.

**—Ss. 354, 376 and 511—Applicability—Assault upon a girl.**

The accused took off a girl's clothes, threw her on the ground and then sat down beside her. He said nothing to her nor did he do anything more.

**Held**, that the accused committed an offence under S. 354, Penal Code, and was not guilty of an attempt to commit rape. 116 P.L.R. 1912=16 P.W.R. 1912 (Cr.)=13 Cr. L.J. 469=15 Ind. Cas. 309.

**—S. 354—Applicability—Catching hold of a girl of six years.**

The accused took a girl of six years to his room and lay on her.

**Held**, that the accused should be convicted of the offence under S. 354. 14 Bom. L.R. 961=13 Cr. L.J. 858=17 Ind. Cas. 794.

**—S. 354—Applicability—Outraging woman's modesty.**

The fact that a person is in love with a woman does not authorise him to pull that woman by her hand and hair in the presence of others and such an act amounts to an outrage of a woman's modesty punishable under S. 354. 4 Bur. L.T. 268=13 Cr. L.J. 53=13 Ind. Cas. 389.

**—S. 354—Attempt of rape and indecent assault—Distinction—Attempt to commit rape must be distinguished from preparation to commit rape and from indecent assault.**

An act which amounts to attempt to commit rape does not lose that character merely because the offender does not display a determination to effect his object at all costs. But two conditions are requisite for an attempt to commit the offence. First, there must be an attempt to commit the offence and second, some act must be done towards the commission of the offence. The word "attempt" is not itself defined in the Penal Code and must therefore be taken in its ordinary meaning. And even if an act has been done towards the commission of the offence that alone does not bring the case within the section. From the moment when the intention is formed to commit an offence every act done which facilitates the commission of the offence, and which is done with that object in view, is in one sense an act done towards the commission of the offence, but the doing of every such act does not constitute an attempt to commit the offence. It must in every case be a question depending upon the circumstances whether a particular act done (with the requisite intention) towards the commission of an offence is sufficiently proximate to its commission to constitute an attempt or is so remote as merely to constitute preparation for its commission.

When a lady who was travelling alone in a train woke up from her sleep, she found the accused sitting on her berth. She jumped up and rushed screaming to the door, but the accused caught hold of her, put his hand over her mouth and threatened her with a revolver and made her sit down. She then managed to get to the window and open it but he caught her by the hair and pushed her on the seat—in a sitting position. He threatened to strangle her if she screamed. Then he began to unbutton his trousers and had unfastened the top button when she made an attempt to reach the communication cord. The accused then caught her by the wrist and in the struggle her wristwatch was broken. Then immediately the accused released her and asked her name. She gave it and he apologised for molesting her, saying he had mistaken

her for some other lady. It was established on the evidence that accused entered the carriage with the intention of having intercourse by force if necessary, with a woman whom he then believed to be another than the one actually assaulted.

**Held**, that the acts were acts of preparation, done towards the commission of rape, but that singly or collectively they did not amount to an attempt to commit rape. They did, however, amount to an assault with the intent to outrage the modesty of a woman or which accused knew to be likely to have that result, and thus constituted an offence punishable under S. 354 of the Penal Code. 96 Ind. Cas. 260=4 Bur. L.J. 83=27 Cr. L.J. 916=A.I.R. 1925 Rang 247.

**—Ss. 354, 376 and 511—Attempt of rape—Outraging modesty—Distinction.**

Conviction of rape cannot be maintained where in the first report to the police, the girl merely stated that the accused seized her by the arm and asked her to have connection with him; but where the accused is proved to have stripped her nearly naked and was lying upon her when her cries attracted people to the spot, he commits an offence under S. 376 plus 511 and not merely under S. 354. 42 P.W.R. 1910 Cr.=11 Cr. L.J. 611=8 Ind. Cas. 257.

**—S. 354—Essentials—Intent to outrage or likelihood thereof essential.**

An offence under S. 354 is only committed when a person assaults or uses criminal force to a woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty, but where a woman has no modesty to mention or it is not such as would be outraged by a person having sexual intercourse with her, the act of a person in taking her to a room and having intercourse with her, cannot be said to outrage her modesty. 108 Ind. Cas. 81=9 A.I.Cr.R. 545=29 Cr.L.J. 325=A.I.R. 1928 Pat 326.

**—S. 354—Offence under—Essentials—Catching a woman while sleeping by neck—Offence under S. 354 is not committed. (Cuming, J., Graham, J. contra).**

**Cuming, J.**—Every assault on a woman or every use of criminal force to a woman does not necessarily fall under S. 354, Indian Penal Code, namely, an assault or use of criminal force to a woman with intent to outrage her modesty.

**Graham, J.**—Catching a woman by neck while she is sleeping is an act which clearly comes within the purview of S. 354, since the accused may fairly be presumed to have known that his act was likely to outrage the woman's modesty. 103 Ind. Cas. 553=553=31 C.W.N. 583=28 Cr.L.J. 697=A.I.R. 1927 Cal. 505.

**—S. 354—Offence of indecent assault—Essentials.**

An offence of indecent assault on a woman cannot be complete unless there is an intention or knowledge that the woman's modesty will be outraged. 6 Bur. L.T. 21=14 Cr. L.J. 149=19 Ind. Cas. 149 (F.B.).

**—Ss. 354 and 323—No offence—Process-server and decree-holder going to house to effect delivery of possession of the house to decree-holder—Woman occupant refusing to vacate—Forcible removal—Struggle—Dhori of woman getting loose :**

**Held**, that the peon and the decree-holder acted in good faith and in exercise of their legal rights and offences under Ss. 323 and 354 were not committed. A.I.R. 1936 Oudh 379=1936 O.W.N. 601=37 Cr.L.J. 892=164 Ind. Cas. 99.



**—S. 354—Offence under—Whipping Act, if can be applied.**

Whipping Act has no application to an offence under S. 354, Indian Penal Code where the accused is 18 years old. A.I.R. 1942 Bom. 78=44 Bom. L.R. 48=43 Cr. L.J. 475=199 Ind. Cas. 85.

**—S. 353—Sentence—Substantial sentence—Necessity of inflicting.**

Criminal assault on an innocent woman with intent to outrage her modesty publicly and in open daylight in a high-handed manner merits a substantial sentence of imprisonment. A.I.R. 1934 Lah. 36(2)=35 P.L.R. 83=14 L. 800=35 Cr. L.J. 613=148 Ind. Cas. 96.

**—S. 355—Sentence.**

In a case arising out of a faction, a sentence of fine along with compensation is the proper sentence. (1935) M.W.N. 478(1).

**—S. 355—Provocation—Prosecution must prove absence of grave and sudden provocation—Disturbing an orthodox Hindu Brahmin in his prayer is sufficient to cause grave and sudden provocation.**

In order to prove that the assault by the accused was made with intent to dishonour a woman, absence of grave and sudden provocation has to be proved.

The accused, an orthodox Hindu Brahmin, took his bath and was sitting on a stone in the midst of a stream offering his prayers. While he was so reciting his prayer, a low caste woman passed through the stream at such close distance from that place that the surface of the water got naturally disturbed and some particles of water fell on his body. The accused was upset and after some exchange of abuses the accused caught hold of the woman's hand.

**Held**, that the accused acted under grave and sudden provocation and was not guilty under S. 355. 96 Ind. Cas. 859=9 M.L.J. 157=27 Cr.L.J. 1003=A.I.R. 1927 Nag. 47.

**—S. 358—Accused using criminal force on grave and sudden provocation—Conviction.**

Where the accused uses criminal force on grave and sudden provocation given by the patrol who had abused the accused, the conviction ought to be under S. 358, Indian Penal Code. A.I.R. 1934 All. 872=36 Cr. L.J. 766=3 A.W.R. 699=155 Ind. Cas. 540 (1).

**—Ss. 359 to 369.**

**Synopsis.**

1. Age of girl.
2. Applicability.
3. Completion of offence.
4. Consent of guardian.
5. Consent of minor.
6. Consent of person kidnapped.
7. Continuing offence.
8. Conviction.
9. Defence.
10. Essentials and Scope of offence.
11. Evidence and Proof.
12. Intention and knowledge.
13. Jurisdiction.
14. Interpretation.
15. Lawful custody.
16. Lawful guardian.
17. Minor—Meaning of.

**18. Offence under.**

**19. Person of unsound mind.**

**20. Procedure.**

**21. Sentence.**

**22. Who can abduct or kidnap.**

**1. Age of girl.**

**—S. 361—Age of minor girl—Determination of—Ossification test.**

It is not safe to fix the age of a minor girl on the ossification result for the purpose of determining whether an offence under S. 361, Indian Penal Code, has been committed, as different tables have been prepared by the authorities in different provinces. A.I.R. 1950 Cal. 406=54 C.W.N. 329=51 Cr. L.J. 1486.

**—S. 366—Medical evidence about age of girl—Court should obtain precise evidence whether girl could not be of 16 years or above that.**

In a case under S. 366, Penal Code, in view of the fundamental importance of the question of age of the girl concerned, it is the duty of the Judge to obtain the evidence of the medical witness with the utmost precision and to have it brought out clearly whether the witness was prepared to stake his opinion that the girl could not be of the age of sixteen or over. A.I.R. 1946 Cal. 493=47 Cr. L.J. 325=233 Ind. Cas. 44.

**—S. 366—Evidence of age.**

Apart from the statement of the kidnapped girl's father as regards her age, there was the evidence of the doctor, who examined the girl, to the effect that she was under 16 years of age. All the evidence on the question of age including the deposition of the girl herself—which suggested that she was more than sixteen—was placed fully and fairly by the Judge before the jury who had the girl herself before them. On consideration of that evidence, the jury definitely found that she was under 16 years of age :

**Held**, that in the circumstances, the verdict could not be assailed in any way. A.I.R. 1941 Cal. 315=42 Cr. L.J. 649=195 Ind. Cas. 12.

**—S. 366—**In order to prove the charge of kidnapping, it is incumbent on the prosecution to prove that the person kidnapped was under 16 years of age. A.I.R. 1939 All. 708=1939 A.W.R. 693=1939 A.L.J. 980=41 Cr.L.J. 142=I.L.R. (1939) All. 871=185 Ind. Cas. 271.

**—S. 366—**In a prosecution for abduction, the onus of proving the girl's age is on the prosecution and no conviction can be sustained if the evidence is inconclusive. A.I.R. 1937 All. 353=1937 A.L.J. 547=38 Cr. L.J. 621=1937 A.W.R. 203=168 Ind. Cas. 833.

**—S. 361—Ossification.**

Although it may be recognized that ossification is an important test for determining the age, yet having regard to the practical difficulties which would attend the application of this test, it cannot be said that ossification is an indispensable test for determining the age of a girl. A.I.R. 1937 Pat. 263=38 Cr.L.J. 673=18 P.L.T. 535=15 Pat. 817=169 Ind. Cas. 48.

**—S. 366—**Before the accused is convicted of the offence of kidnapping, it is necessary to prove that the person kidnapped, if a female, is under 16 years of age. A.I.R. 1934 Sind 119=36 Cr.L.J. 62(2)=28 S.L.R. 285=151 Ind. Cas. 984.

**—S. 366—**In a prosecution for kidnapping, the age of the girl must be proved by the prosecution.



A doctor's opinion as to age is not of much value. A.I.R. 1931 Lah. 401=32 P.L.R. 98=32 Cr.L.J. 1041=133 Ind. Cas. 560.

## 2. Applicability.

—**S. 364**—Applicability and scope—Murder in consequence of abduction or abetment of murder. See PENAL CODE, Ss. 302 AND 364. 224 Ind. Cas. 435=A.I.R. 1947 Cal. 35.

—**Ss. 364 and 302**—Prosecution alleging that accused murdered person abducted or abetted his murder—Accused should be charged under S. 302 or Ss. 302 and 109—No charge under S. 364 can be framed.

Where the prosecution case is that accused murdered the deceased or abetted his murder and that the murder was committed in consequence of the abduction of the deceased by the accused, the charge can be framed only under S. 302 or S. 302 read with S. 109. The case cannot be dealt with under S. 364 which is mainly a special case of enhanced punishment for particular type of abetment of murder. The enhanced punishment will be applicable even though the murder is not committed in consequence of the abduction. But when murder is committed S. 364 cannot apply. 224 Ind. Cas. 435=A.I.R. 1947 Cal. 35.

### —S. 361—Exception.

The exception to S. 361 simply is that the section does not extend to the act of any person who in good faith believes himself or herself to be entitled to the lawful custody of the child. There is no question whatever or any authority to remove the girl from the control of her lawful guardian. A.I.R. 1938 Cal. 475=39 Cr. L.J. 751=176 Ind. Cas. 456.

—**S. 364**—Section 364 provides for the punishment of a specific offence and is not intended as an indirect method of punishing persons who are suspected but not proved to have committed a murder. A.I.R. 1937 Cal. 578=I.L.R. (1937) 1 Cal. 484=39 Cr. L.J. 31=171 Ind. Cas. 944.

## 3. Completion of offence.

### —S. 363—Offence of kidnapping—When completed.

It is well-settled that the taking away of a minor from the lawful custody is not the same thing as keeping the minor out of such custody; the act of taking away is completed as soon as the minor is taken out of his or her guardian. 231 Ind. Cas. 457=48 Cr.L.J. 799.

—**S. 366-A**—If the accused kidnapped or abducted the woman with the necessary intent, the offence is complete whether or not the accused succeeded in effecting his purpose, and even if in the event the women in fact consented to the marriage or the illicit intercourse taking place. A.I.R. 1933 Rang. 98=11 Rang. 213=34 Cr.L.J. 696=143 Ind. Cas. 872 (F.B.).

—**S. 366-A**—Where *A* and *B* induced a girl to go with them offering to take her to her destination but with the real object of selling her for illicit intercourse and afterwards *C* and *D* took her from one place to another with the object of selling her but there was no evidence to show that *C* and *D* offered any inducement to the girl or to any act with the intention that she may be or knowing to be likely that she will be forced to illicit intercourse:

Held, that the offence, under S. 366-A was complete when *A* and *B* induced the girl to leave her place and what happened afterwards did not constitute a fresh offence under S. 366-A either against *A* and *B* or against

any other accused who just took her from one place to another and passed her on from hand to hand. A.I.R. 1932 Lah. 555=33 Cr.L.J. 675=33 P.L.R. 727=138 Ind. Cas. 597.

### —S. 363—Removal of girl by *A* with consent of guardian—Subsequent removal by *C* without consent—Liability of *C*.

*A* came to her mother's house one day and took her sister *B* who was living with their mother, for helping her in carrying flour to the village mill. *A*'s husband *C* put *B* on a camel and rode away with her. *C* was charged an convicted under S. 363. It was contended on his behalf that the offence of kidnapping must be deemed to have been completed when the girl was removed by her sister from the lawful guardianship of her mother and that her subsequent transportation by the accused was not an act of kidnapping punishable under S. 363:

Held, that though kidnapping is not a continuous offence, on the facts of the case the act of kidnapping took place when *B* was taken away from the custody of her sister *A*, and the accused was properly convicted under S. 363. A.I.R. 1931 Lah. 53=32 Cr.L.J. 615=130 Ind. Cas. 782.

—**Ss. 359 to 369**—A person who finding the girl below 16 years of age takes her away from guardianship to make use of her for his own purposes, is guilty of the offence and the offence is completed the moment he takes away the girl. 7 O.W.N. 499=126 Ind. Cas. 510=1930 Cr. C. 582=A.I.R. 1930 Oudh 289.

### —S. 363—The question has to when the offence is completed is a question of fact.

Whether the kidnapping is complete or not, is a question of fact and must in each case be decided upon the evidence. Where the finding is that the accused took part in the actual removal of the girl immediately after she was taken out of the house of her guardian, his conviction under S. 363 read with S. 114 is correct.

Where *A* enticed a girl to come out of her house to the road and then to the motor car in which *B* was sitting, who took the car to the village in order that he might kidnap her.

Held, that *B* committed an offence under S. 363 and that kidnapping was not already completed at the moment when the girl entered the car but it was completed by *A* driving her off in the motor-car. 104 Ind. Cas. 436=6 Pat. 471=28 Cr.L.J. 820=A.I.R. 1928 Pat. 159.

### —S. 363—Offence is complete as soon as minor is actually taken from the lawful guardianship.

The offence of kidnapping from lawful guardianship is complete when the minor is actually taken from the lawful guardianship. It is not an offence continuing so long as he is kept out of such guardianship. 2 C.W.N. 81; 27 Cal. 1041 and 26 Mad. 454, Foll. 95 Ind. Cas. 392=5 Pat. 536=7 P.L.T. 812=1926 P.H.C.C. 176=27 Cr. L.J. 792=A.I.R. 1926 Pat. 493.

### —S. 361—When the offence is complete—Kidnapping—Completion of the offence—Abetment.

The offence of kidnapping is complete as soon as a girl under 16 years of age is actually taken out of the custody of lawful guardian and it does not continue until she returns to her guardian; therefore there is no abetment of the offence by conduct if it commences only after the minor has once been completely taken out of the keeping of the guardian.



38 All. 664=14 A.L.J. 765=17 Cr. L.J. 498=36 Ind. Cas. 466.

—S. 363—When the offence is complete.

Whether 'the taking' of a minor girl out of the custody of her lawful guardian is or is not complete at a given moment is a question depending on the circumstances proved in each particular case. 55 P.L.R. 1916=25 P.W.R. 1916 (Cr.)=17 Cr. L.J. 236=34 Ind. Cas. 652.

—S. 361—When the offence is complete—Abduction of a woman passed from man to man—Liability of all concerned.

Where a woman is passed from man to man in the course of abduction all such men are equally liable. 54 P.L.R. 1916=17 Cr. L.J. 284=47 P.W.R. 1915 (Cr.)=34 Ind. Cas. 1004.

—Ss. 361 and 366—When the offence is complete—Abduction—Nature and essentials of—Continuing offence—Intent essentials.

A girl is being abducted not only when she is first taken away from a certain place but also when she is subsequently removed from place to place. Abduction is an offence only when it is committed under certain conditions mentioned in chapter XIV of the Penal Code. The mere taking of a girl to the house of an immigration recruiter is not an offence under S. 366. 12 A.L.J. 91=15 Cr. L.J. 154=22 Ind. Cas. 730.

—S. 361—When the offence is complete—'Keeping'.

The question as to when an act of kidnapping is complete is a question of fact to be determined according to the circumstances of each case. So long as the minor can at will take advantage of the guardian's protection and place herself within the sphere of its operation, the relation between minor and the guardian implied by the word 'keeping' is not dissolved. 7 S.L.R. 17=14 Cr. L.J. 439=20 Ind. Cas. 599.

4. Consent of guardian.

—S. 361—Married girl of 14 years, held was in "keeping" of not her husband but of mother.

Where a minor leaves the immediate custody of her lawful guardian for a temporary purpose, such as a visit to friends, she will no doubt be deemed to be still in his keeping for the purposes of S. 361. There must obviously, however, be a point after which it could no longer be held that the girl, while out of the immediate custody of the guardian, could still be deemed to be in his keeping. The real principle to be followed in dealing with such cases is that the Court must consider all the facts, and see whether they are consistent or not with the continuance of the legal guardian's possession of the minor. If they are not inconsistent, the minor must be held to be in the legal guardian's possession or keeping even though the actual physical possession should be temporarily with a friend or other person.

Where the minor girl aged 14 years who had been married seven years ago, had been staying with her mother as she had not attained puberty, and there is nothing to show that the girl had ever lived in her husband's house for any extended period and the attempts of the husband to take away the girl on her attaining puberty were foiled by the mother on some pretexts, the girl must be deemed to have been in the "keeping" not of the husband, but of the mother. Hence, if the mother was a consenting party to the girl's being taken away, no offence of kidnapping can

be said to have been committed. A.I.R. 1943 Pat. 212=44 Cr.L.J. 590=22 Pat. 263=207 Ind. Cas. 420.

—S. 361—Where a girl originally goes to an institution with the consent of her mother who is her guardian but the mother subsequently changes her mind, the detention of the girl by the institution does not constitute an offence of kidnapping. A.I.R. 1939 Sind 152=40 Cr.L.J. 698=I.L.R. (1939) Kar. 760=182 Ind. Cas. 710.

—S. 366—Mother of minor girl along with accused taking her from lawful guardianship of her father.

The mother of a minor girl went in the company of the accused from her house to the house of the accused's brother with the intention of marrying her daughter to the brother's son of the accused. It appeared that while she wanted to marry the girl to that boy, her husband objected to her so doing:

**Held**, that as the mother of the girl was not acting in good faith and that as she and the accused removed the girl from her father's house for the express purpose of marrying her without the father's consent and hereby deprived the father for ever of the guardianship of his minor daughter and that this act amounted to a taking out of the keeping of the lawful guardianship of the father, the conviction under S. 366 was right but that in the circumstances, the sentence might be reduced. A.I.R. 1934 Oudh 89=11 O.W.N. 30=35 Cr.L.J. 469=147 Ind. Cas. 670.

—Ss. 359 to 369—Consent of Guardian—Lawful guardian (father) pledging daughter to creditor who pledged her to another—Father without demanding his daughter recovering her with the help of police—No offence under S. 361.

The pledging of a girl to secure a loan a legal contract and may not be enforced in law but if a minor is retained in the custody of a person with the consent of the lawful guardian he will not commit the offence of kidnapping in S. 361. It does not matter whether the consent is given for consideration or not. If after having obtained custody of a minor in a lawful manner with the consent of guardian the minor is married or disposed of in such a manner as to make it impossible for the lawful guardian to get back the custody of the minor, an offence under S. 361 would be committed and the temporary guardian doing any such act would be liable under S. 361 but so long as nothing is done which would render the restoration or exercise of the custody of the child by the lawful guardian impossible, the mere fact of transferring the guardianship by the temporary guardian would not constitute an offence.

C the lawful guardian of his minor daughter pledged her to J for a sum due. J pawned the girl to N for a loan. C hearing that his daughter was sold by J went in search of her and found her in N's house. He got her back after lodging information but without demanding her either from J or N.

**Held**, that as it was not proved that the girl was retained in the custody of either of the accused J or N after the guardianship temporarily created in favour of J was terminated no offence of kidnapping was committed by any of the accused. 119 Ind. Cas. 72=10 P.L.T. 326=30 Cr.L.J. 980=1929 Cr.C. 97=A.I.R. 1929 Pat. 316.

—S. 366—Third person in charge for a limited purpose and for a limited time—Consent of such person is insufficient.

A girl under 16 years of age, living under guardianship of her mother, was sent by the latter with a female



friend of hers on a visit to her sister at Dalepur and on her way there, the two petitioners kidnapped her and took her to their own village and there she was married to one of them without the consent of her mother.

**Held:** the petitioners were guilty of an offence under Section 366. The mere fact that the mother allowed the girl to be in the custody of a certain person for a limited purpose and for a limited time only does not determine the mother's rights as guardian or her legal possession of the minor for the purpose of the criminal law. The consent of such a person who has no authority to give a consent, does not affect the question in any way. 68 Ind. Cas. 620=3 Lah. 213=23 Cr.L.J. 588=A.I.R. 1922 Lah. 380.

**—S. 361—Consent of guardian—Kidnapping—Taking with consent—Subsequent improper marriage of minor without consent.**

Where a minor is removed with the consent of the guardian and subsequently married improperly without the guardian's consent, such marriage would not itself amount to kidnapping. 36 Mad. 453=15 Cr.L.J. 24=22 Ind. Cas. 168.

**—S. 361—Consent of guardian—Kidnapping from unlawful guardianship—Taking with the connivance of guardian.**

Where there is no taking of the girl and the taking is with the connivance of the mother and not without her consent but the accused falsely denied that the girl was at a particular place.

**Held,** that such denial cannot be construed into a prevention of the girl's returning and that no charge was sustainable under S. 363 of the Code. (1912) U.B.R. 36=14 Cr.L.J. 190=18 Ind. Cas. 669.

**—S. 361—Kidnapping—Girl driven out of the house.**

Where a minor girl was driven from her father's house, by her father and was found some days afterwards in the company of the accused,

**Held,** that no offence of kidnapping was committed. To constitute that offence, the girl must have been taken by the accused from the keeping of her father; in this case the father himself had driven her away from the house. (1912) M.W.N. 538=13 Cr.L.J. 598=16 Ind. Cas. 166.

**—Ss. 361 and 363—Consent of guardian—Kidnapping—Essentials—Consent—What is.**

To constitute an offence under S. 363 it is sufficient to show that the minor was taken away without the consent of lawful guardian. The consent of the guardian given subsequent to the commission of the offence is not sufficient. Motive has nothing to do with the offence though it may be a consideration in awarding punishment. Even if the accused thought that the lawful guardian, would not have objected to his taking him yet, if in facts there was no consent the offence would be committed. Where the temporary guardian is in collusion with the other party, and the taking away is accomplished under such collusion, the consent of the lawful guardian is not the consent of as contemplated by the section. 31 All. 448=6 A.L.J. 682=10 Cr.L.J. 295=3 Ind. Cas. 480.

**5. Consent of minor.**

**—S. 366—**Where a girl over 14 and under 16 years of age and in lawful custody, consents to illicit intercourse with a man and is persuaded to elope with him for the same purpose, an offence is committed under S. 366. A.I.R. 1944 Bom. 159=46 Bom. L.R. 203=45 Cr.L.J. 750=214 Ind. Cas. 231.

**—Ss. 366 and 420—Married girl of 14 years married by accused to another person on taking bride price from him—Girl's mother consenting party—Offences under Ss. 420 and 366, held committed.**

A girl N, who was aged about 14, had been married seven years previously to one H. As she had not attained puberty, she did not go to live with her husband, but remained in the house of her mother, who was a widow. The accused B and D who were close friends of N's family took away N from her house, told her that they were going to marry her to a rich man so that she would be better off and would not have to go back to the first husband and actually got her married to M at a certain village. The mother of the girl was a consenting party to all these matters. The accused did not disclose that N was already married. M paid certain amount to the accused as bride price which was handed over by them to the mother of N:

**Held,** that the accused were guilty under S. 420 Indian Penal Code.

Even if the girl went with the accused willingly, she could not be said to have done so with the knowledge that she would be committing a criminal offence by undergoing a second marriage. Her consent could only have been under a misapprehension and hence was no consent in the eye of the law. The element of deceit was, therefore, present. A.I.R. 1943 Pat. 212=44 Cr.L.J. 590=22 Pat. 263=207 Ind. Cas. 420.

**—Ss. 366 and 376—Girl below 14.**

If it is proved that a girl who is alleged to have been kidnapped was at the time under the age of fourteen, her consent is immaterial. A.I.R. 1934 Oudh 32=10 O.W.N. 1274=35 Cr.L.J. 498=147 Ind. Cas. 759 (2).

**—Ss. 359 to 369—Underlying policy is to throw production over minor girls—Consent of girl does not exonerate seducer.**

Section 366 is an aggravated form of S. 363. The consent of the girl does not exonerate the seducer. The underlying policy of the section is to uphold the lawful authority of parents or guardians over their minor wards, to throw a ring of protection over the girl themselves and to penalise sexual commerce on the part of persons who corrupt or attempt to corrupt the morals of minor girls by taking improper advantage of their youth and inexperience. 120 Ind. Cas. 433=31 Cr.L.J. 85=1930 Cr.C. 35=A.I.R. 1930 All. 19.

**—Ss. 366 and 376—**On a charge under Ss. 366 and 376, the question of the age of the girl is very material and if the girl is less than 14 years of age, although she may have been love smitten and wrote love letters, her consent to acts referred to in Ss. 366 and 376 is in law immaterial. 51 C.L.J. 352=129 Ind. Cas. 834=A.I.R. 1930 Cal. 437.

**—S. 366-A—Consent of minor does not prevent commission of offence under S. 366-A.**

The aim of the provisions of S. 366-A is to prevent immorality and the provisions are framed more with the desire of the safeguarding the public interest of morality than the chastity of one particular woman. The consent therefore of the minor against whom the offence is committed is immaterial. The consent might have been induced and any reason given by the accused to move the girl from one place to another is sufficient inducement. Once the offence of inducement is proved, the girl's subsequent willingness will neither prevent the offence nor reduce the gravity of the offence. 119 Ind. Cas. 14=30 Cr.L.J. 985=10



L.R.A. (Cr.) 143=10 L.R.A. (Cr.) 146=12 A.I. Cr.R. 380=12 A.I. Cr.R. 494=1929 Cr.C. 293=A.I.R. 1929 All. 709.

—S. 366—Custom of rakshasa marriage and subsequent consent by the girl does not prevent the acts technically constituting the offences.

The fact that the rakshasa form is in vogue among the Gonds and the subsequent consent by the girl to the marriage, cannot prevent the previous acts of taking away the girl by force, having sexual intercourse with her, and removal of her braceless to prevent the girl going away, from constituting the offences of wrongful confinement and robbery when they are committed; and it does not even reduce their culpability, but under these circumstances there is no necessity for a heavy sentence. 103 Ind. Cas. 195=28 Cr.L.J. 659=A.I.R. 1927 Nag. 279.

—S. 366—In a case under S. 366, the consent of the girl makes no difference to the offence but it has bearing on the sentence when she is not altogether a child although legally a minor. 95 Ind. Cas. 931=27 Cr.L.J. 851=A.I.R. 1926 Lah. 547.

—S. 363—Consent of minor is no defence—But accused should not be severely punished if other circumstances justify.

Although consent of the person kidnapped is no defence to a charge under S. 363 where the accused and the girl are neighbours and for this reason become fond of each other and when her marriage was about to take place the accused decided to take her away and she agreed:

**Held**, that it is not a bad case of kidnapping though technically it amounts to such and that the accused should not be punished severely. 96 Ind. Cas. 874=27 Cr.L.J. 1018=A.I.R. 1926 Lah. 677.

—S. 366—Where a fatherless Muhomedan girl of about 10 or 11 years of age was taken away with the consent of her mother and married against the wishes of her brother who was her guardian for marriage and against her own will.

**Held**, an offence under S. 366 was committed. In such a case it is unnecessary to consider whether the girl had any right to act of her own free will in the matter. 84 Ind. Cas. 434=26 Cr.L.J. 290=A.I.R. 1925 Cal. 578.

—Ss. 361 and 366—Consent of minor—Kidnapping—Consent.

There is no offence under S. 366 where a girl of 15 years is kidnapped out of British India with her consent for unlawful intercourse. 42 Bom. 391=20 Bom. L.R. 372=19 Cr.L.J. 602=45 Ind. Cas. 506.

—Ss. 361 and 90—Consent of minor—Misrepresentation—Evidence Act, S. 3.

If a minor is taken out of the guardian's keeping without guardian's consent, the offence of kidnapping is committed, though the minor consents to his being taken. Consent given under misrepresentation of fact is one given under misconception of fact. Misrepresentation as to intention in taking away is misrepresentation of 'fact' within S. 3 Evidence Act. 17 P.R. 1916 (Cr.)=18 Cr. L.J. 18=36. Ind. Cas. 850.

—S. 361—Consent of minor—Girl under 16 leaving her husband's house of her own free will—Abduction or kidnapping.

Where a girl under sixteen, left her husband and father-in-law out of her own free will and meeting the accused on her way, voluntarily stayed with him

for a few days without any fraud or force being practised on her, the accused was neither guilty of abduction nor of kidnapping. 12 A.L.J. 265=15 Cr.L.J. 265=23 Ind. Cas. 473.

—S. 361—Consent of minor—Girl going away of her own free will.

The offence under S. 363 is committed if the accused takes away a minor girl who leaves her parent's house for her infatuation for the accused and asks him to go with her, provided the girl had no intention of not returning to her parents. 11 Cr.L.J. 81=4 Ind. Cas. 901 (U. Bur.).

## 6. Consent of person kidnapped.

—Ss. 361 and 363—Consent of person kidnapped, obtained by false representations.

The accused induced certain woman (the complainants) to leave British India for Ceylon on the misrepresentation that they were to be married to his sons after arriving at Ceylon. He engaged them as coolies on Tea Estate.

**Held**, that the women must be held to have been taken without their consent and that the accused was guilty under S. 363. (1910) M.W.N. 262=8 M.L.T. 91=11 Cr.L.J. 368=6 Ind. Cas. 503.

—S. 361—Consent of person kidnapped—Abduction of married woman—Elopement—Elements of offence.

Where evidence for the prosecution, as to a married woman of 20 or 25 years of age being abducted against her will, was not strong and where there were circumstances tending to show that there was elopement, conviction under S. 366 was not justifiable, especially where one of the accused claimed the girl as his fiancée and where she was perhaps dissatisfied with her husband. 2 Lah. L.J. 536.

## 7. Continuing offence.

—S. 366-A—Offence under, is a continuing offence.

The offence under S. 366-A is a continuing offence. The differences between S. 366 and S. 366-A merely concern the manner of the inducement and the age of the girl and are irrelevant for the question of continuing offence. A.I.R. 1936 Lah. 850=38 Cr.L.J. 474=39 P.L.R. 365=167 Ind. Cas. 847.

—S. 366-A—Continuing offence—Forum for prosecution.

An offence under S. 366-A is a continuing offence. Where the offence and abetment is committed at different places by the participants the accused may be jointly tried in the place where the offence was first committed. 53 All. 140=131 Ind. Cas. 246=A.I.R. 1931 All. 55=1930 A.L.J. 1485.

—Ss. 359 to 369—When after inducement offender offers girl to several persons, fresh offence is not committed at every fresh offer of sale.

An offence under S. 366-A, is one of inducement with a particular object and when after inducement the offender offers the girl to several persons a fresh offence is not committed at every fresh offer for sale. Several offers for sale evidence the criminal intention of the offender just as much as one offer for sale. If a person is convicted of seducing the girl he cannot be convicted over again for the same seduction unless in a case where the girl had returned to her parents and then subsequently there had been a fresh seduction. 118 Ind. Cas. 384=1929 A.L.J. 800=10 L.R.A.



(Cr.) 103=30 Cr.L.J. 904=12 A.I. Cr.R. 92=51 All. 888=1929 Cr.C. 175=A.I.R. 1929 All. 585.

—Ss. 362 and 366—Abduction is continuing offence—Each fresh removal is offence.

Certain persons conspired together to induce a Muhammadan girl of about 18 years to accompany them. Their intention was to make her over to the accused for marriage to accused's brother. The girl was brought to a certain place when the accused arrived on receiving a pre-arranged communication. The girl was not made over to him there, but they all started by train towards another direction and at a certain other Railway station got out of the train and told the accused to take charge of the girl. The girl, however, was not ready to accept the company of the stranger, got out of the train and refused to reenter it. The accused thereupon caught hold of her hand and dragged her.

**Held**, that the accused could not be convicted of abetment of the original offence of abduction. His was a separate offence of abduction when he tried to compel the girl by force to go along with him from the railway station in question. Abduction is a continuing offence. The abduction was not completed when the girl was removed from her home. Every fresh removal of her constituted an offence of abduction. The girl was unwilling to accompany the accused and he was compelling her by force to do so, so he abducted the woman. 86 Ind. Cas. 71=12 O.L.J. 27=2 O.W.N. 17=26 Cr.L.J. 695=A.I.R. 1925 Oudh 328.

—S. 362—The offence of abduction is a continuing offence. 81 Ind. Cas. 906=50 Cal. 1004=25 Cr.L.J. 1082=A.I.R. 1924 Cal. 389.

—S. 361—Kidnapping is not a continuing offence. 64 Ind. Cas. 842=24 O.C. 329=23 Cr.L.J. 58=A.I.R. 1921 Oudh 226.

## 8. Conviction.

—Ss. 366 and 376—Abduction of girl of 15 years with intent to compel her to marry against her will or to have illicit intercourse—Accused can ordinarily be convicted under S. 366 and not S. 376 unless evidence of that offence is forthcoming. 4 A.I. Cr.D. 642.

—Ss. 366 and 366-A—Two persons charged one under S. 366, for kidnapping only and the other under both parts of S. 366-A—Former acquitted—Conviction of latter for concealing woman knowing her to be kidnapped or abducted.

Where two persons are charged, one under S. 366, for kidnapping a woman and there is no charge of abducting against him, and the other under both parts of S. 366-A for concealing the woman knowing her to be kidnapped or abducted, and the former is acquitted of the charge under S. 366, the latter cannot be convicted of concealing a woman knowing her to be kidnapped, and the case of confining the woman knowing her to be abducted should not go before the jury, the former accused not being charged for abducting a woman. A.I.R. 1945 Cal. 432=49 C.W.N. 533.

—S. 366—Conviction under, when can be challenged.

The conviction on the kidnapping charge can only be challenged on grounds of law. The only ground of law possible in a case of jury trial would be that there was misdirection in the charge to the jury. But where no misdirection is alleged, nor is the Court able to find any, the High Court cannot interfere

in appeal with the conviction. A.I.R. 1941 Nag. 94=1940 N.L.J. 565=42 Cr.L.J. 154=A.I.R. (1941) Nag. 157=191 Ind. Cas. 371.

—S. 366—Essential for conviction under.

A conviction under S. 368 can only be maintained if the accused could be charged with the knowledge of the fact that an offence under S. 366 had been committed in respect of the girl abducted. A.I.R. 1939 Lah. 180=41 P.L.R. 45=40 Cr.L.J. 684=182 Ind. Cas. 520.

—Ss. 366, 376—Charge under Ss. 366 and 376—Acquittal under S. 376 but conviction under S. 366—Propriety.

There is no necessary inconsistency in jury's acquitting the accused of the main charge of rape under S. 376 and convicting him of abduction under S. 366. The offence of abduction under S. 366 is made out as soon as the accused persons takes away a woman. But, when he has committed the offence of abduction under S. 366 the further question to be decided is whether, when he has had illicit intercourse with the woman, that fact amounts to rape as defined by S. 375. Where a man has illicit intercourse with an adult woman, with her consent it is not rape under the law. In such a case the accused person will be held guilty under S. 366 but not guilty under S. 376. A.I.R. 1938 Cal. 460=39 Cr.L.J. 674=176 Ind. Cas. 104.

—Ss. 364 and 307—Held, accused could not be convicted under S. 364, but under S. 307.

**Held**, after considering the evidence that there was no evidence to show whether the deceased had died or was alive when he was dragged towards another town and if he was dead, he could not be said to have been abducted as there could not be abduction of a dead person under S. 362. Even if he was alive and was abducted, it was very doubtful if it could be said that he was abducted in order that he might be murdered or might be so disposed of as to be put in danger of being murdered. The nature of the assault made on him showed that the accused did intend to murder him but this assault was made before the abduction and there was at least a possibility that the deceased should have been taken for the sake of concealment. Consequently, the accused could not be convicted under S. 364, Penal Code.

[In the above circumstances, the conviction was altered to one under S. 307.] A.I.R. 1936 Oudh 44=1935 O.W.N. 1177=37 Cr.L.J. 12=158 Ind. Cas. 945.

—S. 366—Misdirection.

In a case under S. 366, if the object of the accused was to bring pressure to bear on the husband of the woman, it cannot be said that they knew it to be likely that she would be forced or seduced to illicit intercourse.

Where it appeared that by the Judge's direction to the jury, the jury were likely to be misled, that is they were likely to believe that what they had to find, was not that the woman was abducted for illicit intercourse but that she was abducted for the purpose of bringing pressure to bear on her husband, and they brought in a verdict of guilty on this understanding the conviction under S. 366 ought not to stand. A.I.R. 1935 All. 665=(1935) A.L.J. 670=36 Cr.L.J. 826=1935 A.W.R. 695=155 Ind. Cas. 662.

—Ss. 359 to 369—Conviction and sentence.

Where it was not stated in the complaint that the girl alleged to be kidnapped was a minor, nor were



other necessary ingredients of an offence under S. 363 disclosed in the evidence led by the prosecution, but the Magistrate *suo motu* framed an additional charge under that section and convicted the accused who is already convicted under S. 498 at the same trial.

**Held**, conviction under S. 363 cannot stand. 110 Ind. Cas. 794=11 A.I.Cr.R. 35=29 Cr.L.J. 762=A.I.R. 1928 Lah. 898.

—**Ss. 366 and 376**—Though the offences under, S. 366 and S. 376 may appear to overlap each other they are essentially distinct from each other. This being so, separate conviction under the two sections are perfectly correct. A.I.R. 1927 Lah. 88, Foll. 109 Ind. Cas. 213=10 A.I.Cr.R. 216=29 Cr.L.J. 485 (Lah.).

—**Ss. 366 and 376**—Where the proved facts in the case established two distinct offences falling under Ss. 366 and 376, respectively the accused can be convicted separately for each offence. A.I.R. 1927 Lah. 88, Foll. 107 Ind. Cas. 388=29 Cr.L.J. 248 (Lah.).

—**Ss. 363 and 365**—Where persons are kidnapped with the object of holding them to ransom the kidnapper is guilty under S. 363 or S. 365 but not under S. 364, Indian Penal Code. 91 Ind. Cas. 240=27 Cr.L.J. 64 (Lah.).

—**S. 368**—Section 368 refers to some other party who assists in concealing any person who had been kidnapped and does not refer to the kidnappers, and therefore, a kidnapper cannot be convicted under S. 368; 6 W.R. 17 (Cr.), Foll. 97 Ind. Cas. 960=2 Luck. 249=13 O.L.J. 739=3 O.W.N. 687=27 Cr.L.J. 1200=A.I.R. 1926 Oudh 560.

—**S. 363**—A boy under 14 years of age was kept in charge of the applicant who was to teach him Quran and feed him with the money of the boy's father. The applicant ran away with the boy to a distant place with the object of teaching him painting scenes.

**Held**, that the applicant was guilty under S. 363. 86 Ind. Cas. 428=23 A.L.J. 10=26 Cr.L.J. 796=6 L.R.A. Cr. 62=A.I.R. 1925 All. 295.

—**Ss. 361, 364 and 365—Abduction to extort money—Confinement.**

When a person is abducted in order that money may be extorted from his relatives S. 364 would not apply as danger to life of the abducted person does not follow as a matter of course. A conviction under S. 365 is justifiable because the abductor had the interest to secretly and wrongfully confine him. 6 L.B.R. 160=14 Cr.L.J. 167=6 Bur. L.T. 77=19 Ind. Cas. 167.

—**Ss. 361 and 363—Kidnapping—Motive—Punishment.**

For a conviction under S. 363, it was sufficient to prove that the minor was taken away from the custody of a lawful guardian without his consent. Motive had nothing to say to the offence of kidnapping (see S. 361, Indian Penal Code) though it might have much to say to the punishment. Consent given by the guardian after the commission of the offence would not cure it. (1909) 6 A.L.J. 682=31 A. 448=3 Ind. Cas. 480=10 Cr.L.J. 295.

## 9. Defence.

—**S. 366-A—Profit by conveying girl to other persons.**

Where a girl who is already seduced by some but left alone is taken away by the accused, with a view to

profit from her sex and her youth by conveying her to some man other than her original seducer, he cannot claim immunity from a conviction under S. 366 in respect to this young and helpless girl on the ground that other men had previously taken advantage of her. A.I.R. 1937 All. 353=1937 A.L.J. 547=38 Cr.L.J. 621=1937 A.W.R. 203=168 Ind. Cas. 833.

—**S. 366**—The unchastity of the kidnapped girl before her abduction is no defence. 1935 M.W.N. 358.

—**S. 366—Unchastity of woman.**

There can be seduction even in the case of a woman who had at one time surrendered her chastity provided that at the time of the abduction she had returned to a life of chastity. The question whether the life of chastity to which she returned was the result of her enforced separation from her lover or was voluntary, makes no difference in law for the purpose of attracting the provisions of S. 366. 160 Ind. Cas. 255=18 N.L.J. 49=37 Cr.L.J. 270.

—**S. 366-A**—The fact that the accused *bona fide* believed or had reasonable grounds for believing that the girl was over the prescribed age is no defence to a charge under S. 366-A, nor is the fact that the accused did not know that the girl was married, a valid defence. A.I.R. 1932 Lah. 555=33 Cr.L.J. 673=33 P.L.R. 727=138 Ind. Cas. 597.

—**S. 361**—If it turns out that the girl was under 16 years of age, the accused, even if he honestly believed her to be over 16, cannot protect himself as he must be deemed to have acted at his peril. 113 Ind. Cas. 765=1929 A.L.J. 114=10 L.R.A. Cr. 40=11 A.I.Cr.R. 257=30 Cr.L.J. 218=A.I.R. 1929 All. 82.

—**S. 366**—Illicit intercourse does not cease to be one, merely because it is repeated. If the intention is to kidnap the girl in order to seduce her to illicit intercourse, the fact of previous intimacy with her is wholly immaterial. 113 Ind. Cas. 765=1929 A.L.J. 114=10 L.R.A. Cr. 40=11 A.I.Cr.R. 257=30 Cr.L.J. 218=A.I.R. 1929 All. 82.

—**S. 361**—Section 361 is framed in such terms as to make it immaterial what the offender took the age of the girl or victim to be. S. 76 has no application in such a case. 1929 Cr.C. 379=A.I.R. 1929 Pat. 651.

—**S. 366—Although girl has lost her chastity she can be seduced.**

It is not a correct proposition that once a girl has lost her chastity, she cannot be seduced since she has no chastity to lose. On each occasion that a woman is persuaded to indulge in illicit intercourse, she is being tempted into sin and so seduced within the meaning of S. 366. 99 Ind. Cas. 98=21 S.L.R. 356=7 A.I.Cr.R. 181=28 Cr.L.J. 66=A.I.R. 1927 Sind 104.

—**S. 366—Fact that the girl intended to have illicit intercourse is no defence.**

One object of the section is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen, but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience. The facts that the girls, at the time they were enticed away from their home by the accused had the intention of having illicit intercourse with him is no defence to the charge under S. 366. 72 Ind. Cas. 379=49 Cal. 905=24 Cr.L.J. 379=A.I.R. 1922 Cal. 508.



**10. Essentials and Scope of offence.****—S. 361—Ingredients of offence—"Taking"—Meaning of—Abandonment of guardian by minor girl—What constitutes.**

In order to support a conviction of kidnapping a girl from lawful guardianship the ingredients to be satisfied are:—(1) that the girl was under 16 years of age, (2) such minor was in the keeping of a lawful guardian, and (3) the accused took or enticed such person, out of such keeping and such taking was done without the consent of the lawful guardian.

The word "taking" as used in S. 361, Indian Penal Code, does not mean a continuing or continuous act. The "taking" which constitutes an offence is completed as soon as the girl is removed from the keeping of the lawful guardian. The mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping. If, however, it is proved that a minor had abandoned her guardian with no intention of returning back she cannot, thereafter, be deemed to continue in the keeping of the guardian. What will be deemed to be sufficient to constitute an abandonment of a guardian by a minor girl depends on the facts of each particular case. It cannot be that whenever a child being taken to task by the guardian leaves the guardian's house with the mental reservation that he or she will not be returning back to be under that guardian it must in the eye of law be taken to put an end to the protection of the guardian at the sweet will of the minor. If it is shown that such conduct is due to a mere petulant outburst in consequence either of a quarrel with her relations or because of the guardian reprimanding her for her conduct that will be a relevant question to be considered for deciding whether her conduct was sufficient to put an end to the ties of guardianship.

Even where there is some evidence that the girl, at the time when she left the protection of her guardian, did not intend to come back to her father's place but the evidence further discloses that but for something which the accused consented to do and did ultimately do the minor would not have, in the natural course of events, left the house of her father then these would be a sufficient taking by the accused in the eye of the law for attracting the provisions of the section. A.I.R. 1950 Cal. 406=54 C.W.N. 329=51 Cr.L.J. 1486.

**—S. 361—Ingredient of offence.**

The most essential ingredient of the offence under S. 361, Indian Penal Code, is that the minor should have been "taken" by the accused "out of the keeping" of his lawful guardian. If, therefore, a minor girl voluntarily leaves the roof of her guardian and when out of his house comes across another, who treats her with kindness, or at least without employing any force or practising any fraud on her, he cannot be held guilty under the section. I.L.R. (1950) A. 787=1950 A.W.R. 98=A.I.R. 1949 All. 710=51 Cr.L.J. 29.

**—S. 364—Ingredients of offence.**

In order to establish a charge of abduction in order to murder, when the case is one of abduction by deceitful means, it is not enough for the prosecution merely to prove certain circumstances under which the abducted person was induced to go, nor even to prove a mere misrepresentation. They must prove that there was a misrepresentation, that particular misrepresentation was the result of a plan to murder and that it was one by which the abducted person was himself deceived and was induced to go. 41 C.W.N. 287, applied. 1 D.R. 169=A.I.R. 1949 Dacca 21=50 Cr.L.J. 1008.

**—S. 366-A—Scope—Essentials—Intention and knowledge.**

If a person induces a girl to go from one place to another for the purpose of seducing her himself, the offence is not one which comes within the purview of S. 366-A. The section is aimed at procurers. The prosecution must prove that the accused intended that the girl would be forced or seduced to illicit intercourse with some one other than himself or that the accused knew that it was likely that she would be so forced or seduced. The existence of this specific intention or knowledge is most important element in the constitution of the offence under S. 366-A and it is the duty of the Judge to ask the jury to consider the evidence and to decide whether the evidence conclusively proved such intention or knowledge. A.I.R. 1935 Cal. 432=49 C.W.N. 533.

**—S. 364—Essentials to be proved to establish offence under S. 364, stated.**

To establish an offence punishable under S. 364, it must be proved that the person charged with the offence had the intention at the time of the abduction that the person abducted would be murdered or would be so disposed of as to be put in danger of being murdered. Even if after the abduction the accused person placed the abducted person in danger of being murdered, that would not establish the charge of abduction punishable under S. 364 against him. It would be necessary for the Crown to establish that he intended at the time of the abduction to place the abducted person in a position which would put her in danger of being murdered. A.I.R. 1940 Cal. 561=71 C.L.J. 597=42 Cr.L.J. 285=192 Ind. Cas. 352.

**—Ss. 361 and 363—If should be read together.**

Per full Bench (*Beaumont, C. J. dissentiente.*):—Section 361 must be read with S. 363 and the offence of kidnapping from lawful guardianship penalised by the latter section is the offence which is defined in the former. Consequently, such an offence can be committed only when the person kidnapped is under 14 if a male and under 16, if a female. The offence punishable under S. 363, in the case of minors is that contemplated in S. 361, and not one comprising all minors in lawful guardianship. A.I.R. 1933 Bom. 417=57 Bom. 537=35 Bom. L.R. 886=34 Cr.L.J. 1239=146 Ind. Cas. 248 (F.B.).

**—S. 366-A (As amended in 1923)—Under S. 366-A,** the person who induces a girl of an age between the years 16 and 18 without force or fraud to go from any place with the intention that she will have illicit intercourse with himself does not commit any offence. The new section, however, makes it an offence in the case of such girl if she is induced by a person to go from any place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. A.I.R. 1933 Cal. 362=37 C.W.N. 317=34 Cr. L.J. 341=142 Ind. Cas. 308.

**—Ss. 359 to 365—The inducement to leave must have for its object seduction by another person and not by the person who himself induces the woman to leave.** 1930 A.L.J. 1113=125 Ind. Cas. 577=A.I.R. 1930 All. 497.

**—S. 366—It is not necessary for a conviction under S. 366 that the accused should know definitely who the guardian of a minor girl is, whom he finds wandering about and makes use of her for his own ends.** 81 Ind. Cas. 529=27 O.C. 32=25 Cr. L.J. 913=A.I.R. 1924 Oudh 335.



—**Intent specified in S. 366 may be inferred from circumstances and subsequent conduct of parties.**

There are two ingredients of an offence under Section 366. First there must be a kidnapping or an abduction as defined in Section 361 or Section 362 of the Penal Code, and secondly the kidnapping or the abduction must be done with the intent or with the knowledge or with the object that certain things will happen as specified in Section 366. The intent with which a woman is abducted or kidnapped is more or less a matter of inference. There may be some cases in which the matter is capable of direct proof, but very generally one has to infer from the circumstances of the case and the subsequent conduct of the accused as to what was the intention with which the kidnapping or the abduction had been brought about. But the circumstances of the case which though incriminating to outward appearances may yet be capable of a perfectly good and reasonable explanation and may be fully compatible with the innocence of the accused. In such cases it would be for the accused to explain away the incriminating circumstances and to prove that he had no improper or sinister object in view. 67 Ind. Cas. 731=3 L.L.J. 574=A.I.R. 1921 Lah. 323.

—**Ss. 361 and 366—Essentials of the offence—"Married woman"—Abduction.**

Abduction of a married woman comes under S. 366, the word 'marriage' meaning merely observing a form of marriage irrespective of the actual validity or otherwise of the marriage. 45 Cal. 641=22 C.W.N. 695=27 C.L.J. 436=19 Cr. L.J. 640=45 Ind. Cas. 688.

—**S. 361—Essentials of the offence—Kidnapping from unlawful guardianship—Abetment.**

For an offence under S. 361 there must be established (1) a taking or enticing, (2) the girl's age was less than 16, (3) she was in the keeping of the lawful guardian, and (4) absence of consent by the guardian to her removal. The offence is not a continuing one but is complete as soon as the minor is enticed or taken out of the keeping of the lawful guardian. The Code makes a distinction between taking and returning and between taking and detaining and concealing. When there is no evidence that he co-accused did not act in concert before the girl was taken, the former cannot be convicted of abetment. 15 O.C. 351=14 Cr.L.J. 93=18 Ind. Cas. 653.

—**S. 361—Essentials of the offence—Kidnapping—Elements of.**

Evidence that the minor was taken out of the keeping of its lawful guardian without his consent is necessary to establish the offence of kidnapping. 6 Bur. L.T. 21=14 Cr. L.J. 149=19 Ind. Cas. 149 (F.B.).

—**S. 361—Essentials of the offence—Mere carrying off a woman by force, if amounts to abduction.**

To constitute the offence of abduction, a mere carrying off a woman by force is not enough; there should further be evidence of an intention to marry her against her will or to force her to illicit intercourse. 12 P.W.R. 1911 (Cr.)=193 P.L.R. 1911=12 Cr.L.J. 393=11 Ind. Cas. 577.

—**Ss. 366 and 109—Kidnapping from lawful guardianship—Kidnapping not a continuing offence—Abetment.**

The offence of kidnapping minor is complete as soon as he or she is entered or taken out of the keeping of his or her lawful guardian. The taking of a minor from lawful custody is not the same as keeping the

minor out of such custody and therefore during the time the minor is kept out of the custody of his other guardian, the offence of kidnapping does not continue; consequently a person who assists a person who kidnapped after the enticement in keeping the minor cannot be convicted of abetment of kidnapping unless the kidnapping was itself the outcome of a preconcert. 19 A. 109 and 2 C.W.N. 81, Foll. (1903) A.W.N. 233=26 A. 197.

## 11. Evidence and Proof.

- (a) Evidence of abducted woman—Value of.
- (b) Proof necessary.
- (c) Sufficiency of evidence.
- (d) Miscellaneous.

### (a) Evidence of abducted woman—Value of.

—**S. 366—Proof of offence—Evidence of abducted woman—Value of.**

In a case under S. 366, Indian Penal Code, the evidence of the abducted woman is no doubt important, but it has to be received with caution. I.L.R. (1949) A. 237=A.I.R. 1949 All. 139=50 Cr. L.J. 158.

—**S. 366-A—Conviction—Proof—Evidence of victim—Corroboration—Necessity—Victim's evidence found false in some respects—Recovery of girl from house of accused—Conviction—Sustainability.**

It cannot be absolutely laid down that in cases under S. 366-A Indian Penal Code, the evidence of the girl always needs corroboration. But where it is found that the girl in question has been definitely lying on important points in her story, it is unsafe to rely on other parts of her evidence to convict any person of a criminal offence unless that evidence is corroborated on material points. The presence of the girl in the house of the accused and the fact that she was recovered from that house cannot be taken as a material point for the purpose of corroboration of the evidence of the girl. 13 B.R. 350=229 Ind. Cas. 175=48 Cr. L.J. 301=A.I.R. 1948 Pat. 73.

—**Ss. 366 and 362—The rule of practice, amounting almost to a rule of law, that in cases involving sexual intercourse, the corroboration of the woman's story must be obtained does not apply in the case of abduction, because the offence of abduction is complete if the accused takes the woman away by deceitful means intending to seduce her to sexual intercourse. A.I.R. 1942 Bom. 71=44 Bom. L.R. 27=43 Cr.L.J. 529=I.L.R. (1942) Bom. 384=199 Ind. Cas. 202 (F.B.).**

—**S. 366—In cases of offences under S. 366, the evidence of the girls is to be taken with a great amount of caution. A.I.R. 1938 Lah. 474=40 P.L.R. 730=39 Cr. L.J. 844=177 Ind. Cas. 97.**

—**S. 366—In a trial under S. 366 it is extremely dangerous and permissible only in exceptional cases to convict a man of a sexual offence on the uncorroborated testimony of the complainant. This fact must be properly emphasised in the charge to the jury. A.I.R. 1936 Cal. 18=37 Cr.L.J. 359=160 Ind. Cas. 1028.**

—**S. 366—Girl taken away from her husband's place at M—Girl seen with accused in suspicious circumstances at D—Constable's report—Statement of girl to Sub-Inspector, held was not admissible in evidence in proceedings under S. 366. A.I.R. 1933 All. 665=55 All. 979=1933 A.L.J. 923=34 Cr. L.J. 1215=146 Ind. Cas. 199.**



**(b). Proof Necessary.**

—**Ss. 364 and 302**—Accused tried for murdering girl and also under S. 364 for abducting her—No evidence of murder nor evidence that motive for abducting was to murder girl—Accused, held could not be convicted under S. 364 unless it was conclusively proved that girl was murdered. A.I.R. 1940 Cal. 561=71 C.L.J. 597=42 Cr.L.J. 285=192 Ind. Cas. 352.

—**S. 364**—For a conviction under S. 364, it is necessary to show that there was pre-conceived plan for committing the murder. A.I.R. 1938 Cal. 51=I.L.R. (1938) 1 Cal. 290=66 C.L.J. 225=42 C.W.N. 129=39 Cr. L.J. 161=173 Ind. Cas. 65.

—**S. 366**—In order to sustain a conviction under S. 366, it must be shown that the girl was, either by force compelled, or by deceitful means induced to leave her lawful guardian's house. A.I.R. 1937 All. 353=1937 A.L.J. 547=38 Cr. L.J. 621=1937 A.W.R. 203=168 Ind. Cas. 833.

—**S. 367**—For conviction under S. 367, it is necessary to prove actual force and not mere show of threat or force. 1937 M.W.N. 1198.

—**S. 364**—Only self-exculpatory statements do not warrant a conviction. 1935 M.W.N. 951.

—**S. 363**—The charge of abduction would involve the Crown in the necessity of proving a forcible compulsion. A.I.R. 1934 Sind. 164=36 Cr.L.J. 231 (2)=152 Ind. Cas. 1061.

—**S. 366—Offence under—Need for proof of deceit.**

There must be some reliable and convincing evidence from which it can be unmistakably inferred that a person has been guilty of deceitful conduct before he can be convicted under S. 366 for abducting woman with the intention, knowledge or purpose mentioned therein. 32 P.L.R. 104=129 Ind. Cas. 197=1930 Cr. C. 1185=A.I.R. 1930 Lah. 1024.

—**S. 366—Abducted girl not forthcoming—Principal witness a boy of 10 and brother of abducted girl's husband—Other witnesses not giving immediate information to her relations—Conviction was set aside.**

Where the abducted girl was not forthcoming and the principal witness was a boy of ten years who was the younger brother of the husband of the abducted girl, and other witnesses were persons who saw the girl forcibly being taken away and though she was weeping and crying had not done anything to rescue her or to inform her relatives immediately.

**Held**, that the abduction was not proved and that the conviction must be set aside. 100 Ind. Cas. 357=27 P.L.R. 747=28 Cr. L.J. 277=7 A.I.Cr.R. 408.

—**S. 366**—It is not necessary for the prosecution to prove that the woman was compelled to leave not only her house but was compelled to go from place to place in order to sustain a charge under S. 366. 92 Ind. Cas. 439=42 C.L.J. 524=27 Cr. L.J. 263=A.I.R. 1926 Cal. 320.

**(c). Sufficiency of evidence.**

—**S. 363**—Section 363 is a penal statute and not a mere rule of morality or ethics and must be strictly construed. The mere fact that the girl was found in the company of the accused is not sufficient to establish the prosecution case. The prosecution must prove that the accused either took or enticed the minor girl from her home. 42 P.L.R. 25.

**—S. 364—Evidence for conviction.**

An accused was convicted under S. 364, Penal Code. There was no evidence of the commission of this offence, except the statement made by the accused to the Sub-Inspector of Police. Moreover, the whole of this statement was not admissible under S. 27, Evidence Act. The sole evidence relevant under S. 364 was that of the mother of abducted person who merely said that the accused accompanied her son just before his abduction :

**Held**, that there was no legal evidence for conviction under S. 364. A.I.R. 1939 Mad. 593=1939 M.W.N. 519=(1939) 2 M.L.J. 487=40 Cr. L.J. 849=50 L.W. 518=184 Ind. Cas. 99.

**—S. 366-A—Selling girl for immoral purpose.**

There mere circumstance that the accused accompanied a person who was alleged to have raped the girl or that he was trying to sell the girl possibly for immoral purposes, may be suspicious but is not sufficient to establish the essential ingredient of the offence under S. 366-A. A.I.R. 1938 Lah. 684=40 P.L.R. 903=39 Cr. L.J. 967=177 Ind. Cas. 938.

**—Ss. 366 and 367—Mere presence at time of kidnapping.**

Where there is no evidence to show that a person did any overt act in furtherance of the act of kidnapping or took or enticed the minor within the definition given in S. 361, the mere facts that he happened to be present when the minor was kidnapped, that he followed the kidnapper and was present in the house where the minor girl was married, do not, taken either singly or collectively, establish a charge against him under S. 366. A.I.R. 1933 Oudh. 62=9 O.W.N. 1049=34 Cr. L.J. 337(2)=142 Ind. Cas. 813.

**—S. 366—Seduction resulting in abduction need not be proved to be separate from that resulting in illicit intercourse.**

In order to have conviction under S. 366 it is not necessary to establish by independent evidence that the girl was seduced to illicit intercourse and that such seduction was separate from and independent of the original seduction which resulted in her abduction. The proximity of both the events is an important factor and so long as the Court is satisfied that the effect of inducement which was the cause of abduction continued till the time of the illicit intercourse, it is legally open to it to hold that the girl was seduced to illicit sexual intercourse. 101 Ind. Cas. 189=28 Cr.L.J. 413=8 A.I.Cr.R. 41=A.I.R. 1927 Lah. 370.

**—Ss. 359 to 369—Evidence and proof—Incriminating evidence not inconsistent with innocence of accused—Conviction is not proper.**

In a prosecution under S. 364, where there was no incriminatory evidence whatsoever against the accused beyond the fact that he and the deceased left together and were last seen together, and that the one returned without the other :

**Held**, that although circumstances lead to a high degree of suspicion against the accused, they cannot be said to be inconsistent, with any reasonable theory in accused's favour other than that the accused lured the deceased away for the purpose of having him murdered, or being exposed to the danger of being murdered, and hence no conviction could be safely had. 103 Ind. Cas. 838=8 A.I.Cr.R. 575=9 L.L.J. 396=28 Cr.L.J. 758=A.I.R. 1927 Lah. 658.

**—Ss. 359 to 369—Evidence and proof.**

A woman, while going to her home, was met by two ruffians, one of whom caught hold of the woman by



her arm and dragged her a short distance, when she was rescued by her neighbours. There was no evidence to indicate as to what their real intention was.

**Held**, that under these circumstances the accused could not be convicted under S. 366 but under S. 354. 109 Ind. Cas. 127=10 A.I.Cr.R. 207=29 P.L.R. 444=10 L.L.J. 325=29 Cr. L.J. 479.

—**S. 366**—*B* having lived at *D* for some time came back to *M* where his wife was living and told her that as he had got work at *D*, she should go with him to *D* to cook for him. In that way he induced her to leave *M* for *D*. When they reached *D*, they were met by one *S* and they all went together to the house of a woman *K*. When *B*'s wife went to the house of *K*, she was told by *K* that her husband had sold her to *S*, for Rs. 150 and that *S* would give her presents and make her happy. *S* also told her the same thing and asked her to come and live with him. *B*, *S* and *K* were all charged under S. 366.

**Held**, that the question was not merely whether the jury was satisfied that *S* made immoral proposal to the woman at *D* or whether the jury were satisfied that *K* was a woman who kept a house of a disorderly and disreputable character but the question which the jury had to answer was whether it was shown that the offence of the husband under S. 366 was abetted by *S* and *K* under S. 107; and the only way in which that could be made out was to see whether there was sufficient proof that before the husband left *D* for *M* he had a bargain with these people to that effect, that they knew that the girl could not be brought to *D* except by deceitful means and that, therefore, they abetted the offence under S. 366. 99 Ind. Cas. 236=44 C.L.J. 317=28 Cr. L.J. 108.

—**S. 368**—Evidence, that the accused said that they wanted to sell the girl is not sufficient for a conviction for an offence under S. 368. The prosecution has to prove that the accused concealed the girl or kept her in wrongful confinement. 93 Ind. Cas. 1050=27 Cr. L.J. 554=A.I.R. 1926 Lah. 384.

—**S. 366—Evidence—Jury—Question of sufficiency of evidence to justify finding of jury—Conspiracy Act No. XLV of 1860 (Indian Penal Code), S. 366.**

One Kandhai meeting of young Ahir girl outside the Fort at Allahabad, took her against her will into the Fort, and there had forcible connection with her. Immediately after this, Rahmatullah, an ekka driver and two other persons, Bhagwan and Madho, appeared on the scene with an ekka, and took the girl off to a sarai in the city, and there the three had, or attempted to have, forcible connection with her. The girl was taken for the night to the house of Rahmatullah, but was brought back in the morning, and apparently returned to the custody of Kandhai and she spent that day, if not the following night, in his house. All four of the persons concerned had work about the Fort, and they were all previously acquainted with each other.

**Held** upon these facts that it could not be said that there was no evidence upon which a jury could find a conspiracy to kidnap against all four men. (1902) A.W.N. 143.

#### (d). Miscellaneous.

—**S. 366**—Minor girl found with a man—Inducement cannot be presumed. 38 P.L.R. 98.

—**S. 368**—Benefit of doubt.

Where the whole story of kidnapping or abduction has been disbelieved and the account given by the accused himself of the presence of the girl in his house

is not an incredible story, and it is quite possible that it is at any rate partially true, the accused is entitled to the benefit of the doubt. 157 Ind. Cas. 168=1935 A.W.R. 788=36 Cr.L.J. 1089.

—**S. 366—Cohabitation—Presumption of marriage.**

When the law presumes the affirmative, then the negative is to be proved. Thus, where it is admitted by the complainant that there had been sexual intercourse between a man and a woman, the mere cohabitation affords an inference of greater or less strength that a marriage has been solemnized between them. The law, therefore, presumes against vice and immorality and on this ground, the presumption is strongly in favour of marriage; so under S. 366, is the duty of the prosecution to prove the negative. A.I.R. 1934 Sind 119=36 Cr.L.J. 62(2)=28 S.L.R. 285=151 Ind. Cas. 984.

#### 12. Intention and knowledge.

(a) Abduction—When an offence.

(b) Knowledge or intention.

(c) Knowledge and intention—Presumption.

(a) Abduction—When an offence.

—**Ss. 362, 364, 365 and 366—Offence of abduction.**

S. 362, Indian Penal Code, merely defines what "abduction" is. It does not define an offence. Abduction becomes an offence only when it is accompanied by one of the three intentions described in Ss. 364, 365 and 366, Indian Penal Code. 51 Cr.L.J. 408=A.I.R. 1950 Assam 37.

—**S. 366**—Mere abduction without criminal intent of one of the kinds specified in the Penal Code is not recognised as an offence. A.I.R. 1934 Lah. 227=35 Cr. L.J. 1386=151 Ind. Cas. 741 (2).

—**Ss. 366 and 354—Outraging modesty.**

Abduction is in itself no offence. It is only when the intention of either marrying the woman against her will or forcing her to subject herself to illicit intercourse is proved that abduction becomes an offence under S. 366. Otherwise the mere act of assault and outraging the modesty of a woman is covered by S. 354 and not by S. 366. A.I.R. 1934 Pesh. 69=35 Cr.L.J. 1273=151 Ind. Cas. 103.

—**Ss. 364 and 367**—Mere abduction without criminal intent of one of the kinds specified in the Indian Penal Code is not recognised as an offence. 99 Ind. Cas. 121=6 L.L.J. 512=27 P.L.R. 867=28 Cr.L.J. 89.

—**S. 365**—Section 365 makes punishable the offence of abduction with intent to cause the person abducted to be secretly and wrongfully confined. 92 Ind. Cas. 213=7 L.L.J. 520=26 P.L.R. 733=27 Cr.L.J. 229=A.I.R. 1925 Lah. 614.

—**S. 362**—Abduction in itself constitutes no offence and only becomes an offence when certain criminal intents are proved. 75 Ind. Cas. 297=24 Cr.L.J. 921 (Lah.).

—**S. 366—Abduction—No improper object—Offence.**

Abduction *per se* is not an offence under the law of India when unaccompanied by any of the intentions mentioned in S. 366. (1901) 6 C.W.N. 209=L.R. 29 I.A. 9=4 Bom. L.R. 238=12 M.L.J. 73=29 Cal. 154 (P.C.).



**(b). Knowledge or intention.****—S. 366-A—Applicability—Conditions.**

S. 366-A of the Penal Code would be applicable only if at the time of the removal of the girl there was an intention on the part of the accused to have sexual intercourse with her. 1947 A.W.R. (C.C.) 56=230 Ind. Cas. 144=1947 O.W.N. 180=1947 O.A. (C.C.) 56=1947 A Cr.C. 109=48 Cr.L.C. 542=A.I.R. 1948 Oudh. 1.

**—S. 366—Intention and knowledge.**

Married girl of 14 years married by accused to another person on taking bride price from him. There could have been no intent to marry the girl against her will since there could be no legal marriage; there was certainly an intent that she should be seduced to what would be in the circumstances, illicit intercourse, and at the lowest the accused certainly knew that it was likely that the girl would be forced or seduced to illicit intercourse. All the elements, therefore, necessary to constitute an offence under S. 366 were established. A.I.R. 1943 Pat. 212=44 Cr. L.J. 590=22 Pat. 268=207 Ind. Cas. 420.

**—S. 365—Husband, if can compel his wife to leave her parents' home and join him.**

The intention of persons charged under S. 365 at the time of abduction can be deduced only from what they subsequently did.

Under the Indian Law, a woman is not a slave and there is no justification for the suggestion that a husband is entitled to use force to compel his wife to leave her parents' house and join him. A.I.R. 1936 All. 360=1936 A.L.J. 340=1936 A.W.R. 441=37 Cr. L.J. 827=163 Ind. Cas. 301.

**—Ss. 363 and 368—Kidnapped child left with accused.**

The accused's brother having kidnapped three children left one of them with the accused and disappeared with the other two. The accused, finding it difficult to maintain himself, sought the help of a neighbour who, finding out who the guardian of the child was, sent it to the guardian. The accused was charged under S. 363, Penal Code:

**Held**, that mere knowledge that his brother kidnapped the child could not bring home the offence to the accused, and that he was not liable under S. 363 or under S. 368. A.I.R. 1933 Lah. 392=34 Cr.L.J. 1177=146 Ind. Cas. 42.

**—Ss. 366, 366-A—Ingredients.**

The essential ingredient of an offence under S. 366 or 366-A is that the accused intended or knew that it was likely that the abducted woman might or would be compelled to marry a person against her will or that she might or would be forced or seduced to illicit intercourse. In the absence of evidence as to such intention or knowledge on the part of a person, he cannot be held guilty of the offence under S. 366, however reprehensible his conduct might have been otherwise. A.I.R. 1933 Oudh 45=9 O.W.N. 1181=34 Cr.L.J. 220=141 Ind. Cas. 741.

**—S. 361—Intention to marry child in contravention of Child Marriage Restraint Act.**

An intention to give a child in marriage in contravention of the Child Marriage Restraint Act, 1929, is an "unlawful purpose" within the exception to S. 361, Penal Code, on the ground that if the purpose is carried out, the person giving child in marriage is liable to conviction and punishment for a criminal offence.

A.I.R. 1933 Rang. 98=34 Cr. L.J. 696=11 R. 213=143 Ind. Cas. 872 (F.B.)

**—Ss. 361, Excep. & 366—Intention—Gist of offence.**

The intention of the accused is the basis and gravamen of an offence under S. 366, Penal Code. Hence, in considering whether an offence has been committed under this section, the volition, the intention and the conduct of the woman are *nihil ad rem*, except in so far as they bear upon the intent with which the accused kidnapped or abducted her.

Normally where a little girl under twelve years of age is taken out of the keeping of the guardian without the guardian's consent, the act of the accused would arouse suspicion and where it also transpires that the child, within two months of being kidnapped, is given in marriage by the accused, it would not require a great stretch of imagination for the jury to conclude that the accused, when he kidnapped the little girl intended to compel her to marry wilfully and in spite of her opposition. But to hold, that where the accused had kidnapped a little girl under twelve years of age with intent to give her in marriage a *presumptio juri et de jure* arises that the accused kidnapped the child with intent to compel her, or knowing that it to be likely that she will be compelled to marry against her will, would be to travel outside the ambit of S. 366.

Before the accused can be convicted of an offence under the first part of S. 366 the Court must be satisfied as a matter of fact upon the evidence that the accused, when he kidnapped or abducted the woman, whatever her age might be, did so with intent to compel her or knowing it to be likely that she would be compelled to marry against her will, that is to say, in spite of her opposition; and unless such an intent is proved, the accused is entitled to be acquitted. A.I.R. 1933 Rang. 98=34 Cr.L.J. 696=11 R. 213=143 Ind. Cas. 872 (F.B.).

**—Ss. 368, 366—**For a conviction under S. 368, the accused must be proved to have had knowledge of the fact of kidnapping or abduction. A.I.R. 1932 Oudh 28=8 O.W.N. 1325=33 Cr.L.J. 275=136 Ind. Cas. 243.

**—S. 366-A—**Where the accused is not shown to have knowledge or intention that the girl might be or was likely to be forced to illicit intercourse, the offence under S. 366-A is not committed. 102 Ind. Cas. 552=28 P.L.R. 260=8 A.I.Cr.R. 239=28 Cr. L.J. 584=A.I.R. 1927 Lah. 727.

**—S. 366** is only an aggravated form of the offence created by S. 363, and where the girl kidnapped from lawful guardianship is under the age of 16 years, the intention of the accused in kidnapping her is the material matter and not the consent or willingness or otherwise of the kidnapped girl and if the intention of the accused is to give her in marriage, conviction under S. 366 is right. 93 Ind. Cas. 248=20 S.L.R. 74=27 Cr.L.J. 456=A.I.R. 1926 Sind. 151.

**—S. 368—**Requires "knowledge" on the part of the accused and not merely suspicion or reason to believe. 87 Ind. Cas. 845=26 Cr.L.J. 1021=A.I.R. 1926 Cal. 226.

**—Ss. 366, 366-A—**Where the accused took a girl under 18 years of age about from place to place with the intention of seducing her to illicit intercourse but force or deceitful means were not used.

**Held**, that no offence under S. 366 but one under S. 366-A was committed. 88 Ind. Cas. 463=2 O.W.N. 445=26 Cr. L.J. 1151=A.I.R. 1925 Oudh 454.

**—S. 366—**Where the abducted woman has voluntarily lived with the accused for a couple of months



before abduction as his wife, and whom the accused had intended to marry.

**Held**, the intention which is a necessary ingredient to constitute offence under S. 366 was absent and hence no offence was committed under the section. 72 Ind. Cas. 533=24 Cr.L.J. 421=A.I.R. 1924 Lah. 218.

—**S. 366—Accused party opposing every match for the girl and accused going through Nikah form with her—Intention to force her to marry is proved.**

Where it was urged that the common object of party that took away the girl was to bring pressure to bear on her grandmother to give the younger sister of the girl abducted, in marriage to accused, and it was proved that the accused and his party were opposing every match proposed for the girl abducted and the accused went through a form of *Nikah* with her.

**Held**, the intention of the party on carrying away the girl was not merely to bring pressure to bear on her grandmother but was to force the girl to marry accused. 77 Ind. Cas. 997=4 L.L.J. 322=25 Cr. L.J. 533=A.I.R. 1922 Lah. 410.

—**Ss. 361, 366—Abduction with intent to defile a lady—Offence.**

A person who compels a girl to go away from the place where her mother-in-law was, with intent to have sexual intercourse with her, commits an offence under Ss. 366 and 362. 9 M.L.T. 406=12 Cr.L.J. 240=10 Ind. Cas. 290.

(c). **Knowledge and intention—Presumption.**

—**S. 364—**In a case under S. 364, depending on circumstantial evidence, the question of motive, is of great importance, and where there is absence of motive it is the duty of the Judge to emphasise this absence of motive which is a circumstance in favour of the accused. A.I.R. 1940 Cal. 561=71 C.L.J. 597=42 Cr. L.J. 285=192 Ind. Cas. 352.

—**S. 366—**Where an accused charged under S. 366 suggested that his intention was to lawfully marry the girl and it was admitted that the parties being of different castes could not marry according to Hindu Law, and also that the girl being below 21 years of age, they could not marry under Special Marriage Act, without the consent of her lawful guardian, *i.e.* her father :

**Held**, that the marriage not being practicable, the accused must have contemplated illicit intercourse. A.I.R. 1938 Cal. 551=39 Cr.L.J. 835=42 C.W.N. 896=177 Ind. Cas. 29.

—**S. 366—Presumption as to intention.**

Even a forcible abduction does not amount to an offence under S. 366, Penal Code, unless there are other ingredients, namely the intention either that the girl should be seduced or forced to illicit intercourse or that she should be compelled to marry against her will. In a case under S. 366, there can seldom be direct evidence as to the actual intention of the abductor and that intention must be inferred from the circumstances. Section 114, Evidence Act, provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Human nature being what it is whenever one finds a young man abducting a girl of marriageable age, the first and natural presumption must be that he has abducted her with the intention of having sexual intercourse with her, either forcibly

or with her consent after seduction or after marrying her. If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies upon him under S. 106, Evidence Act, to prove that intention. A.I.R. 1938 Lah. 474=40 P.L.R. 730=39 Cr.L.J. 844=177 Ind. Cas. 97.

—**S. 366—Intention can be inferred from conduct of accused and circumstances of case.**

In a case under S. 366, it is the duty of the prosecution to prove that the abduction took place with the intention mentioned in the section ; but then the intention can also be inferred from the conduct of the accused and the circumstances of the case. Ordinarily it is not possible for the prosecution to establish the intention except by proving the conduct. A girl of about 14 years was forcibly abducted by the accused.

**Held**, that no inference except of the intention such as is mentioned in S. 366 is possible. 123 Ind. Cas. 528=1930 Cr. C. 20=31 Cr.L.J. 529=A.I.R. 1930 Lah. 52.

—**S. 366—Presumption—When woman is kidnapped it is with one or other intents mentioned in S. 366.**

It is practically impossible for the prosecution in case of kidnapping and abduction to establish affirmatively the intention with which a woman is abducted. But it is a fair and justifiable presumption that when any woman is kidnapped or abducted it is undoubtedly with one or other of the intents specified in S. 366. The intention is more or less a matter of inference though there may be cases where the matter is capable of direct proof. It is for the accused to explain away incriminating circumstances. 120 Ind. Cas. 606=1930 Cr.C. 171=31 Cr.L.J. 131=A.I.R. 1930 Lah. 163.

—**Ss. 359 to 369—Intention—Persons selling girl with knowledge or intention that she would be subjected to illicit intercourse are guilty—It is not necessary that accused should know that girl is married.**

*D* having quarrelled with her husband left her house with the idea of going to her grandfather. She met *S* and *N* on the way who offered to escort her. Instead of doing so, they tried to sell her and being unsuccessful concealed her in the house of *S* where she was later on traced by her relations. It was contended that *S* did not know that *D* was a married girl.

**Held**, that even assuming that *S* did not know that *D* was a married girl, his attempt to sell her clearly made him liable under S. 366-A. The manner in which *S* tried to dispose of *D* was clear indication of his intention or knowledge that the girl would be subjected to illicit intercourse. The conduct of *N* also showed his guilty knowledge and intention. 1930 Cr.C. 531=A.I.R. 1930 Lah. 463=127 Ind. Cas. 159.

—**S. 366—**Intention under S. 366 is a matter of inference from the circumstances of the case and subsequent conduct of the accused after the abduction has taken place. A.I.R. 1921 Lah. 323, Foll. 110 Ind. Cas. 99=10 A.I.Cr. R. 429=29 Cr.L.J. 643 (Lah.).

—**Ss. 361, 366—Presumption of intent or knowledge to abduct.**

Presumption as to knowledge or intent to abduct does not arise when the accused is a child of immature age. 53 P.L.R. 1916=13 P.R. 1916 Cr. = 28 P.W.R. 1916 Cr. = 17 Cr. L.J. 283=84 Ind. Cas. 1003.



## 13. Jurisdiction.

—S. 366—Order for custody of girl after trial is over.

After trial is over, order for custody of girl with reference to whom the offences were committed is wholly without jurisdiction. A.I.R. 1934 Cal. 756=38 C.W.N. 1211=36 Cr.L.J. 231 (1)=152 Ind. Cas. 973.

—S. 361—Jurisdiction to try the offence—Place of offence.

A person charged with having committed the offence of kidnapping at a place outside British India, cannot be tried by a Court in British India though the person kidnapped may be concealed or detained in British India. 20 C.W.N. 62=17 Cr.L.J. 128=33 Ind. Cas. 304.

—S. 361—Order of Magistrate—*Ultra vires*.

An order by a Magistrate making over a minor girl to the maternal uncle on certain conditions and entrusting her to a trustee until fulfilment of those conditions, is *ultra vires*. 1 O.L.J. 416=15 Cr.L.J. 640=25 Ind. Cas. 840.

## 14. Interpretation.

(a) Against the will and without the consent of.

(b) Concealment.

(c) Deceitful means and illicit intercourse.

(d) Enticing.

(e) Forced.

(f) Induce.

(g) Keeping.

(h) Seducing to illicit intercourse.

(i) Taking.

(a). Against the will and without the consent of.

—S. 366—Though every act done “against the will” of a person is done “without his consent” yet an act done “without the consent” of a person is not necessarily “against his will”, which expression imports that the act is done in spite of the opposition of the person to the doing of it. A.I.R. 1933 Rang. 98=11 R. 213=34 Cr.L.J. 696=143 Ind. Cas. 872 (F.B.).

(b). Concealment.

—S. 368—‘Concealment’, meaning of.

“Concealment” means a withdrawal from the actual observation of others of the person kidnapped or abducted and not merely taking her away to a long distance so that her father or guardian would not know where she was.

Where a kidnapped girl is taken to a well where she is allowed to move in the neighbouring fields, it cannot be said that she is concealed. A.I.R. 1939 Lih. 26=41 P.L.R. 162=40 Cr.L.J. 277=179 Ind. Cas. 874.

—S. 368—It is doubtful whether it is possible to read into the words “the offence of kidnapping or abduction” the words “wrongfully concealing or keeping in confinement a kidnapped person”, and although the punishment under S. 368 is the same as that under S. 365 the offences are not the same. 46 All. 138=21 A.L.J. 912=5 L.R.A. (Cr.) 49=25 Cr.L.J. 552=A.I.R. 1924 All. 454.=81 Ind. Cas. 40.

(c) Deceitful means and illicit intercourse.

—Ss. 362 and 366—“Deceitful means”—“Illicit intercourse”.

Held, (1) that the expression “deceitful means” as used in S. 362, is wide enough to include the inducing of a girl to leave her guardian’s house by means of a representation that the person to whom she went would either marry her himself or arrange for the marriage; (2) that the words “illicit intercourse,” as used in S. 366 mean merely sexual intercourse between a man and a woman who are not husband and wife. (1907) A.W.N. 199=4 A.L.J. 482.

(d). Enticing.

—S. 361—The expression “enticing” involves that, while the person kidnapped might have left the keeping of the lawful guardian willingly, still the state of mind that brought about that willingness must have been induced or brought about in some way by the accused. 109 Ind. Cas. 907=27 M.L.W. 683=29 Cr.L.J. 635=1 M.Cr.C. 65=A.I.R. 1928 Mad. 585=54 M.L.J. 456.

(e). Forced.

—S. 362—“Force”—Meaning of.

The word “force” in S. 362, Indian Penal Code, means actual force and not merely a show or threat of force. I.L.R. (1950) A. 787=1950 A.W.R. 98=A.I.R. 1919 All. 710=51 Cr.L.J. 29.

—S. 366—The word ‘forced’ as used in S. 366, is used in its ordinary dictionary sense and would include forced by stress of circumstances. 50 C.L.J. 593=1930 Cr.C. 209=A.I.R. 1930 Cal. 209=57 Cal. 1074=125 Ind. Cas. 656.

(f). Induce.

—S. 362—“To induce” means “to lead into,”; it connotes a leading of the woman in some direction in which she would not otherwise have gone. There must be a change of mind caused by an external pressure of some kind. A.I.R. 1934 Sind 164=36 Cr.L.J. 231 (2)=152 Ind. Cas. 1061.

—Ss. 359 to 369—The word “induce,” is used in its ordinary meaning of any words of inducement flowing from one person to the girl. 1930 A.L.J. 1113=125 Ind. Cas. 577=A.I.R. 1930 All. 497.

(g). Keeping.

—S. 361—“Keeping”—Meaning of—Minor married girl leaving husband’s house after a quarrel to seek temporary shelter with a relation—If continues in the keeping of her husband’s guardianship.

A married girl under 16 years of age who leaves her husband’s house of her own accord after a quarrel and is proceeding to the house of a near relation with the idea of seeking temporary shelter with him, does not cease to be in the keeping of her lawful guardian and a person who induces her at the time to go with him is guilty of kidnapping. Her seeking protection with a near relation is not at all inconsistent with the continuity of her being in the keeping of the guardianship of her husband. The minor does not cease to be in the keeping of the guardian unless the guardian himself abandons the minor or the minor having attained years of discretion voluntarily and definitely abandon the protection of the guardian. I.L.R. (1949) Cut. 194=A.I.R. 1949 Orissa 22=50 Cr.L.J. 650.



**—S. 361—Lawful guardian — Meaning of—Keeping—Temporary absence.**

The word 'keeping' in S. 361 connotes the fact, that it is compatible with independence of action and movement in the object kept. It implies neither apprehension nor detention, but rather maintenance, protection and control manifested not by continual action but as available on necessity arising; the control of the guardian is not put an end to, by the fact that the minor has temporarily left the guardian's house. 6 Bom. L.R. 785, Foll. 6 S.L.R. 71=13 Cr.L.J. 736=16 Ind. Cas. 768.

**—Ss. 363, 368—Keeping of the lawful guardian—Possession—Kidnapping—Lawful guardianship.**

A girl under sixteen years of age was going to a vegetable market in search of work. On her way she met another woman, who asked the girl to accompany her under a promise of obtaining work for her. The woman took the girl to her house and kept her there all evening, when she was removed by the accused in a closed carriage to a solitary bungalow far away from the town. The accused kept the girl there for two days and two nights after which she was permitted to return to her home.

**Held**, that the accused were guilty under S. 368 of the offence of wrongful concealing a minor knowing that she had been kidnapped. In S. 363, the Legislature has advisedly preferred the phrase "keeping of the lawful guardian" to the word "possession" which frequently recurs in the Code in connection with inanimate objects. The word "keeping" connotes the fact that it is compatible with independence of action and movement in the object kept. It implies neither apprehension nor detention but rather maintenance, protection and control manifested not by continual action but as available on necessity arising. And this relation between the minor and guardian is certainly not dissolved so long as the minor can at will take advantage of it and place herself within the sphere of operation. (1904) 6 Bom. L.R. 785.

**(h) Seducing to illicit intercourse.**

**—S. 366—Committing the first act of sexual intercourse, if seducing.**

The term 'seduce' in S. 366 is used in the general sense of enticing or tempting, and not in the limited sense of committing the first act of illicit intercourse. The substantial offence in the section is the act of kidnapping or abduction; and the intention or knowledge that the girl may be forced or seduced to illicit intercourse raises it to an aggravated form of the main offence of kidnapping or abduction and punishable with greater severity. The material words in the section are "illicit intercourse" rather than "forced or seduced." It is the illicit nature of the intercourse for which the kidnapping or abduction takes place that constitutes the aggravation of the offence and not the priority in point of time of such intercourse. A.I.R. 1935 Bom. 189=59 Bom. 652=37 Bom. L.R. 176=36 Cr.L.J. 1509=158 Ind. Cas. 1048.

**—S. 366—Seduced to illicit intercourse, meaning of.**

The expression 'seduced to illicit intercourse' in S. 366 is not to be intended to be restricted to an inducement to a woman to surrender her chastity for the first time but it cannot be deemed to include a case where a man takes back a woman with whom he had been living until very recently for a period of several months during which he had been indulging in illicit intercourse with her. A.I.R. 1934 Pat. 170=35 Cr.L.J. 814=15 P.L.T. 229=148 Ind. Cas. 791.

**—Ss. 366, 368, 109—"Seduced to illicit intercourse" in S. 366—Meaning of—Whether restricted to inducing a girl to surrender her chastity for the first time—Abettor not shown to have guilty mind—Conviction for abetment—Legality of.**

The expression 'seduced to illicit intercourse' in S. 366, Indian Penal Code, is not restricted in meaning to inducing a girl to surrender her chastity for the first time. The expression means "induced to surrender or abandon a condition of purity from unlawful sexual intercourse." Therefore, as accused cannot be convicted of this offence unless it is proved that the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place. This does not mean that it is necessary to prove that the girl has never, at any time, surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past, and thereafter, have resumed a life of purity. On the other hand, if she is already leading a life of indulgence in unlawful sexual intercourse at the time of the kidnapping, it cannot be said with any reason or sense that she was kidnapped "in order that she might be seduced to illicit intercourse" within the meaning of the section. In such a case, the accused could not have kidnapped her in order that she might be led astray in conduct, or drawn away from the right course of action into a wrong one, because she was already astray, and was pursuing a wrong course at the time of the kidnapping. A.I.R. 1933 Cal. 718=35 Cr.L.J. 307=38 C.W.N. 71=60 Cal. 1457=147 Ind. Cas. 79.

**—S. 366—**The phrase 'seduced to illicit intercourse' implies two distinct stages in the act of the accused, the seduction and the illicit intercourse. They must be two distinct acts, though they may follow in immediate sequence. The words or actions of the accused which induced the girl to submit to the illicit intercourse must precede the actual act. The term "seduction" can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile, or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man.

The act of seduction alleged must be subsequent to the kidnapping in order to make S. 366 applicable. A.I.R. 1932 All. 409=1932 A.L.J. 483=33 Cr.L.J. 669=54 All. 756=138 Ind. Cas. 609.

**—S. 366-A—**The expression "illicit intercourse" in S. 366-A means sexual intercourse between a man and a woman who are not husband and wife. A.I.R. 1932 Lah. 555=33 Cr. L.J. 673=33 P.L.R. 727=138 Ind. Cas. 597.

**—S. 366—'Seduced' includes subsequent seduction for further acts of illicit intercourse.**

The word 'seduced' as used in S. 366 should not be taken to have that narrow meaning of inducing a girl to part with her virtue for the first time but that even though a girl may have by the first act of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse is also meant to be included. 50 C.L.J. 593=1930 Cr.C. 209=A.I.R. 1930 Cal. 209=57 Cal. 1074=125 Ind. Cas. 656.

**—S. 366—Words "seduced to illicit intercourse" do not refer to first act of seduction only.**

The words "seduced to illicit intercourse" do not refer to first act of seduction or surrender of chastity but they refer also to subsequent cohabitation as well.



The object of the section is to punish not the seduction by itself but the kidnapping of the kidnapped. 10 Bur. L.R. 196, Foll. 1929 Cr.C. 379=A.I.R. 1929 Pat. 651.

—S. 366—Per Kincaid, J. C. (Kennedy A.J.C., doubting). Seduction is not to be confined to the first connexion with an unmarried girl.

It is not a correct proposition that because a man has induced a girl, while in the custody of her parents, to surrender her chastity, he does not commit further act of seduction to illicit intercourse, when he persuades her to live with him to a condition of concubinage not sanctioned by marriage. 10 Bur. L.R. 196 and Rex. v. Moon, (1910) 1 K.B. 818, Foll. 96 Ind. Cas. 188=27 Cr.L.J. 1292=A.I.R. 1927 Sind 97.

#### (i). Taking.

—361 S.—“Takes any minor”—Meaning of.

Mere passive consent on the part of a person in giving shelter to a minor married girl does not amount to taking or enticing of the minor girl. But if he actively brings about her stay in his house while she is proceeding to the house of a near relation after leaving her husband's house of her own accord, by playing upon her weak and hesitating mind, it amounts to his taking the girl within the meaning of S. 361, Indian Penal Code.

It cannot be maintained that taking which is requisite to kidnapping must be constituted by a single act. A whole series of acts might together constitute the process of taking and when actually the taking is complete and in that sense kidnapping has been committed is a question of fact. 5 P. 536, referred to. I.L.R. (1949) Cut. 194=A.I.R. 1949 Orissa 22=50 Cr.L.J. 650.

—S. 361—The expression “taking” in S. 361 is not confined to mere physical taking. There is such a taking as is indicated in the common expression: “If you will come along, I shall take you.” The expression taking out of the keeping of the lawful guardian must, therefore, signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian or in other words, an act but for which the person would not have gone out of the keeping of the guardian as he or she did.

Where it was found that the girl, alleged to be kidnapped by the accused, had written letters in which she was desperately calling for him to come and take her away and she was soon after discovered to be with the accused or under the control:

Held, that from these two facts it is legitimately open to a Court of law to assume that he finally yielded in the solicitations and made it possible for her to get away and that is sufficient “taking” in law for the purposes of S. 363, Indian Penal Code. 109 Ind. Cas. 907=27 M.L.W. 683=29 Cr.L.J. 635=1 M.Cr.C. 65=A.I.R. 1928 Mad. 585=54 M.L.J. 456.

—S. 361—‘Taking’—Meaning of.

‘Taking’ in S. 361 means physical taking. 1 O.L.J. 330=15 Cr.L.J. 630=25 Ind. Cas. 638.

#### 15. Lawful custody.

—S. 366—Where a minor leaves the immediate custody of her lawful guardian for a temporary purpose, such as a visit to friends, she will no doubt be deemed to be still in his keeping for the purposes of S. 361. A.I.R. 1943 Pat. 212=Cr.L.J. 590=22 Pat. 266=207 Ind. Cas. 420.

—Ss. 359 to 369—Where the mother from whose custody a Mahomedan minor girl was removed by the accused was proved to have married in a stranger family and consequently lost her right of guardianship.

Held, that the conviction under S. 363, Indian Penal Code, could not be sustained. 51 C.L.J. 476=A.I.R. 1930 Cal. 665(2)=128 Ind. Cas. 181.

#### 16. Lawful Guardian.

(a) Entrustment.

(b) Lawful Guardian—Meaning of.

(c) Lawful Guardian—In the keeping of.

(d) Lawful Guardian—Who is.

(e) Miscellaneous.

##### (a). Entrustment.

—Ss. 363, 361, Explanation—Parents of girl, held lawful guardians and accused guilty under S. 361.

The reasonable and proper construction of the Explanation to S. 361 should be to regard the expression “lawfully entrusted” as signifying that the care and custody of a minor should have arisen in some lawful manner so as to show as if the person having the custody of the minor had been entrusted with the care and custody of the minor. The entrustment may be by a legal guardian; it may be written, oral express or implied. In the absence of a legal guardian, the entrustment may be presumed from the course of conduct of the person actually taking upon himself the duties of the care or custody of a minor. Guardianship connotes maintenance, protection and control of a minor. The word used in the explanation is “lawful” and that must be distinguished from the term “legal.” A guardian may be lawful without being a legal guardian. The expression “lawful guardian” must be liberally construed.

A girl of 14 years who was married at the age of 3 and had lost her husband before attaining puberty was living with her mother and putative father. All the time she was living with her parents. According to the custom, a married girl could not leave her parents' house before attaining puberty and the husband was not entitled to her custody until she attained maturity. The father-in-law of the girl never cared to exercise his right and was not willing to undertake the responsibility of a guardian. The girl was kidnapped by the accused while thus living with her parents:

Held, that the parents never lost their guardianship as the girl did not attain puberty and even if they had lost it by her marriage, that was revived in consequence of the failure of the father-in-law to take up the responsibility of a guardian. At all events, the father-in-law must be deemed to have “entrusted” the guardianship to the parents as was clear from his course of conduct. The accused was, therefore, guilty under S. 361. A.I.R. 1941 Nag. 66=I.L.R. (1942) Nag. 34=41 Cr.L.J. 356=1940 N.L.J. 203=186 Ind. Cas. 660.

—Ss. 363, 361—Entrustment, proof of.

The entrustment required by the explanation to S. 361, may be proved not only by oral evidence but also by surrounding circumstances and the conduct of the parties concerned. A.I.R. 1937 Pat. 263=15 Pat. 817=38 Cr.L.J. 673=18 P.L.T. 535=169 Ind. Cas. 48.



**—Ss. 359 to 369—Lawful entrustment means acceptance of the trust.**

To bring a case within the purview of the expression "lawfully entrusted" in explanation to S. 361 it must be clearly shown that not only the mother of the girl requested the alleged guardian to take the girl under his protection but that he accepted the trust. 1930 Cr.C. 649=A.I.R. 1930 Sind 164=126 Ind. Cas. 55.

**(b). Lawful Guardian—Meaning of.**

**—S. 361—Per Meredith J.**—Though the explanation to S. 361 may extend the accepted definition of the words "lawful guardian" under the civil law, yet, as against a person who, in fact, is the civil law guardian of the minor, mere *de facto* guardianship cannot be set up so as to convict the real civil law guardian of an offence under S. 361. A.I.R. 1943 Pat. 109=43 Cr.L.J. 918=203 Ind. Cas. 163.

**—S. 361—**The words "lawful guardian" in S. 361, include a *de facto* guardian. A.I.R. 1943 Pat. 212=44 Cr.L.J. 590=22 Pat. 263=207 Ind. Cas. 420.

**—S. 361—**The words "lawful guardian" in S. 361 are used in a wide sense. They are made by the explanation to that section to include any person lawfully entrusted with the care or custody of a minor. A.I.R. 1934 Pat. 170=35 Cr.L.J. 814=15 P.L.T. 229=148 Ind. Cas. 791.

**—Ss. 359 to 369—Lawful guardian.**

In case of a girl whose parents are dead and who is below 16, her brother though not over 18 years of age is deemed to be her lawful guardian. 1929 Cr.C. 563=A.I.R. 1929 Lah. 835.

**—S. 361—**The test of lawful guardianship is that the infant or minor should be in a position to apply to his guardian for protection. It is not necessary and the law does not require that the Crown should prove that a minor has been taken actually from the actual custody of his guardian. 1929 Cr.C. 543=A.I.R. 1923 Sind 249.

**—S. 361—Lawful guardian, meaning—Removing minor from custody of nearest male relative.**

Though a person happens to be the nearest male relative of a Hindu minor girl, it does not give him the absolute right to the custody of the girl. If he takes her away without the consent of the person in whose custody she was, he is guilty under S. 361. Only the natural guardian of a minor could raise the technical plea that the legal relations of ward and guardian did not exist between the minor and the person from whose custody she was taken away. 18 A.L.J. 64=2 U.P.L.R. (H.C.) 76=21 Cr.L.J. 50=54 Ind. Cas. 402.

**—S. 361—Lawful guardian—Meaning—Essentials of offence.**

By the explanation added to S. 361, Indian Penal Code the accepted and general meaning of the term lawful guardian has been extended so as to include a person lawfully entrusted with the care or custody of a minor. The section and the explanation are express and exhaustive and to constitute an offence there must be in fact a duly, properly and legally proved taking or enticing away of a minor from the custody of the following persons: (1) the natural guardian, (2) the legal guardian if the natural guardian be dead or (3) a person lawfully entrusted with the care and custody of a minor. The term 'lawfully entrusted' means a declaration of trust and the handing over or the giving or entrusting of a minor

to the care and custody of another by a person competent to do so unaffected by any illegality or impropriety coupled with the assent, express or, implied of the person in whom the trust is vested or imposed. Neither the declaration of the trust itself nor its acceptance need be necessarily in writing; it is sufficient if the declaration is verbally made and given or if it arises from a course of conduct consistent only with the existence of such antecedent declaration and accepted verbally or by necessary implication arising from the conduct of the party so entrusted with the duty imposed. S. 361 has no application to self-constituted guardians, nor to persons who are taken up and maintained by charitable institutes. The mere relationship *per se* of master and servant does not constitute the latter, the lawful guardian of a minor servant in his employment nor can such master of such minor, in the absence of proof, be deemed to be a proper person lawfully entrusted with the care and custody of such minor. 4 Pat. L.J. 74=(1919) P. H.C.C. 33=20 Cr.L.J. 161=49 Ind. Cas. 481 (F.B.).

**—S. 361—Lawful guardian, meaning of—Kidnapping—Guardianship.**

A married woman under 16 being dissatisfied with her mother-in-law left her husband's home for her maternal uncle's. On the way she was deceitfully taken to Aligarh where she was kept in the house of K's brother. Her negotiations were set on foot by K to pass the girl as a *jat*, but on the girl disclosing her identity to some woman there, K left the village. Thereupon K's brother took her to *Thana*, and pending enquiry by the police she lived for a month at his place.

**Held,** that K was guilty of kidnapping though the girl left home of her own accord she did not cease to be under the guardianship of the husband, her lawful guardian, but K's brother was not guilty as he was not one of the conspirators. 14 A.L.J. 792=17 Cr.L.J. 532=36 Ind. Cas. 580.

**—S. 361—Lawful guardian—Meaning—Kidnapping—Mother in custody of child—Consent.**

Where the accused was charged with kidnapping a girl from the lawful guardianship of her maternal uncle and it was found that the mother of the girl was present with the accused when he was leading the girl away and consented to it.

**Held,** that the maternal uncle's guardianship ceased and the guardianship of the mother revived and that taking with her consent was no offence under S. 366. 16 Cr.L.J. 237=27 Ind. Cas. 909 (Mad.).

**—S. 361—Lawful guardian—Meaning of—Kidnapping—Lawful guardian of a Hindu widow.**

Where the widow was residing with her husband's mother, with the consent, express or implied, of her deceased husband's brother, the husband's mother was the lawful guardian of the girl for the purposes of S. 361. 27 P.R. 1915 Cr.=16 Cr.L.J. 780=43 P.W.R. 1915 Cr.=31 Ind. Cas. 380.

**—Ss. 361, 363—Lawful guardian—Meaning.**

Where in a divorce suit a decree was passed dissolving the marriage and ordering the wife to deliver up the son born of the marriage to the husband and the decree was forwarded to the High Court for confirmation under S. 17 of the Act IV of 1869, the husband obtained custody of the son, but soon after the wife removed him from the husband's house before confirmation of the decree by the High Court, the wife could not be charged with kidnapping as, till the



confirmation of the decree the parties were still husband and wife. 41 Cal. 714=18 C.W.N. 484=15 Cr.L.J. 72=22 Ind. Cas. 424.

—S. 361—Lawful guardian—Meaning of.

Where a girl lived with the maternal uncles for more than a year and the paternal uncles who claimed an interest in the properties in her name, forcibly carried away and married the girl to somebody.

Held, that they were rightly convicted. 1 O.L.J. 416=15 Cr.L.J. 640=25 Ind. Cas. 840.

—S. 361—Lawful guardian—Meaning of.

The term 'lawful guardian' does not include a person who has himself gained possession of the minor by committing an offence under S. 361, but it does include a person with whom the minor resides by the express or implied consent of those possessing higher legal rights. 7 P.R. 1911 Cr.=31 P.W.R. 1911 Cr.=12 Cr.L.J. 211=154 P.L.R. 11=10 Ind. Cas. 97.

—S. 361—Lawful guardian—Meaning.

The term 'lawful guardian' includes a *de facto* guardian of a minor whose guardianship is not against the wishes of the husband of the minor. 12 Cr.L.J. 239=10 Ind. Cas. 281 (Mad.).

—Ss. 361, 363, 366—'Lawful guardian'—Parents—Possession continues though physical possession temporarily with another.

P's daughter went to the house of her sister, who with her husband, lived with her husband's uncle K. While there with K's consent certain people took the girl away and gave her in marriage to one to whom P had objected to their knowledge and K.

Held, that though they could not be convicted of kidnapping S from the guardianship of N, yet they should be tried for kidnapping from the guardianship of P. The word 'include' in S. 361 does not limit the protection given to parents and minors, but extends it by including in the term 'lawful guardian' any one lawfully entrusted with the care or custody of the minor. The parents' possession continues even though physical possession is with another for a limited time and for a limited purpose. (1900) 24 M. 284=10 M.L.J. 405.

(c) Lawful guardian—In the keeping of.

—S. 366—Where a minor abandons the house of her guardian of her own accord and has no intention of returning to the house, she cannot be held to continue in the keeping of her lawful guardian. A.I.R. 1941 Oudh 567=1941 O.W.N. 874=42 Cr.L.J. 728=1941 A.W.R. 260=17 Luck. 128=195 Ind. Cas. 371.

—Ss. 368, 363—Wife turned out by husband.

Where a minor is living with a lawful guardian, but is taken or enticed away from a street or some other place of resort, the position is that the guardian retains the care and custody of the minor even though the latter is not actually in the house. But, where the guardian abandons the care and custody of the minor and allows her to go anywhere she likes, she cannot be considered to be in his care or custody. Where, therefore, a person takes away a minor girl who has been turned out by her husband and allowed to be free to go anywhere, there is no case of kidnapping from lawful guardianship. A.I.R. 1937 All. 182=38 Cr.L.J. 401=1936 A.W.R. 1065=167 Ind. Cas. 676.

—Minor—Control of guardian—Termination.

The mere fact that the minor leaves protection her guardian does not put her out of the guardian's

keeping. But if the minor abandons her guardian with no intention of returning she cannot be held to continue in the guardian's keeping. Which principle should be applied to a particular case depends on the facts of that case. 87 Ind. Cas. 513=30 C.W.N. 215=26 Cr.L.J. 977=A.I.R. 1926 Cal. 467.

—S. 363—Lawful guardian—Meaning of—'Keeping'—'Taking.'

So long as the minor can at will take advantage of the guardianship and protection and place herself within the sphere of its operation, the relation between the minor and guardian implied by the word 'keeping' is not dissolved. 55 P.L.R. 1916=25 P.W.R. 1916 Cr.=17 Cr.L.J. 236=34 Ind. Cas. 652.

—S. 361—Lawful guardian—Meaning—Kidnapping—Child passing out of keeping of guardian.

A little girl who with no intention of starting life independently leaves her house for living with another relation, cannot be considered to have passed out of the keeping of her natural guardian, until she has by some overt act passed into the keeping of some one else. A person who induces her to accompany him shortly after she leaves her house is guilty of an offence under S. 366. Where the accused removed a girl to a place far away from her house, and deprived her of all independent judgment and will power by threats and inducements, she is confined because she is not conscious of the desire to escape. 8 S.L.R. 182=16 Cr.L.J. 117=27 Ind. Cas. 181.

(d). Lawful guardian—Who is.

—S. 366—Mother is lawful guardian for the purpose of S. 366 even though the minor is illegitimate child. 1935 M.W.N. 358.

—S. 361, Expln.—Removal from custody of *de facto* guardian for and with consent of civil guardian, whether offence.

Although the Explanation to S. 361 is intended to extend the meaning of the words "lawful guardian" beyond their ordinary scope so as to include any person lawfully entrusted with the care or custody of the minor, it cannot be used to mean that as against a person who, in fact is the civil guardian of the minor, mere *de facto* guardianship can be set up so as to convict the real civil guardian of an offence under S. 361.

Where a minor boy was taken away from the *de facto* guardianship of the complainant by the accused in association with and on behalf of the boy's paternal aunt who was alleged to be the civil guardian of the boy at law:

Held, that the accused could not be convicted without coming to a conclusion whether the paternal aunt was the guardian of the boy at civil law, merely because the boy was admittedly in the *de facto* guardianship of the complainant. A.I.R. 1931 Cal. 446=35 C.W.N. 195=32 Cr.L.J. 888=58 Cal. 897=132 Ind. Cas. 246.

—S. 361—The husband of a Mahomedan girl, who has not attained puberty, is not the lawful guardian of her person under the Mahomedan law. Her lawful guardian is ordinarily her mother and if the mother is dead, the mother's mother. 73 Ind. Cas. 936=27 C.W.N. 531=37 C.L.J. 329=24 Cr.L.J. 712=A.I.R. 1923 Cal. 672.

(e). Miscellaneous.

—S. 361—Karta of joint Hindu family, position of.

The position of a *karta* in a Hindu family is a unique one and even though one need not go so far as to say



that a person would necessarily be the lawful guardian of a minor within the meaning of S. 361, by the mere fact of his being a *karta*, it is safe to say that very slight evidence of the consent of the natural guardian would be required to hold that the *karta* of the family was in fact the guardian of a minor who is being brought up under his care. A.I.R. 1937 Pat. 263=15 Pat. 817=38 Cr. L.J. 673=18 P.L.T. 535=169 Ind. Cas. 48.

—S. 361—Dual guardianship.

The conception of a dual guardianship is, by itself, not repugnant to law and it is not difficult to conceive of cases where there may be more than one guardian. The guardianship of the father does not cease while a minor is in the possession of another person who had been lawfully entrusted with the care and custody of such minor by the father. Again, there is nothing in law to prevent the father or the mother of a minor, who may be his or her lawful guardian for the time being, from entrusting lawfully the care and custody of such minor to more than one person at a time.

A person should be regarded in the eye of the law as having been lawfully entrusted with the care and custody of a minor, if he has acquired control over the minor lawfully and in such circumstances as would imply trust even though he may not have been formally entrusted with the care and custody of the minor by a third person. A.I.R. 1937 Pat. 263=15 Pat. 817=38 Cr.L.J. 673=18 P.L.T. 535=169 Ind. Cas. 48.

—Ss. 366, 368—Guardianship of husband.

In a charge of kidnapping a woman from lawful guardianship of her husband, the prosecution must prove a legal marriage between the woman and the alleged husband. In the absence of such a proof, there would be no legal guardianship and consequently, no enticement from her lawful guardian and no offence under Ss. 366 and 368, would be committed. A.I.R. 1935 All. 566=1935 A.W.R. 515=36 Cr. L.J. 1031=156 Ind. Cas. 914.

—Ss. 359 to 369—Guardian and Ward—Minor cannot be guardian of his sister.

A minor cannot be the guardian of his sister. So he cannot institute a complaint of kidnapping of his sister. 67 Ind. Cas. 831=3 L.L.J. 588=A.I.R. 1921 Lah. 316.

17. Minor—Meaning of.

—S. 361—Minor—Meaning—Kidnapping girl over 16 years of age—Delay.

The accused was charged with having kidnapped a minor girl from the guardianship of her father. The girl was over 16 at the time when she disappeared and there was delay in making a report to the police.

**Held**, that the accused were not guilty of an offence under S. 363. The extraordinary delay in making the first information report was very suspicious and the fact that she was over 16 strengthened the belief that she went of her own accord. 19 Cr. L.J. 1011=48 Ind. Cas. 351 (Lah.).

—S. 361—Minor—Meaning—Minority—Guardianship—Unmarried Mahomedan girl—Kidnapping, when completed.

According to Mahomedan Law, attainment of puberty determines the minority of a Mahomedan girl. For the purpose of S. 363, Indian Penal Code, regard must be had to the definition of 'minority' in S. 3 of Majority Act.

Where the girl alleged to have been kidnapped was unmarried and her father was dead, the lawful guardianship is undoubtedly her mother's. 37 Mad. 567=16 Cr.L.J. 169=27 Ind. Cas. 553.

18. Offence under

(a) What constitutes.

(b) Offence—When not committed.

(c) Miscellaneous.

(a). Offence—What constitutes.

—S. 366—Applicability—Woman arrested under warrant and released—Person standing surety for her appearance against her will keeping her in confinement forcibly—Offence. See Criminal Procedure Code, S. 499. 49 Cr. L.J. 1=A.I.R. 1948 All. 72.

—S. 362—In the case of a grown up woman, it would be an offence to carry her away by force against her own will even with the object of restoring her to her husband. A.I.R. 1942 Lah. 89=43 P.L.R. 680=43 Cr. L.J. 588=I.L.R. (1942) Lah. 470=199 Ind. Cas. 870.

—S. 368—Proof of kidnapping.

Section 368 pre-supposes that the offence of kidnapping or abduction has taken place, so that anyone wrongfully concealing or confining the person kidnapped or abducted is guilty of an offence under S. 368. But where kidnapping is not proved, wrongfully confining or concealing does not constitute an offence under S. 368. A.I.R. 1937 All. 182=38 Cr. L.J. 401=1936 A.W.R. 1065=167 Ind. Cas. 676.

—S. 366—Girl not removed from lawful custody—Her marriage by brother—Offence.

The girl was not physically removed from the custody of her mother, because she had already been taken out of that woman's custody by the Court.

**Held**, that the marriage itself of the girl by her brother could not be treated as a constructive form of kidnapping because her brother was the person who was entitled to give the girl away in marriage. Hence no Criminal Offence was committed. A.I.R. 1935 All. 920=1935 A.W.R. 939=36 Cr.L.J. 1498=158 Ind. Cas. 1047.

—S. 364—There can be no offence of kidnapping if a person of age is conveyed from one part of British India to another. What has to be seen is whether the accused, by deceitful means, induced him to go from one place to another. 137 Ind. Cas. 290=9 O.W.N. 243=33 Cr.L.J. 514 (2).

—Ss. 359 to 369—What constitutes Offence—The substantial Offence under S. 366 is abduction or kidnapping—Not seduction in the sense of loss of chastity for the first time.

A conviction under S. 366 is not bad therefore merely for the reason that the accused has had intercourse with the woman even before she was kidnapped. *Rex v. Emily Moon* (1910) 1 K.B. 818, held inapplicable. 1930 M.W.N. 905=A.I.R. 1930 Mad. 980.

—Ss. 359 to 369—Offence under.

One P who was formerly a Christian changed her religion and became a convert to Hinduism. She left the house in which she was living during the absence of her husband who had gone to another place. When the latter came back he demanded his children, but they were not handed over to him.

**Held**, that on these facts there is no question of an offence under S. 363. 41 Cal. 714. Foll. 102 Ind. Cas. 209=28 Cr. L.J. 513 = 8 A.I.Cr.R. 187=A.I.R. 1927 Lah. 496.

—S. 362—Attempt to abduct.

Where the accused came on to the roof of a house and awakening the woman who was sleeping there,



with her husband asked her to accompany them and on her refusal they lifted her up in order to carry her away, when she raised an alarm, and the accuser dropped her on the roof and ran away.

**Held**, that under S. 362 of the Penal Code, the accused were not guilty of the offence of abduction inasmuch as the woman was not compelled to go from the place where she was, but was merely lifted up and that the action of the accused amounted to an attempt to abduct. 86 Ind. Cas. 1007=26 P.L.R. 119=26 Cr.L.J. 943=A.I.R. 1925 Lah. 512.

—Ss. 366 and 366-A—Where the accused took a girl under 18 years of age about from place to place with the intention of seducing her to illicit intercourse but force or deceitful means were not used:

**Held**, that no offence under S. 366 but one under S. 366-A was committed. 88 Ind. Cas. 463=2 O.W.N. 445=26 Cr. L.J. 1151=A.I.R. 1925 Oudh 454.

—S. 362—Girl led by accused to his house by false representations—Accused is guilty of abduction.

When the appellant met the girl, she had ceased to be a kidnapped woman in the strict sense. She was then a free agent but she would not have gone with the appellant but for his false representations to her as to his being a police constable and the inducement held out by him that he would take her to the police station.

**Held**, his action therefore amounted to abduction as defined in S. 362, Indian Penal Code. 73 Ind. Cas. 510=24 Cr. L.J. 622=A.I.R. 1923 Lah. 158.

—S. 365—Where the appellant intended to and actually did confine a girl wrongfully while he negotiated with her relatives for the payment of a sum of Rs. 600 which was practically her ransom,

**Held**, his act therefore fell under S. 365, Indian Penal Code. 6 L.B.R. 160, Foll. 73 Ind. Cas. 510=24 Cr. L.J. 622=A.I.R. 1923 Lah. 158.

—S. 361—To constitute the offence of kidnapping the intention to prevent the kidnapped person from returning to his guardian is not necessary.

Where a minor runs away from lawful guardianship the person with whom he takes refuge is not "taking him" within the meaning of the law. But inducing a minor to run away or giving him encouragement would constitute the offence, and any question of intention would be relevant only as regards the sentence. 69 Ind. Cas. 444=23 Cr. L.J. 716.

—Ss. 361, 366—Removing girl from legal guardianship.

The accused who induced a girl under 16 to go with them and kept her with them in boy's garb, were guilty of abduction, having taken her away from lawful guardianship. 40 All. 507=16 A.L.J. 445=19 Cr.L.J. 645=45 Ind. Cas. 837.

—S. 361—Essentials of the offence—Minor girl—Kidnapping—Selling minor.

A *Chamar* girl of 14 years left the custody of her husband and his parents and voluntarily stayed with the accused for a month who then made her over to certain other persons who made her look as much as possible as a *Jat* woman. After changing hands several times she was finally made over to a person to be married to his brother.

**Held**, that the accused was guilty neither of the offence of taking or enticing a minor out of the keeping of her lawful guardian nor of the offence of selling a minor with the intent that such minor should be

employed for the purpose of prostitution. 2 All. 694; 12 A.L.J. 265, Foll. 37 All. 624=13 A.L.J. 848=16 Cr. L.J. 663=30 Ind. Cas. 647.

—Ss. 361, 363—Mahomedan girl before puberty—Husband's custody—Onus.

The taking away of a minor Mahomedan girl before puberty by her mother or her agent from the custody of the girl's husband or of any one on his behalf will not constitute the offence of kidnapping from lawful guardianship. The onus of proving that the girl had attained puberty is on the complainant. (1904) 32 C. 444=2 Cr L.J. 328.

(b). Offence—When not committed.

—S. 366—Conviction under—Proof required.

To convict a person under the later part of S. 366, Indian Penal Code, it is essential that he is found to have practised some "criminal intimidation" or employed "any other method of compulsion." If, therefore, a girl had gone out of her father's house and gone out with the accused willingly and without anybody having exercised any compulsion on her, no charge under that section can be made out against him. I.L.R. (1950) A. 787=1950 A.W.R. 98=A.I.R. 1949 All. 710=51 Cr. L.J. 29.

—S. 366—If a girl is carrying on an intrigue up to the time of abduction and then the accused takes her away to continue that intrigue, S. 366 does not apply. A.I.R. 1934 Lah. 227=35 Cr. L.J. 1386=151 Ind. Cas. 741 (2).

—S. 366—Illicit intercourse going on before kidnapping.

Where illicit intercourse has been going on between the girl and the accused before she left home and probably had been going on for sometime before the kidnapping, it cannot be said that the accused kidnapped her in order that she might be seduced to illicit intercourse and he cannot be convicted under S. 366. A.I.R. 1933 Cal. 718=35 Cr.L.J. 307=38 C.W.N. 71=60 Cal. 1457=147 Ind. Cas. 79.

—S. 366—Previous intrigue.

Section 366 cannot be applied to a case where the accused is said to have been carrying on an intrigue with a girl under 16 while she is in the custody of her lawful guardian, and goes away with her because obstacles are thrown in the way of that intrigue, even though when he so goes away with her it is with the intention of carrying on that intrigue or in other words, with the intention of continuing illicit intercourse. A.I.R. 1932 All. 409=1932 A.L.J. 483=54 All. 756=33 Cr. L.J. 669=138 Ind. Cas. 609.

—S. 366—Probability of girl eloping with accused—Conviction is bad.

Where it was not unlikely that the girl herself eloped with some of the accused and on missing her, her parents got up the story to recover her and to bring her paramours into trouble.

**Held**, that a conviction under S. 366 was improper. 6 L.L.J. 622=A.I.R. 1925 Lah. 274.

—Ss. 366, 368—Persons not taking active part are not guilty.

Where the accused appeared to have helped merely in getting the kidnapped girl married and nowhere had he taken any part in keeping the custody of the girl and he was simply carrying out orders of the other accused and took no active part in concealing or confining the girl.



**Held**, the accused was not guilty of the offence. 81 Ind. Cas. 529=27 O.C. 32=25 Cr.L.J. 913=A.I.R. 1924 Oudh 335.

—**S. 362**—Where the circumstances rendered it more probable that the girl had eloped with the accused rather than that she was abducted.

**Held**, that the accused should be acquitted. 5 L.L.J. 38=A.I.R. 1923 Lah. 274.

—**S. 366**—If a minor girl leaves her husband's house without any persuasion, inducement or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, he cannot be deemed to have infringed the law, even if he does not restore her to her lawful guardian. 73 Ind. Cas. 260=24 Cr. L.J. 654=A.I.R. 1923 Lah. 330.

#### (c). Miscellaneous.

—**Ss. 366, 376**—Sexual intercourse with girl near her own home.

To prove an offence under S. 366, it is necessary to show that the girl or woman has been kidnapped or abducted from her lawful guardianship.

A man who commits sexual intercourse with a girl in a field near her own home without having any intention of taking her away with him is not guilty of an offence under S. 366 but a man who has intercourse with a minor girl even with her consent is guilty of the offence of rape. A.I.R. 1932 All. 580=1932 A.L.J. 776=34 Cr. L.J. 100=141 Ind. Cas. 127.

—**Ss. 359 to 369**—Conspiracy to sell girl in marriage—No proof of kidnapping—Offence committed.

Where there is conspiracy between certain persons that a girl should be brought to Sind and sold there to some person who might be willing to buy her and that to such person it should be stated that the girl was a relation of one of the party of the conspirators and it is not proved that the girl was kidnapped from lawful guardianship the offence committed falls under Ss. 420 and 511 read with S. 120-B rather than under S. 366 read with S. 120-B. 126 Ind. Cas. 55=1930 Cr.C. 649=A.I.R. 1930 Sind. 164.

—**Ss. 361 and 362**—Kidnapping is an entirely distinct offence from abduction, the necessary ingredients being entirely different. 104 Ind. Cas. 245=45 C.L.J. 561=31 C.W.N. 940=28 Cr. L.J. 805=A.I.R. 1927 Cal. 644.

—**S. 365**—When there is nothing to show that the whereabouts of the person confined were concealed by the accused from the other relations or from the person interested in the person confined, the offence amounts to one of wrongful confinement under S. 342 and not under S. 365. 92 Ind. Cas. 213=27 Cr.L.J. 229=7 L.L.J. 520=26 P.L.R. 733=A.I.R. 1925 Lah. 614.

#### 19. Person of unsound mind.

—**Ss. 366, 361**—Unconscious person, if of unsound mind.

It may be that S. 361 ought to include persons who have been made unconscious; but an unconscious person cannot be said to be of unsound mind within meaning of S. 361.

Where an accused is charged under S. 366 for having kidnapped a girl of twenty years of age, while she was unconscious as a result of poisoning, the girl cannot be regarded as being of unsound mind so as to bring the offence under S. 366. A.I.R. 1939 Lah. 224=41 P.L.

R. 526=40 Cr. L.J. 706=I.L.R. (1939) Lah. 517=182 Ind. Cas. 919.

#### 20. Procedure.

(a) Charge—framing of.

(b) Trial by jury.

(c) Miscellaneous.

(a). Charge—framing of.

—**S. 366**—Alternative charges of kidnapping and abduction—Separate charges—Desirability.

Alternative charges of kidnapping and abduction should not be framed in one charge. It is desirable that there should be separate charges in the alternative for these offences. 223 Ind. Cas. 44=47 Cr. L.J. 325=A.I.R. 1946 Cal. 493.

—**S. 364**—Scope—Abducted person murdered—Proper charge.

Where the case for the prosecution is that the person abducted was in fact murdered, there can be no scope for a charge under S. 364, Indian Penal Code, and the abductor should be charged either with murder pure and simple or at least with abetment of murder. 2 D.R. 68.

—**Ss. 362, 323**—Charge.

Where the complaint is that a girl was abducted and ravished and this is supported by medical evidence of ruptured hymen, the charge should not be entered as one under S. 323. A.I.R. 1942 Bom. 71=14 Bom. L.R. 27=43 Cr.L.J. 529=I.L.R. (1942) Bom. 384=199 Ind. Cas. 202 (F.B.).

—**Ss. 364, 302**—When the case for the prosecution is that the person abducted has been murdered by the abductor, there can be no scope for a charge under S. 364. The abductor should be charged with murder, pure and simple. However, in such cases where the evidence to establish the charge of murder is weak or inconclusive, the prosecution is prone to adopt this device of adding or preferring a charge under S. 364 in the hope that a jury which may hesitate to find the accused guilty of murder on such slender evidence, may be induced to find against him on the lesser charge, but such a procedure is unfair and improper and should not be adopted. A.I.R. 1940 Cal. 561=71 C.L.J. 597=42 Cr. L.J. 285=192 Ind. Cas. 352.

—**S. 366**—Occurrence though single transaction, separate charges held, should have been framed for separate offences.

A married girl whom the jury found to be under 16 years of age, was due to return to her husband's house after a visit to her father in a village. On the way, she passed the house of the accused. He asked her to come inside on the pretext that his wife wanted her. When she went in, he bolted the door and demanded that she should remain with him. In the night, he ravished her. Later on, he took her out and was joined by the other three appellants. They took her away, and according to her story, her ornaments were taken off. All were jointly charged, both with kidnapping and abduction.

**Held**, that the whole incident could not be regarded as constituting a single offence and though it may be said that the whole occurrence was one single transaction, even in that case separate charges should have been framed for the separate offences which went to make up that transaction. A.I.R. 1939 Cal. 321=40 Cr.L.J. 649=182 Ind. Cas. 322.

—**S. 366**—Accused charged with offences of kidnapping and abduction in respect of same occurrence—



Charge should be framed under two heads. Trial is not vitiated however in case charge is framed under one head provided thereby accused is not prejudiced. A.I.R. 1938 Cal. 460=39 Cr.L.J. 674=176 Ind. Cas. 104.

—**S. 366—Abduction and kidnapping—Separate charges, if necessary.**

It is always desirable in proper circumstances, to charge the accused separately for kidnapping and abduction. But the omission of the Judge in splitting up the whole thing into two parts is not sufficient for interference by the High Court unless the omission has caused a failure of justice or the accused was, in any way, prejudiced thereby. When the accused had ample opportunity to meet the evidence of the prosecution on the various points taken in the case, he cannot be said to have been prejudiced. A.I.R. 1934 Cal. 85=37 C.W.N. 1071=35 Cr.L.J. 487=147 Ind. Cas. 828.

—**S. 366—Where a person is to be charged in the alternative of kidnapping or abduction of a minor girl, a separate charge must be framed with respect to each offence.** A.I.R. 1934 Pat. 170=35 Cr.L.J. 814=15 P.L.T. 229=148 Ind. Cas. 791.

—**S. 366—The charge under S. 366 which the accused is called upon to answer should mention the words "kidnaps or abducts."** A.I.R. 1934 Sind 119=36 Cr.L.J. 62(2)=28 S.L.R. 285=151 Ind. Cas. 984.

—**Ss. 366, 368—Misjoinder of charges.**

Six persons were jointly tried. The charge on which the first four accused were tried was for kidnapping and abduction. The charge against the fifth accused was for abduction only as mentioned in S. 366. The sixth accused was jointly tried with the other five, for the offence under S. 368.

**Held**, that a joint trial of this kind was illegal and could not but have, in fact, prejudiced the accused in their defence, and their conviction could not be maintained.

Though the offences of kidnapping and abduction are referred to in the same section of the Penal Code, they are distinct offences and separate charges should be drawn up if it is intended to charge the accused with both the offences. A.I.R. 1933 Cal. 563=34 Cr.L.J. 682=144 Ind. Cas. 93.

—**S. 366—Where a married woman of 15 years of age had gone outside her husband's hut at night to answer the call of nature and was seized, taken away and raped by accused and they were charged under S. 366, Indian Penal Code for kidnapping.**

**Held**, that the case did not fall within the provisions of S. 236, Criminal Procedure Code, and the accused should not be charged in the alternative for having committed some of the offences. A.I.R. 1933 Cal. 676=37 C.W.N. 1074=34 Cr.L.J. 1219=60 Cal. 1394=146 Ind. Cas. 305.

—**S. 366-A—A conviction under S. 366-A may be made even though no specific charge is framed.** A.I.R. 1933 Nag. 259=35 Cr. L.J. 28=29 N.L.R. 365=146 Ind. Cas. 332.

—**Ss. 366, 376—Offence under both sections—No charge under S. 376—Effect.**

Where the prosecution evidence discloses an offence not only under S. 366, but also one under S. 376, the case should be committed to the sessions. The order of the trying Magistrate refusing to frame a charge under S. 376 is, in substance, one discharging the accused under that section and both the Sessions Court and the High Court have power to revise it. A.I.R. 1932 Nag. 85(1)=15 N.L.J. 26=33 Cr. L.J. 558=137 Ind. Cas. 904.

—**S. 366—Notice of a charge of kidnapping under S. 366 is not a fair, proper or sufficient notice of a charge of abduction under S. 366 because on a charge of abduction the accused has got to meet that charge on facts different from those which would be involved in a charge of kidnapping.**

The accused were charged of kidnapping but the jury were led to believe that it was open to them to return a verdict of guilty of abduction.

**Held**, that it was impossible to say that no prejudice was caused to the accused and the case was fit for ordering retrial. A.I.R. 1927 Cal. 200, Foll. 117 Ind. Cas. 862=32 C.W.N. 1245=30 Cr. L.J. 857.

—**S. 366—Where an accused was charged in one head under one charge with 'kidnapping or abduction.'**

**Held**, that the ingredient of the two offences being obviously different, the accused was entitled to know which of the charges he was asked to meet. 104 Ind. Cas. 245=45 C.L.J. 561=31 C.W.N. 940=28 Cr.L.J. 805=A.I.R. 1927 Cal. 644.

—**S. 361—Charge to be explained clearly to accused.**

When a question whether there was kidnapping either with or without persuasion, and a question as to how long the kidnapping has continued, and as to whether at some stage a fresh kidnapping has been carried out, and whether there was a previous conspiracy or conduct amounting to abetment, or whether, there was no kidnapping or share in the kidnapping at all but merely a confidence trick undertaken to cheat a person, it is more than ever the duty of the Judge even though counsel may be engaged, to clear the ground, and to be quite sure that each accused or counsel clearly understand what case they have to meet. 81 Ind. Cas. 80=4 L.R.A. (Cr.) 83=25 Cr.L.J. 592=A.I.R. 1923 All. 285.

(b). Trial by jury.

—**Ss. 366, 302—Trial by jury.**

Accused prosecuted under Ss. 366 and 302—Trial under S. 366 by jury—Unanimous verdict of guilty and conviction—Conviction by Judge under S. 302—Appeal against both convictions—Appeal against conviction under S. 366 incompetent—Case such that conviction for murder depending upon conviction for kidnapping—Accused can be allowed in appeal against conviction for murder to challenge facts on which their convictions under S. 366 rest. A.I.R. 1941 Nag. 94=1940 N.L.J. 565=42 Cr.L.J. 154=I.L.R. (1941) Nag. 157=191 Ind. Cas. 371.

—**S. 366-A—Misdirection to jury.**

In a trial under S. 366-A, the fact that a girl is handsome is no evidence at all to show that the persons with whom she goes away had any intention that she should become an inmate of brothel.

Where the Judge, in dealing with the evidence regarding the intention under S. 366-A, told the jury to look at the surrounding circumstances and he then pointed out that the girl was handsome.

**Held**, that it amounted to a serious misdirection. A.I.R. 1939 Cal. 290=43 C.W.N. 668=40 Cr. L.J. 660=182 Ind. Cas. 447.

—**S. 366-A—Trial by jury.**

In case of offence under S. 366-A, the question of age is the crucial one and strict and exact evidence of age is essential. Where, however, there is no exact evidence of age, the Judge should strongly emphasise this feature of the case and clearly direct the jury that



if they are not completely satisfied that it had been established that the girl was under eighteen, they are bound to acquit upon that charge.

Where, as in cases of this nature, the law is somewhat complicated and liable to be misunderstood by jury, it is essential for the Judge to say exactly how he has explained it to the jury so that the Appellate Court may be in a position to judge whether he has done so correctly and fully. Where there is no evidence that the girl is under sixteen, the charge under S. 366 depends entirely on the proof of force or deceit. The Judge should explain this to the jury and ask them to consider carefully whether any deceit had really been shown to have been practised upon the girl. A.I.R. 1939 Pat. 536=18 Pat. 698=41 Cr.L.J. 1=20 P.L.T. 898=184 Ind. Cas. 354.

#### —S. 366—Trial by jury.

Charge under S. 366—Nature of direction to jury indicated—Offence against one not proved—Nature of proper direction stated. A.I.R. 1938 Cal. 475=39 Cr.L.J. 751=176 Ind. Cas. 456.

—S. 366—Omission to direct jury on one of the vital ingredients of offence under S. 366, *e.g.*, about the consent of the girl below the age of 16, amounts to misdirection amounting to miscarriage of justice. A.I.R. 1937 Pat. 440=16 Pat. 413=38 Cr. L.J. 919=18 P.L.T. 607=170 Ind. Cas. 464.

—S. 366—In cases under S. 366, it is the duty of Judges with jury to adopt in part the system which is prevalent in England and that is, to put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject of the charge. It is very doubtful that the jury, unless it is specifically put to them, ever really understand what their duty is under S. 366. A.I.R. 1936 Cal. 675=38 Cr. L.J. 176=166 Ind. Cas. 323.

#### —S. 366—Trial by jury.

The 'will' referred to in the first part of S. 366 means the will of the girl and does not mean the will of her guardian. Hence, a direction to the jury that if the marriage of the girl kidnapped was against her guardian's will, it was against her will within the meaning of S. 366, is a misdirection. A.I.R. 1932 Cal. 442=36 C.W.N. 49=33 Cr. L.J. 512=137 Ind. Cas. 819.

#### —S. 368—Charge to jury.

A verdict of the jury finding a person guilty under S. 368, Indian Penal Code, must be considered erroneous within the meaning of S. 423(2), Criminal Procedure Code, where the Judge did not adequately bring out the difference between knowledge and existence of grounds for belief or suspicion in his charge to the jury or, at any rate, the jury did not understand the importance of the difference between the two things. A.I.R. 1932 Oudh 28=8 O.W.N. 1325=33 Cr.L.J. 275=136 Ind. Cas. 243.

—Ss. 359 to 369—Seduction is a comprehensive expression and it does not exclude the possibility of deceitful means being used in order that seduction may be practised with effect. Where, therefore, a Judge charges the jury under S. 366, and explains the whole section fully to them, he need not suggest that if they find that the girl was not compelled by force to leave her father's house they should next proceed to consider whether deceitful means had been practised upon her by the accused and whether by such means she was induced to leave her father's house. 126 Ind. Cas. 762=A.I.R. 1930 Cal. 433.

—Ss. 361, Expl. 363—Kidnapping minor married girl from father's keeping—"Lawful guardianship"—Misdirection to jury—Failure to place

evidence fairly before jury—Retrial, order for—Sentence suffered under conviction set aside.

Where an accused was charged with having kidnapped a married Hindu girl under 16 years age by taking her out of the keeping of her father the father being alleged in the circumstances of the case to be the lawful guardian, what the Judge should have left to the Jury was whether or not the father had been lawfully entrusted with the care or custody of the girl. The judge had charged to the jury as follows. "Now the lawful guardian of a married woman is no doubt her husband. But there is the evidence before you that she came with the consent of the husband into the house of her father if you believe such evidence. Therefore the father, of the girl was her *de facto* lawful guardian for the time the girl was residing in her father's house."

**Held**, that in matters of this kind a judge should adhere to the words of the particular section of the Penal Code with which he has to deal and not substitute phraseology of his own. As it further appeared that upon the point of the husband's consent the judge had failed to place before the Jury a fair and proper statement of the evidence on the record, the conviction was set aside and a further trial ordered.

Per *Jenkins*, C.J.—"I have no doubt should the accused be again convicted, the court in estimating what would be the proper sentence, will have regard to the detention already suffered by him." (1909) 11 Cr.L.J. 9=4 Ind. Cas. 543=13 C.W.N. 754.

#### (c). Miscellaneous.

#### —S. 363—Sentence of fine—If must be imposed with sentence of imprisonment.

It is not necessary under S. 363, Indian Penal Code, that a sentence of fine must be imposed along with the sentence of imprisonment. What is essential is that a person convicted of such an offence should be punished with imprisonment and should not be punished with fine alone. With the sentence of imprisonment it is open to the Court to impose a sentence of fine as well. The Court is not, therefore bound to sentence an accused to fine in every case. 1949 A.L.J. 248=A.I.R. 1949 A. 587=50 Cr. L.J. 884=1949 A.W.R. 362.

#### —S. 366—Commitment for trial under S. 366—Legality of.

Where it is found that the woman alleged to have been abducted was going with the accused persons willingly and that she was above eighteen years of age and there is no evidence that she had been induced to go by any deceitful means and the woman herself has not been examined, the commitment of the accused for trial under S. 366 should be quashed. A.I.R. 1936 Pat. 103=160 Ind. Cas. 161.

#### —S. 368—Offence under, if triable by Sessions exclusively.

Neither on the wording of S. 368 nor on the policy of the Legislature can it be argued that an offence under S. 368 should be tried exclusively by a Court of Session when the girl was wrongly confined or concealed for the purpose of forcing her to illicit intercourse. A.I.R. 1935 All. 63=36 Cr. L.J. 117=1931 A.L.J. 1234=4 A.W.R. 949=152 Ind. Cas. 550.

#### —S. 368—Duty of prosecution to place first information report before Court.

It is the duty of the prosecution in a case under S. 368, Indian Penal Code, to place the first information report before the Court and if the prosecution does not do so and as the accused does not come to know of this



report at an earlier stage it is necessary in the interest of justice, that in an application under S. 428, Criminal Procedure Code, made to the Sessions Judge, additional evidence should be taken by him. A.I.R. 1935 All. 63=36 Cr. L.J. 117=1934 A.L.J. 1234=4 A.W.R. 949=152 Ind. Cas. 550.

—**Ss. 366, 373, 498**—Complaint under S. 498, Indian Penal Code, was filed by the father of the abducted girl. After the evidence was recorded, the husband of the girl stated that the complaint was filed with his consent.

**Held**, that there being no proper complaint by the person authorised by law to make, the conviction under S. 498 was bad.

**Held further**, that the High Court cannot alter a conviction on a charge under S. 498, Indian Penal Code, only to a conviction under S. 366-A or S. 373, Indian Penal Code as these offences are major offences. A.I.R. 1934 Lah. 122=36 Cr.L.J. 423=153 Ind. Cas. 721.

—**Ss. 366-A, 368**—Where the District Magistrate desired an acquittal under S. 368, to be reversed not because it was wrong but because it would preclude a fresh trial of offence under S. 366-A.

**Held**, that the question was one which ought to be raised in appeal and that the appropriate procedure was to prefer an appeal against the order of acquittal and ask for conviction either under S. 368 or S. 366-A in the alternative. A.I.R. 1933 Nag 259=29 N.L.R. 365=35 Cr.L.J. 28=146 Ind. Cas. 332.

—**S. 366**—Where the Magistrate finds in a case under S. 363, Indian Penal Code, that there is *prima facie* sufficient evidence that the girl was enticed away, the Magistrate should examine and decide whether an offence under S. 366 or some other cognate offence against a female of over 16 was committed and should not remain content with finding that the girl was not proved to be under 16. 85 Ind. Cas. 36=6 L.L.J. 318=26 Cr.L.J. 420=A.I.R. 1924 Lah. 718.

## 21. Sentence.

—**S. 366—Sentence, held excessive.**

The kidnapped girl went away with the accused willingly. The medical evidence indicated that although the girl was under 16 years of age she was accustomed to sexual intercourse.

**Held**, that in the circumstances, the sentence of 4 years' rigorous imprisonment was excessive and sentence of 12 months already undergone was sufficient as it was not a case of a woman being forcibly compelled or unlawfully induced to leave her home for the purpose of illicit intercourse. A.I.R. 1941 Cal. 315=42 Cr.L.J. 649=195 Ind. Cas. 12.

—**S. 366**—Conviction under Ss. 460 and 366 read with S. 149—No harm done to the girl who was rescued.

**Held**, that a long sentence was uncalled for. A.I.R. 1936 Lah. 15=37 Cr.L.J. 430=38 P.L.R. 323=161 Ind. Cas. 313.

—**S. 366—Age of accused, if to be considered.**

The fact that the accused is 55 years old does not justify a lenient sentence for an offence of abduction. In such cases, the public interest requires that justice and not sentiment should prevail. (Sentence of one year's rigorous imprisonment raised to five years). A.I.R. 1936 Sind 233=38 Cr.L.J. 114=165 Ind. Cas. 933.

—**S. 366**—If the girl is a willing party and the accused did not ill-treat her, one year's sentence is quite sufficient. 1935 M.W.N. 358.

—**S. 366-A—Sentence of whipping in addition to detention in Borstal School.**

Where the accused was convicted for an offence under S. 366-A and sentenced, both to detention at the Borstal School and also to receive 20 lashes.

**Held**, that the sentence of whipping in addition to a punishment to which he was liable, not under the Indian Penal Code but under S. 25 (1) of Burma Prevention of Crime (Young Offenders) Act III of 1930, was illegal.

Where the accused has given way to his passions detention in a Borstal institution is normally not likely to prove either so efficacious or so salutary a punishment as a whipping, which, in such cases, operates as a wholesome and striking reminder that young men must behave themselves properly in their relations with women and girls and must learn to control their natural instincts. This object is much more likely to be achieved by a whipping than by a period of reflection and detention in a Borstal institution. A.I.R. 1934 Rang. 123=35 Cr.L.J. 903=12 Rang. 349=149 Ind. Cas. 139 (1).

—**Ss. 366 and 376**—A charge under S. 366 involves different elements and different questions of fact from a charge under S. 376, and therefore separate sentences for offences under Ss. 366 and 376 are not against the provisions of S. 71, Indian Penal Code: 8 Bom. L.R. 120, Foll. 99 Ind. Cas. 344=7 Lah. 484=27 P.L.R. 802=28 Cr.L.J. 136=A.I.R. 1927 Lah. 88.

—**S. 366—Abduction with a view to effect marriage—No desire to spoil the girl—Sentence was reduced to 2½ years.**

Where a girl was abducted forcibly but the accused was a second cousin and the motive for the abduction was evidently to bring about a marriage and that there was no evil desire to spoil the girl's future or to disgrace her.

**Held**, that the sentence of five years' rigorous imprisonment should be reduced to 2½ years. 101 Ind. Cas. 456=6 Bur. L.J. 25=8 A.I.Cr.R. 33=28 Cr.L.J. 424=A.I.R. 1927 Rang. 336.

—**Ss. 362 and 376**—Where the real offence is rape and the abduction is an aggravating circumstance separate sentences under both the sections should not be given. 89 Ind. Cas. 912=26 Cr.L.J. 1440=A.I.R. 1926 Lah. 114.

—**Ss. 363 and 376**—If a person abducts a woman with intent to rape her and does rape her, he cannot be awarded separate sentences under Ss. 363 and 376, Indian Penal Code. 92 Ind. Cas. 850=27 Cr.L.J. 338=A.I.R. 1926 Lah. 212.

—**S. 363**—Where the girl kidnapped was not imposed upon.

**Held**, the sentence of 7 years was too severe. 81 Ind. Cas. 529=27 O.C. 32=25 Cr.L.J. 913=A.I.R. 1924 Oudh 335.

—**S. 366—Guardian not quite opposed to the marriage—Offence less serious.**

Where a girl of 18, was abducted from the custody of her mother and married to one of the accused who were her near relations and the report made by the mother to the police was to the effect that the accused being the nearest paternal relation had certainly superior right to the possession of the girl but that they had no right to take her away forcibly without paying the mother some compensation to the trouble and expense that she had incurred in bringing up the girl.



**Held**, that an offence was technically committed and accused was guilty under S. 366, but having regard to the fact that the parties are very close relations and that the mother herself did not take a very serious view of the matter when she lodged the first information report, a nominal sentence was sufficient. 77 Ind. Cas. 606=5 L.L.J. 377=25 Cr.L.J. 430=A.I.R. 1924 Lah. 110.

**—S. 366—Abduction by several and rape by one of them.**

Though the causing of the hurt is not a necessary part of the offence under Section 366 and separate sentences under Section 366 and Section 147 would be justified, yet if the force used is a necessary ingredient for the completion of the offence under Section 366, separate sentence under Section 147 is not justified. 77 Ind. Cas. 997=4 L.L.J. 322=25 Cr.L.J. 533=A.I.R. 1922 Lah. 410.

**—Ss. 361 and 365—Kidnapping—Abduction of a female in exchange of a girl—Sentence.**

The accused abducted a certain woman, merely in order to put pressure upon her friends to restore a young girl whom they had abducted. The girl was abducted and then was also let go. It was found that no harm was done to her.

**Held**, that under such circumstances heavy sentence of imprisonment on the accused was not necessary. 89 P.L.R. 1916=17 Cr.L.J. 472=36 Ind. Cas. 152.

**22. Who can abduct or kidnap.**

**—S. 366—Husband and his minor wife.**

No offence under S. 366 is committed if the husband takes away his minor wife from the custody of her father.

It may well be that, when the husband of a minor girl seeks the assistance of the Civil Court in obtaining the custody of his wife, the Civil Court may, for good and sufficient reason, decline to give him the custody of her and permit her parents to retain her in their custody until she reaches maturity. But it by no means follows that, if such a husband seizes an opportunity that presents itself to him of taking his wife into his own custody, he commits a criminal offence. A husband becomes the lawful guardian of his wife as soon as the marriage ceremony has been performed, and it is immaterial whether or not his wife has then attained puberty. The father ceases to be the guardian of the girl and, when the husband comes across her and insists on her going with him, he does not commit the offence of kidnapping. A.I.R. 1943 Pat. 109=43 Cr.L.J. 918=203 Ind. Cas. 163.

**—Ss. 363, 361—Father deceitfully enticing his own child from custody of his mother.**

If a person who, in good faith, believes himself to be entitled to the lawful custody of a child cannot commit an offence under S. 361 *a fortiori* a person who is in fact the father of the child, and, therefore, in law, entitled to the lawful custody of the child, cannot come within the scope of S. 361. In this case it can be said that he did not merely in good faith believe himself to be entitled to the lawful custody of his child, but that he was beyond the possibility of any challenge entitled to the lawful custody of the child, and that, therefore, this act in taking the child from the keeping of his mother by deceitful means, and who was deserted by him and in whose keeping the child was since its birth could not amount to an offence of kidnapping from lawful guardianship. He does not commit any offence under S. 361 and therefore, he cannot be convicted under S. 363. A.I.R.

1938 Mad. 656=47 L.W. 568=(1938) 1 M.L.J. 670=(1938) M.W.N. 385=39 Cr.L.J. 993=I.L.R. (1938) Mad. 805=178 Ind. Cas. 67.

**—S. 361—If father removes by force an illegitimate child from its mother to suppress ill-name, he cannot seek protection under an exception to S. 361, Indian Penal Code.** 62 Cal. 629=39 C.W.N. 396.

**—S. 366—Mother of minor girl along with accused taking her from lawful guardianship of her father—Absence of good faith in mother—Object of marrying girl against wishes of father.**

**Held**, offence under S. 366 was committed but in the circumstances, the sentence might be reduced. A.I.R. 1934 Oudh 89=11 O.W.N. 30=35 Cr.L.J. 469=147 Ind. Cas. 670.

**—Ss. 359 to 369—Father taking away his unhappy daughter from her husband's house and giving her as wife to another commits offence under S. 366-A.** 1930 A.L.J. 1113=125 Ind. Cas. 577=A.I.R. 1930 All. 497.

**—Ss. 362 and 366—Where a widow has been deceitfully induced by her mother-in-law to leave her house with intent that she might be compelled to marry one of the accused, and the other two accused, compel her by force to accompany them to another place, all the three are guilty of abduction. The phraseology of Ss. 362 and 366 is very comprehensive and fully covers the case.** 30 P.L.R. 573=1929 Cr.C. 305=A.I.R. 1929 Lah. 713.

**—S. 363—Christian woman becoming Hindu and taking her children by Christian husband with her—She is not guilty under S. 363.**

One P. who was formerly a Christian changed her religion and became a convert to Hinduism. She left the house in which she was living during the absence of her husband who had gone to another place. When the latter came back he demanded his children, but they were not handed over to him.

**Held**, that on these facts there is no question of an offence under S. 363: 41 Cal. 714, Foll. 102 Ind. Cas. 209=28 Cr.L.J. 513=8 A.I.Cr.R. 187=A.I.R. 1927 Lah. 496.

**—S. 361—Who can kidnap—Father—When not liable for kidnapping.**

A father who did not remove his daughter from the guardianship of any one but himself, is not guilty of kidnapping. 24 P.W.R. 1914 (Cr.)=161 P.L.R. 1914=15 Cr.L.J. 639=25 Ind. Cas. 839.

**—S. 361—Who can kidnap—Mother kidnapping child.**

A mother can be guilty of kidnapping her child.

Where a married woman goes away with her child from her father-in-law's house, the only person who can be deemed to have kidnapped the child is the mother, and the knowledge of her whereabouts by another person will not make him an abettor of an offence under that section. 56 P.L.R. 1911=58 P.W.R. 1911 (Cr.)=12 Cr.L.J. 94=9 Ind. Cas. 511.

**—S. 372—Sale of girl outside jurisdiction of Court—Competency to try accused.**

In the case of an offence under S. 372 if the sale of the girl had taken place outside the jurisdiction of the Court, it cannot try the accused. 1948 A.M.L.J. 40.

**—S. 372—Where the allegation is that the accused used to hire out her daughter for a certain sum of money to various visitors, proof of an act of hiring**



between the accused and the various visitors to the girl is necessary to bring the case within S. 372. The mere fact that some of the visitors paid some money to the accused is not sufficient. (1936) 40 C.W.N. 1188=65 C.L.J. 344.

**—S. 372—Kidnapping of married woman with a view to sell her as a mistress.**

Section 372 penalises the selling of a woman under the age of 18 years with intent that such person shall be employed or used for the purpose of prostitution or illicit intercourse or for any unlawful or immoral purpose. To sell a woman as a mistress of another person, comes within the section, this being an immoral purpose. The section does not involve a distinction between taking a woman as a mistress and taking her to be used as a prostitute. A.I.R. 1934 All. 324=35 Cr.L.J. 571=147 Ind. Cas. 1102.

**—S. 372—Disposal connotes control over minor disposed of—Mere direction to minor to go to a brothel is not "disposal."**

The word 'disposal' necessarily connotes some control by the person disposing, over the minor disposed of.

The accused, who was a customer of a brothel, came across a girl, that had run away from her father's house, being unable to bear the ill-treatment of her step-mother and directed her to the brothel in order that she may be useful for the business carried on in the brothel. No pecuniary consideration passed nor was any stipulation made with regard to such consideration.

**Held**, that this was not a case of selling or letting and also that the acts of the accused did not constitute or amount to disposal of the minor, and that the accused was not guilty. 86 Ind. Cas. 804=21 M.L.W. 472=26 Cr.L.J. 868=A.I.R. 1925 Mad. 716=48 M.L.J. 594.

**—S. 372—Preliminary steps.**

The ceremony which consists of tying a talimani to a minor girl, worshipping a basin of water and distributing food may be preliminary step before selling, letting out or disposing of the girl for the purpose of prostitution, but that does not make it an offence under the Indian Penal Code. 89 Ind. Cas. 1050=27 Bom. L.R. 1022=26 Cr.L.J. 1482=A.I.R. 1925 Bom. 478.

**—S. 372—Minor girl—Gejee ceremony—Performance of—If an offence.**

Performance of a *Gejee* ceremony on a minor girl does not amount to her disposal within S. 372. 22 Bom. L.R. 894=58 Ind. Cas. 145.

**—Ss. 372 and 373—Making over of possession of minor girl under a sale, hire or other similar arrangement.**

To constitute an offence under Ss. 372 and 373, Indian Penal Code, there should be a making over of possession of the minor girl either by sale or hire or by a similar arrangement. The performance of the *Kanyarikam* ceremony by the accused which has the effect of an arrangement by which a person has several intercourse with a girl who had just attained puberty for three days, while the girl remained with her parents, does not render the accused guilty of the offences under Ss. 372 and 373, Indian Penal Code. 35 M.L.J. 157=24 M.L.T. 77=(1918) M.W.N. 484=8 L.W. 253=19 Cr.L.J. 965=47 Ind. Cas. 865.

**—S. 372—Dedication to temple.**

Dedication of a minor girl to a temple to serve the temple as a dancing girl amounts to disposal for

purposes of prostitution, where it is shown that girls so dedicated have led that life. 10 M.L.T. 501=(1911) 2 M.W.N. 479=12 Cr.L.J. 566=12 Ind. Cas. 654.

**—Ss. 372, 373—Minor already leading an immoral life—Selling or buying minors for the purpose of prostitution—Application of the section to such minors.**

The offence of selling or buying a minor for the purpose of prostitution, punishable under Ss. 372 and 373, is committed even where the minor, prior to such transaction, has been leading an immoral life. (1906) 8 Bom. L.R. 236=3 Cr.L.J. 334.

**—S. 372—Disposing of minor for the purposes of prostitution.**

The offence made punishable by S. 372 is complete when the person intending that a minor should be employed or used for the purpose of prostitution or for an unlawful or immoral purpose or knowing it to be likely that such minor will be employed or used for any such purpose, intentionally places the minor in a position calculated to bring about the result intended or known to be likely. If such a change in the position or circumstances of the minor has been effected with such knowledge or intention it is quite immaterial whether third persons have or have not observed any ceremonies recognised by custom as necessary to give prostitutes a particular status. The offence consists in the intentional or conscious exposure of the minor to the danger of degradation. (1905) 7 Bom. L.R. 562=2 Cr.L.J. 500.

**—S. 373—Girl of 17½ years voluntarily going with accused—Girl free to leave accused at any time—Accused, held not guilty under S. 373.**

Section 373, Indian Penal Code, is a mere counterpart of S. 372.

Section 373, in terms, deals with obtaining possession and not merely with obtaining possession from a third person, and because an offence under S. 372 which is aimed at disposing of a girl, necessarily involves two parties to the transaction it cannot be said that S. 373, which is aimed at obtaining possession, must involve two parties.

A girl who was 17½ years of age, went with the accused voluntarily. There was nothing whatever to show that the accused exercised any control over the girl. She was perfectly free to leave the accused whenever she wanted to.

**Held**, that the accused did not obtain possession of the girl within the meaning of S. 373 and could not be convicted under that section. A.I.R. 1942 Bom. 23=43 Bom. L.R. 847=43 Cr.L.J. 400=I.L.R. (1942) Bom. 7=198 Ind. Cas. 561.

**—Ss. 373, 372—Girl running away with accused of her own accord.**

Section 373 is not self-contained and should not be read as a self-contained whole without any reference to S. 372. They are correlative of each other, being aimed against what may be broadly described as trafficking in girls under the age of eighteen. On this view, the words "otherwise obtain possession" must be construed *ejusdem generis* with "buying" and "hiring." The wording of the two sections is extremely close. The word "sells" in S. 372 corresponds with "buys" in S. 373; similarly "lets to hire" corresponds with "hire." It would be a strained



interpretation of S. 373 to hold that "otherwise obtains possession" does not correspond with "otherwise disposes of." The effect of the amendment is merely to enlarge the scope of the "intent"; it has, in no way, enlarged the meaning of the words "otherwise obtain possession". The word "possession" implies some sort of control.

A girl ran away with the accused of her own accord. In spite of the fact that she was taken home by her father-in-law, she ran away again and re-joined the accused. There was nothing to show that he had possession of her in any sense of the term or that he attempted to control her movements in any way; and there was nothing to prevent her from leaving him at any moment she chose.

**Held**, that under the circumstances, the accused could not be convicted under S. 373. A.I.R. 1937 Cal. 250=41 C.W.N. 447=38 Cr.L.J. 696=I.L.R. (1937) 2 Cal. 187=169 Ind. Cas. 76.

#### —S. 373—Essentials.

To bring a case within S. 373, it is not necessary that possession must be obtained from a third party. A person who steals a minor girl under eighteen years of age with the requisite intention, obtain possession of such minor within S. 373. It is often said that a man enjoying sexual intercourse with a woman possesses her, but possession within S. 373 means something more. It denotes definite control over the person of whom possession is obtained. Possession in S. 372 indicates possession with a power of disposal. A.I.R. 1934 Bom. 200=36 Bom. L.R. 379=58 B. 498=35 Cr.L.J. 1437=151 Ind. Cas. 877.

#### —S. 373—"Possession" need not be obtained from third person.

It is not requisite for the purpose of S. 373 that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with intent that the minor shall be used for the purpose of prostitution. A.I.R. 1921 Bom. 323, Foll. 11 P.L.T. 341=A.I.R. 1930 Pat. 219. See also 59 Ind. Cas. 141=45 Bom. 529=22 Cr.L.J. 29=A.I.R. 1921 Bom. 323.

#### —S. 373—Offence—Possession of minor not obtained from third person.

For an offence under S. 373 it is not requisite that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with the intention of using her for prostitution. 22 Bom. L.R. 1234=59 Ind. Cas. 141.

#### —Ss. 373, 372—Obtaining of possession—Sufficiency—Test.

Section 373 must be read in conjunction with the previous S. 372, which is its counterpart. The law does not specify the nature of the possession, nor its duration, nor intensity. It merely specifies the object, namely, prostitution or illicit intercourse. Whether in each case, the possession is such as to be consistent with the purpose or intention or knowledge of prostitution or illicit intercourse, is the only test which in law is necessary and sufficient.

Where a brothel-keeper allows a girl to visit the brothel for two to three hours in the night and she is allowed to prostitute herself to customers for money, it is sufficient obtaining of possession within the mean-

ing of S. 373. 112 Ind. Cas. 209=11 A.I.Cr.R. 221=52 Bom. 403=30 Bom. L.R. 613=29 Cr.L.J. 993=A.I.R. 1928 Bom. 336.

#### —S. 373—Completion of offence.

Where a minor married girl was, with her husband's consent, brought from Kashmir to Bombay at the expense of the brothel-keeper and was kept in a brothel in Bombay.

**Held**, that what took place in Kashmir was only a preparation for committing the offence under S. 373 which was completed in Bombay. 101 Ind. Cas. 593=8 A.I.Cr.R. 89=29 Bom. L.R. 490=28 Cr.L.J. 465=A.I.R. 1927 Bom. 666.

#### —S. 373—Burden of proof.

Where all the circumstances went to show that the intention of the accused was to employ a girl as a prostitute as soon as she was physically ready for the purpose.

**Held**, the burden lay upon the accused of proving that she intended to wait until the age of majority had been reached. 71 Ind. Cas. 232=35 C.L.J. 451=24 Cr.L.J. 104=A.I.R. 1922 Cal. 539.

#### —S. 373, Expl. (1)—Presumption—When arises.

Accused must be a prostitute or brothel-keeper when possession of girl is obtained for raising presumption—Flat not used as brothel by accused until inmate S brought there—Flat, however, used for employing other girls as prostitutes and S encouraged and then compelled to follow their example—Though no presumption under S. 373, Expl. (1), yet presumption arises under Evidence Act, Ss. 14, 15 and 114 and accused held guilty. A.I.R. 1943 Bom. 150=45 Bom. L.R. 281=44 Cr.L.J. 534=206 Ind. Cas. 592 (F.B.).

#### —S. 373—Intention—Presumption.

If the accused is proved to have obtained possession of a female under the age of 18 years whether by purchase, hire or in any other manner and is proved to be a person who occupies or manages a brothel then he is to be presumed to have obtained possession of that girl with the intent that he shall use her for the purpose of prostitution. 115 Ind. Cas. 65=30 Cr.L.J. 376=30 P.L.R. 414.

#### —S. 373—Intention—Inference.

Proof of intention or knowledge, must be almost, entirely, a matter of inference from circumstances. 12 Mad. 273, Diss. 71 Ind. Cas. 232=24 Cr.L.J. 104=35 C.L.J. 451=A.I.R. 1922 Cal. 539.

#### —S. 373—Taking of minor for purpose of prostitution—Proof—Adoption by Temple dasi—Intention.

The taking of a minor girl by temple dasi, though unattended by ceremonies of adoption will raise a presumption of guilt under S. 373 throwing on the taker the onus of proving absence of guilty knowledge or intention. S. 373 does not require proof, that the minor would necessarily be employed for purposes of prostitution; it is enough if such is the probable result. The section also does not require proof of intention to employ the minor for such purposes during her minority. 13 M.L.T. 131=24 M.L.J. 211=14 Cr.L.J. 33=(1913) M.W.N. 207=18 Ind. Cas. 257.

#### —S. 373—Intention.

A prostitute received into her house two girls, one of them being of mature age and, promised to give



the elder girl good clothes and ornaments if she lived with her.

**Held**, that from these facts it might be reasonably inferred that the accused obtained possession of the girls with intent that one or both of them should be employed for the purpose of prostitution or knowing it to be likely that they would be so employed and that the accused were guilty of an offence under S. 373. (1904) 1 A.L.J. 559.

#### —S. 373—Evidence as to age of girl.

On a charge under S. 373, the prosecution is bound to prove beyond doubt that the girl is under the age of eighteen years.

Where there was no evidence regarding the age of the girl but the Judge told the jury that they might appeal to their own experience and apply that experience to the impression that they had formed on seeing the girl and no caution was given to the jury that such an impression would not be a sure guide.

**Held**, that there had been a material misdirection to the jury inasmuch as if the Judge had given them caution the jury would have seen that on the question of age, the prosecution evidence left the matter in doubt, and the conviction of the accused could not, therefore, be sustained. A.I.R. 1932 Cal. 417 = 35 C.W.N. 316 = 33 Cr. L.J. 553 = 138 Ind. Cas. 111.

—S. 373—The prosecution must prove in a case under S. 373 of Indian Penal Code, that girl is under the age of 16 years. 71 Ind. Cas. 124 = 26 C.W.N. 972 = 36 C.L.J. 152 = 24 Cr.L.J. 76 = A.I.R. 1922 Cal. 505.

#### —Ss. 375 and 376.

#### Synopsis.

1. Abetment.
2. Alteration of conviction.
3. Attempt.
4. Charge.
5. Compensation for false charge.
6. Consent.
7. Evidence and proof.
8. Penetration.
9. Procedure.
10. Sentence.

#### 1. Abetment.

—Ss. 376, 114—Rape—Abetment of—Mere gazing—If constitutes.

The mere act of gazing at an act of rape can hardly constitute abetment of the offence of rape. 4 A.I.Cr.D. 469.

#### 2. Alteration of conviction.

—Ss. 376, 323—A conviction under S. 376, Indian Penal Code, cannot be altered to one under S. 323 of the same Code. A.I.R. 1934 Lah. 178 = 34 P.L.R. 787 = 35 Cr.L.J. 519 (1) = 147 Ind. Cas. 799 (2).

#### 3. Attempt.

—Ss. 375, 376, 511—Attempt to commit rape.

Where the accused caught hold of a girl, threw her down, put sand in her mouth, got on her chest, and attempted to have sexual intercourse with her and the girl resisting cried out and her screams attracted certain persons on seeing whom he ran away.

**Held**, that the accused was guilty of the offence of attempt to commit rape. A.I.R. 1933 Lah. 1002 =

34 P.L.R. 832 = 35 Cr.L.J. 432 (1) = 147 Ind. Cas. 560.

#### —Ss. 375, 376—Attempt.

Though rupture of the hymen is by no means necessary in law to constitute a rape the Courts are reluctant to believe that there could have been penetration without that, which is so very near the entrance, having been ruptured.

A lad of 18 was convicted of rape on a female child of 5½ years. The child, stripped of her trousers, was found seated on the naked thighs of the accused, but there was no bleeding from her private parts with the exception of fresh redness at the entrance to the vagina. The girl bore no other mark of injury and her hymen was intact. She also did not cry out.

**Held**, that this was not merely an indecent assault by the accused but that he attempted, though unsuccessfully to effect penetration and hence the offence was an attempt to commit rape. 100 Ind. Cas. 116 = 28 Cr.L.J. 244 = 7 A.I.Cr.R. 406 = A.I.R. 1927 Lah. 222.

#### —Ss. 375, 376—Attempt.

Attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted.

Where the accused stepped across from his own roof to that of his neighbour at night and caught hold of his daughter, got on to the charpoy with her, undid the string of her pyjama and was seen struggling with her when the neighbour's wife came up in answer to her daughter's cries, and he then ran away.

**Held**, that he had been rightly convicted under Ss. 376 and 511 : 47 Cal. 190 (S.B.), Foll. 103 Ind. Cas. 199 = 28 Cr.L.J. 663 = 8 A.I.Cr.R. 432 = 28 P.L.R. 575 = A.I.R. 1927 Lah. 580.

—Ss. 375 and 376—Attempt to commit rape must be distinguished from preparation to commit rape and from indecent assault.

An act which amounts to attempt to commit rape does not lose that character merely because the offender does not display a determination to effect his object at all costs. But two conditions are requisite for an attempt to commit the offence. First, there must be an attempt to commit the offence and second, some act must be done towards the commission of the offence. The word "attempt" is not itself defined in the Penal Code, and must therefore be taken in its ordinary meaning. And even if an act has been done towards the commission of the offence that alone does not bring the case within the section. From the moment when the intention is formed to commit an offence every act done which facilitates the commission of the offence, and which is done with that object in view, is in one sense an act done towards the commission of the offence, but the doing of every such act does not constitute an attempt to commit the offence. It must in every case be a question depending upon the circumstances whether a particular act done (with the requisite intention) towards the commission of an offence is sufficiently proximate to its commission to constitute an attempt or is so remote as merely to constitute preparation for its commission.



When a lady who was travelling alone in a train woke up from her sleep, she found the accused sitting on her berth. She jumped up and rushed screaming to the door, but the accused caught hold of her, put his hand over her mouth and threatened her with a revolver and made her sit down. She then managed to get to the window and open it but he caught her by the hair and pushed her on the seat—in a sitting position. He threatened to strangle her if she screamed. Then he began to unbutton his trousers and had unfastened the top button when she made an attempt to reach the communication cord. The accused then caught her by the wrist and in the struggle her wrist-let watch was broken. Then immediately the accused released her and asked her name. She gave it and he apologised for molesting her, saying he had mistaken her for some other lady. It was established on the evidence that the accused entered the carriage with the intention of having intercourse by force is necessary, with a woman whom he then believed to be another than the one actually assaulted.

**Held**, that the acts were acts of preparation, done towards the commission of rape, but that singly or collectively they did not amount to an attempt to commit rape. They did, however, amount to an assault with the intent to outrage the modesty of a woman or which accused knew to be likely to have that result, and thus constituted an offence punishable under S. 354 of the Indian Penal Code. 96 Ind. Cas. 260=27 Cr.L.J. 916=4 Bur. L.J. 83=A.I.R. 1925 Rang. 247.

—**Ss. 375, 376**—The fact that the vernacular record showed that the accused put his finger in the private part of the complainant coupled with the absence of semen on the *pyjama* of the girl and the absence of the marks on the male organ of the accused were held to be sufficient circumstances for conviction for an offence of attempt to commit rape and not for rape. 73 Ind. Cas. 513=24 Cr.L.J. 625=A.I.R. 1923 Lah. 167.

—**Ss. 375, 376—Boy of ten.**

A boy of ten who has attained sufficient maturity of understanding to judge the nature and consequences of his conduct can be convicted of an attempt to commit rape. A.I.R. 1935 Rang. 393=37 Cr.L.J. 94=159 Ind. Cas. 450.

—**Ss. 375, 376 and 511—Rape—Attempt—Boy of 12 years.**

A boy of 12 years, though incapable of committing rape may be guilty of an attempt to commit rape. 11 Bur. L.T. 135=18 Cr.L.J. 943=42 Ind. Cas. 175.

#### 4. Charge.

—**S. 376—Charge—Joinder of charge under, with charge under Sections 366 and 147, is illegal.**

The joinder of charge under Section 376 against one of the accused with charges under Sections 366 and 147 against others along with him is a misjoinder which is illegal. 77 Ind. Cas. 997=4 L.L.J. 322=25 Cr.L.J. 533=A.I.R. 1922 Lah. 410.

—**Ss. 376, 366—Offence falling under Ss. 376 366—Refusal of trying Magistrate to frame charge under both—Sessions and High Court can revise it.** A.I.R. 1932 Nag. 85 (1)=15 N.L.J. 26=33 Cr.L.J. 558=137 Ind. Cas. 904.

#### 5. Compensation for false charge.

—**Ss. 375, 376—Offence exclusively triable by a Court of Session—Offence tried by a Special Power Magistrate—Order discharging the accused.**

**Held**, that the Special Power Magistrate could pass the order under S. 250, Criminal Procedure Code. A.I.R. 1936 Rang. 230=37 Cr.L.J. 773=14 R. 378=163 Ind. Cas. 163.

—**Ss. 375, 376—Order of discharge under S. 376, Indian Penal Code, typed with finding that case is false—Order signed by Magistrate—Further order directing payment of compensation typed on same date with same typewriter—Both orders held one and same.** A.I.R. 1936 Rang. 230=37 Cr.L.J. 773=14 R. 378=163 Ind. Cas. 163.

#### 6. Consent.

—**Ss. 375, 376—Where a man has illicit intercourse with an adult woman with her consent, it is not rape under the law.** A.I.R. 1938 Cal. 460=39 Cr.L.J. 674=176 Ind. Cas. 104.

—**Ss. 375, 376—Consent of the woman.**

No offence of rape is committed when the sexual intercourse is with the consent of the woman. 4 Bur. L.T. 136=12 Cr.L.J. 584=12 Ind. Cas. 848.

—**Ss. 375, 376—Age of girl.**

In rape cases, it is only when consent is the defence pleaded that the question would arise as to whether the girl was of age to give consent in law. A.I.R. 1935 All. 935 = 1935 A.W.R. 1071=1935 A.L.J. 1079=37 Cr.L.J. 247=160 Ind. Cas. 162.

—**Ss. 375, 376—Man having intercourse with a minor girl even with her consent is guilty of offence of rape.** A.I.R. 1932 All. 580=1932 A.L.J. 776=34 Cr.L.J. 100=141 Ind. Cas. 127.

—**Ss. 375, 376—Consent.**

In a rape case the question of consent does not arise when the girl is under ten years of age. The fact that the accused was found to be suffering from gonorrhoea and the other party was not infected with the disease is by no means conclusive of his innocence. 106 Ind. Cas. 348=9 A.I.Cr.R. 307=9 P.L.T. 186=29 Cr. L.J. 12.

—**Ss. 375, 376—Where the girl is over sixteen and there is nothing to support her allegation that the accused had sexual intercourse with her against her will and it is at least possible that he was a consenting party, then the accused cannot be held to be guilty of rape by the mere fact of having sexual intercourse with her.** In the absence of any corroborative evidence that the accused had sexual intercourse with her and that if they did so, it was without her consent, the accused ought not be convicted for rape. A.I.R. 1934 Oudh 32=10 O.W.N. 1274=55 Cr.L.J. 498=147 Ind. Cas. 759 (2).

—**Ss. 375, 376—Absence of protest by grown-up girl.**

Where a grown-up girl was carried about by the accused and subjected to sexual intercourse and now and then left by herself and there was no evidence of protest on her part.

**Held**, that she must be presumed to have been a consenting party in the elopement and the accused could not be convicted for rape. A.I.R. 1931 Lah. 401=32 P.L.R. 98=32 Cr.L.J. 1042=133 Ind. Cas. 560.

—**Ss. 375, 376—Where the accused was convicted of committing rape on a woman aged 20, but there were circumstances to show that the accused was copulating with her, with her consent and when she was caught in the act of copulation, she naturally**



concocted a story to save her face that accused had carried her into the room by force.

**Held**, that the offence of rape was not made out. 9 L.L.J. 337=A.I.R. 1927 Lah. 858.

—**Ss. 375, 376**—The fact that the girl was *virgo intacta* upto the date of the occurrence is very strong proof against the committing of rape with consent of the victim in rape cases. 89 Ind. Cas. 1056=26 Cr.L.J. 1488=A.I.R. 1925 Lah. 613.

## 7. Evidence and Proof.

### (a) General.

### (b) Evidence of prosecutrix.

### (c) Medical evidence.

#### 7. (a) Evidence and Proof—(General).

—**Ss. 375 and 376**—It is an essential part of the proof in rape that there should have been, not only an assault but actual penetration. The only witness who can prove that is the woman. In practice, a conviction for rape almost entirely depends on the credibility of the woman so far as the essential ingredients are concerned, the other evidence being merely corroborative. Her testimony is vital in a case where the woman is married and the medical evidence in no way corroborates the charge of rape. Even the presence of spermatozoa indicating semen found in woman's genitals or on her *saree* in the case of a married woman who has been several times a mother, is by no means final. A.I.R. 1942 Mad. 285=43 Cr.L.J. 576=199 Ind. Cas. 742.

—**Ss. 375, 376**—**Finding of spermatozoa on quilt is strong corroborative evidence.**

In a trial for an offence of rape, the statement of the girl to her mother and the neighbours shortly after the incident complaining against the accused, is corroborative evidence under S. 157 and Illus. (j) of S. 8, Evidence Act.

Mere finding of spermatozoa on the quilt of the accused may not by itself have much evidentiary value but it is a strong piece of evidence when taken with the evidence given by the girl that the accused had raped her on the quilt. A.I.R. 1940 Cal. 461=I.L.R. (1940) 2 Cal. 180=44 C.W.N. 830=191 Ind. Cas. 48.

—**Ss. 375, 376**—The mere existence of the injury to the vagina does not necessarily and inevitably justify the inference that there had been rape. A.I.R. 1938 Rang. 298=39 Cr.L.J. 944=177 Ind. Cas. 710.

—**Ss. 375, 376**—Girl, mother and eye-witnesses deposing for prosecution—Girl 14 years old—Medical examination after four or five days—Absence of injuries and hymen—Blood stains on *dhoti* of accused and cloth of girl—Conviction, held proper. A.I.R. 1935 All. 590=36 Cr.L.J. 1095 (2)=1935 A.W.R. 597=157 Ind. Cas. 147.

—**Ss. 375, 376**—**Detection of semen on cloth.**

Where in a case of rape the only evidence was the circumstance that semen was detected on a piece of cloth which was recovered from the house of the accused, and that it was also discovered on the *silwar* which was alleged to have been worn by the woman at the time, and the accused was a young man who was married and the woman was a grown-up woman who admittedly passed the night before making the first information report at her husband's house.

**Held**, that that was a wholly natural circumstance which did not help the case of either side. 9 L.L.J. 384=A.I.R. 1927 Lah. 867.

—**Ss. 375, 376**—Evidentiary value of refusal to submit to medical examination by woman who brought the charge of rape, pointed out. A.I.R. 1935 Nag. 69=17 N.L.J. 189.

—**Ss. 375, 376**—**Tender child—Examination of, as witness.**

Where the Court is of opinion that the child upon whom an offence under S. 376, Indian Penal Code, is committed is unable to give relevant information in the matter by reason of tender years and consequent immaturity of judgment, it should not examine the child at all. 38 All. 49, Foll. 41 Cal. 406, not foll. A.I.R. 1930 Lah. 337=31 P.L.R. 612=127 Ind. Cas. 862.

—**Ss. 375, 376**—In no cases is it more difficult to arrive at a confident verdict whether evidence is false or true than in cases in which women allege that they have been outraged or that an outrage has been attempted on them. Not only one has to consider the possibility of deliberate falsehood but those who have to arrive at a verdict have to consider the possibility of unintentional mis-statements produced by hysterical conditions which are apt to be found in cases of this nature. 81 Ind. Cas. 629=46 All. 265=22 A.L.J. 162=5 L.R.A. (Cr.) 65=25 Cr.L.J. 981=A.I.R. 1924 All. 411.

—**Ss. 375, 376**—**Circumstances may prove the truth of the rape story.**

The fact that the charge of rape was brought against the accused immediately after the occurrence, coupled with the medical evidence and the fact that he was assaulted by Lambardar and arraigned before the panchayat there and then leads strongly to the conclusion that the rape story is no fiction, though the friends of the girl being ignorant rustics may not be wise enough to look for blood for to preserve it as evidence in support of the charge. 38 All. 49, Foll. 76 Ind. Cas. 1037=25 Cr.L.J. 317=A.I.R. 1923 Lah. 332.

—**Ss. 375, 376**—**Delay in reporting to police—Enmity—No reliable direct evidence.**

In a case of rape there was no direct reliable evidence as to the commission of the offence no blood or semen was discovered on the body of the prosecutrix and there had been great delay in making the first information and there was enmity between the parties. All these circumstances combined to raise doubt in favour of the accused to the benefit of which he is entitled. 17 P.W.R. 1916 (Cr.)=17 Cr. L.J. 150=33 Ind. Cas. 630.

—**Ss. 375, 376**—**Proof of age.**

To prove to charge under S. 376, the prosecution is bound to prove that the girl is below the age of 16. A.I.R. 1939 All. 708=1939 A.W.R. 693=1939 A.L.J. 980=41 Cr.L.J. 142=I.L.R. (1939) All. 871=185 Ind. Cas. 271.

#### 7. (b) Evidence and Proof—Evidence of prosecutrix.

—**S. 376**—**Basis of conviction—Uncorroborated evidence of prosecutrix—Girl of seven years of age.**

Although permissible legally, it is dangerous to convict an accused in a sexual case on the uncorroborated evidence of a prosecutrix. This rule would necessarily apply whether the prosecutrix were an adult or a girl of only seven years of age. It is a sound rule in practice not to act on the uncorroborated evidence of a child, although under the Indian Law the rule is a rule of prudence and not of law. A.I.R. 1950



Nag. 9=4 A.I.Cr.D. 118=51 Cr.L.J. 244=1949 N.L.J. 520.

**—S. 376—Proof of offence—Uncorroborated testimony of girl—Value of.**

In a charge of rape the uncorroborated testimony of the girl alone should not be accepted as a sufficient foundation for convicting the accused. I.L.R. (1950) A. 787=1950 A.W.R. 98=A.I.R. 1949 All. 710=51 Cr. L.J. 29.

**—S. 376—Proof of offence—Evidence of prosecutrix—Need for corroboration.**

The rule of corroboration is meant to be applied to accomplices and a ravished woman is not an accomplice but a victim of the crime. Therefore, corroboration of the prosecutrix in a case of rape is not always indispensable. The thing to be remembered in such cases is whether it is safe to convict on her solitary statement. This depends upon the circumstance of each individual case. Pak. L.R. (1950) Lah. 294=A.I.R. 1950 Lah. 151=51 Cr. L.J. 968.

**—S. 376—Proof of offence—Evidence of prosecutrix—Corroboration—Necessity for—Nature of corroboration.**

In cases of rape it is a rule of prudence that there should be corroboration of the testimony of the prosecutrix. Such corroboration can seldom be by direct evidence, corroboration of that sort would be almost always impossible; but the testimony should be capable of being tested. A.I.R. 1950 Kut. 9=51 Cr.L.J. 396.

**—S. 376—Conviction under—Uncorroborated testimony of girl—If sufficient.**

In a case of rape, the uncorroborated testimony of the girl who was the victim of an indecent assault, is insufficient to warrant a conviction, where she made no complaint about it at the time and said nothing about it until questioned by her mother some months later. A.I.R. 1949 Assam 13=50 Cr. L.J. 589.

**—S. 376—Evidence of prosecutrix—Corroboration by her own statement made after occurrence—Sufficiency—Evidence Act, S. 157.**

It is a rule of prudence that the evidence of the victim of a rape requires corroboration. Under S. 157 of the Evidence Act her evidence can be corroborated by a previous statement made by her after the occurrence. Whether such corroboration should be considered sufficient or not is really a question of fact, and the circumstances under which the statement by the prosecutrix is made and the time which elapses between the occurrence and her statement have to be considered. 1936 Cal. 18; 44 C.W.N. 835 and 41 C.W.N. 641, Not Foll. A.I.R. 1949 Cal. 613=51 Cr. L.J. 153.

**—S. 376—Conviction under—Girl's statement coupled with her identification of accused in jail—Sufficiency.**

It is a good rule not to treat the girl's evidence as sufficient for recording a conviction in a case under S. 376, Indian Penal Code. But where there is the additional circumstance of the girl identifying the accused in jail, her statement cannot be ignored. 1947 A.L.J. 435=1937 A.W.R. (H.C.) 276=48 Cr.L.J. 851=1947 A.L.W. 526=A.I.R. 1947 A. 393.

**—S. 376—**In a rape case, the complaint of the prosecutrix is admissible in evidence, not as evidence of the truth of the charge but as corroboration of the credibility of the prosecutrix. It is desirable that a direction should be given to jury about the unsafeness of the

conviction on uncorroborated evidence of the prosecutrix. But if the jury consider it safe, they can convict on the uncorroborated testimony. A.I.R. 1944 Nag. 245=1944 N.L.J. 206=46 Cr.L.J. 68=I.L.R. (1945) Nag. 226=215 Ind. Cas. 244.

**—S. 376—**The law does not require that there should be independent corroboration in the rape of a child aged ten years as to the identity of the culprit. The position is very different where a woman makes an accusation of rape and where a child says that a particular person is a culprit. It is the existence of possible motive for false incrimination which ought to attract the necessity for corroboration and where no such motive can even be suggested, it cannot be said that there is any rule of law or of prudence which makes independent corroboration necessary to the culprit's identity. A.I.R. 1944 Nag. 363=1944 N.L.J. 406=46 Cr.L.J. 371=218 Ind. Cas. 18.

**—S. 376—**There is no presumption of law which differentiates the evidence of the complainant in a rape case from that of the complainant in the case of any other offence. There can be no assumption, in the absence of evidence, that she is an accomplice. A.I.R. 1940 Cal. 461. =I.L.R. (1940) 2 Cal. 180=44 C.W.N. 830=191 Ind. Cas. 48.

**—S. 376—Corroborative evidence.**

Corroboration is not essential even in a case of an offence of rape. The Court is entitled to accept the uncorroborated evidence of a girl but it should be slow in its acceptance of it. It must scrutinize her evidence very carefully and unless her story convinces the Court so much that it does not possibly stand in the need of any corroborative evidence, it should not accept her uncorroborated evidence. Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. What the girl said after the occurrence is really no corroboration at all. A.I.R. 1939 Rang. 128=40 Cr.L.J. 525=180 Ind. Cas. 936.

**—S. 376—Conviction on bare testimony of woman.**

In a charge for rape, in the absence of any corroboration, it is not proper to convict the accused on the bare testimony of the woman alleged to be the victim. A.I.R. 1935 Lah. 8=35 P.L.R. 638=36 Cr.L.J. 428=153 Ind. Cas. 894.

**—S. 376—Charge by woman against man—Testimony of woman—**It must be corroborated by independent evidence. A.I.R. 1934 Cal. 7=38 C.W.N. 108=36 Cr.L.J. 796=62 C. 527=155 Ind. Cas. 584.

**—S. 376—Cases of rape—**Jury must be warned not to accept the evidence of the girl alleged to have been raped unless they find that it is corroborated in some material particulars implicating the accused. A.I.R. 1933 Cal. 833=62 C. 534=35 Cr.L.J. 508=38 C.W.N. 52=147 Ind. Cas. 999 (2).

**—S. 376—**The solitary statement of the complainant that the offence of rape has been committed upon her by the accused is not sufficient to convict him of the offence in the absence of other independent evidence. A.I.R. 1933 Oudh 163=10 O.W.N. 107=34 Cr. L.J. 496=143 Ind. Cas. 73.

**—S. 376—**Where in a case of rape and sodomy there was no evidence to implicate the accused except the statement of the girl ravished, and there was enmity between the parties and there was much delay in



making the report to police even though the police post was very near.

**Held**, that guilt of the accused had not been established. 28 P.L.R. 235=9 L.L.J. 111=A.I.R. 1927 Lah. 836.

—**S. 376—It is unsafe to rely on uncorroborated testimony of the woman.**

Where in a case of rape the evidence of the Sub-Assistant Surgeon combined with the report of the Chemical Examiner, shows that the complainant had sexual intercourse recently with some one, but shows no more than that there and were no signs of rape.

**Held**, that it is notoriously very unsafe to rely on the uncorroborated evidence of the woman alone, and to make it an exception to the general rule. 97 Ind. Cas. 180=5 Bur. L.J. 112=27 Cr. L.J. 1284=A.I.R. 1927 Rang. 67.

—**S. 376—Uncorroborated testimony of the woman not sufficient—Evidence of resistance a good guide to determine consent.**

Where there is no independent evidence in support of the statement of the complainant that she was raped by the accused it would be most dangerous to base a conviction on her uncorroborated testimony alone; the first and foremost circumstance that can be looked for in cases of rape is the evidence of resistance which one would naturally expect from a woman unwilling to yield to a sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts. Where there is absolutely no evidence on the record of any struggle having taken place nor were marks of any injuries found on the person either of the complainant or of the accused.

**Held**, that the accused cannot be said to have had connection with the woman without her consent. 75 Ind. Cas. 986=25 Cr. L.J. 74=A.I.R. 1924 Lah. 669.

—**S. 376—In cases of rape, it would be quite unsafe to convict an individual merely on the accusation of the woman who had been raped.** 67 Ind. Cas. 827=23 Cr. L.J. 475=11 P.W.R. 1922 Cr. (Lah.)

—**S. 376—Girl, young and innocent—Evidence of the girl is highly valuable—Her statement immediately after the occasion increases her credibility.**

When the victim of an offence of rape is an innocent girl of tender age her evidence will carry great weight. A statement made by her by way of disclosure immediately after the occasion will strongly corroborate her credibility and go to prove the consistency of her conduct and also her want of consent. When a person is convicted of rape, his punishment will be proportioned to the greater or less atrocity of crime, his conduct and the defenceless and unprotected state of the injured female whether she is a low native or a high European. 82 Ind. Cas. 142=25 Cr. L.J. 1214=A.I.R. 1925 Nag. 74.

—**S. 376—It is hardly possible that any self-respecting woman would come forward in a Court of Justice to make a humiliating statement against her honour, of having been raped, unless it was absolutely true.** 75 Ind. Cas. 77=6 L.L.J. 111=24 Cr. L.J. 877=A.I.R. 1923 Lah. 291.

#### 7. (c). Evidence and Proof—Medical evidence.

—**S. 376—Medical examination of accused—Necessity—Effect of its absence.**

In a case where the accused are charged with an offence under S. 376, Indian Penal Code, and the accused deny the charge it is the duty of the prosecution to secure the medical examination of the accused within the period of time when conclusive results could be achieved. Where the evidence led by the prosecution in the case of such an offence is not enough to form the basis of conviction, the absence of medical examination would render it wholly insufficient. 1947 A.W.R. (H.C.) 407=1947 A.Cr.C. 172.

—**S. 376—Accused charged with having committed rape—Failure of prosecution to have male organ of accused medically examined—Effect of.**

In rape cases if the glands of the male organ is covered by uniform layer of *smegma* it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of *smegma* round the corona gland is proof against penetration since it is rubbed off during the act of sexual intercourse. The *smegma* accumulates if no bath is taken for twenty-four hours. In rape cases, therefore, the prosecution must get the male organ of the accused examined. If it was not examined the accused is entitled to say that if a medical examination of the vital or the material parts of his body has been conducted, he would have been in a position to show that the condition of those parts negatived the possibility of recent complete penetration or proved that there was no penetration. The argument that as the medical examination had taken place more than twenty-four hours after the occurrence, the result would have been inconclusive because the *smegma* accumulates if no bath is taken for twenty-four hours is no answer to the plea of the accused. It is the duty of the prosecution, if, according to the medical jurisprudence, medical examination is capable of yielding conclusive results, to ensure that examination within a period of time when conclusive results could be achieved. A.I.R. 1946 All. 191=1945 Oudh W.N. (H.C.) 334=1945 A.W.R. (H.C.) 287=1946 A.L.J. 86=224 Ind. Cas. 336=47 Cr. L.J. 611.

—**S. 376—Evidence.**

It cannot be said that medical evidence cannot help the case for the prosecution, because the complainant is pregnant at the time when the rape is alleged to have been committed. 11 L.L.J. 391=1930 Cr.C. 160=30 P.L.R. 662=A.I.R. 1930 Lah. 193.

—**S. 376—The report of the chemical analyser regarding the presence of semen on the complainant's clothing is not sufficient to prove that the complainant is actually raped.** 1930 Cr. C. 160=30 P.L.R. 662=11 L.L.J. 391=A.I.R. 1930 Lah. 193.

—**S. 376—Evidence not sufficient for conviction.**

Where there was no physical proof of the rape, the inference from the medical evidence was that at the time of the alleged offence, the girl was not a virgin, no trace of semen was found on her clothes.

**Held**, the evidence is not sufficient to support conviction for rape. 82 Ind. Cas. 64=25 Cr. L.J. 1200=A.I.R. 1923 Lah. 238.

#### 8. Penetration.

—**Ss. 375, 376—Vulval penetration.**

There is a distinction between vulval penetration and vaginal penetration. It is not necessary that the hymen should be ruptured in every case. In order to constitute rape, the statute merely requires medical evidence of penetration, and this may occur and the hymen remain intact. A.I.R. 1934 Lah. 797=36 P.L.R. 35=36 Cr. L.J. 310=153 Ind. Cas. 218.



—Ss. 375, 376—Vulval penetration is sufficient for conviction under S. 376. 88 Ind. Cas. 705=26 Cr. L.J. 1185=A.I.R. 1923 Lah. 536.

—Ss. 375, 376—Partial penetration.

Partial penetration, though not sufficient to cause any rupture or injury to the hymen, is sufficient penetration within the meaning of S. 376 and the offence is not attempt to commit rape but of rape. 100 Ind. Cas. 113=7 A.I.Cr.R. 416=28 Cr.L.J. 241=A.I.R. 1927 Lah. 735.

9. Procedure.

—Ss. 375, 376—In rape cases, early medical examination of accused is essential.

It is always desirable that the accused in a rape case should be medically examined as soon as possible. A.I.R. 1944 Nag. 245=I.L.R. (1945) Nag. 226=46 Cr.L.J. 68=1944 N.L.J. 206=215 Ind. Cas. 244.

—Ss. 375, 376—Amicus curiae—Appointment of.

It would be well in serious cases of rape at least in some of them, if the Sessions Judges appointed a member of the Bar as *amicus curiae*. A.I.R. 1942 Mad. 285=43 Cr.L.J. 576=199 Ind. Cas. 742.

—Ss. 375, 376, 377—Cases of rape and unnatural vice should be tried by Magistrate with S. 30 powers.

Cases of rape and unnatural vice should, as far as possible, be tried by Magistrate with powers under S. 30, Criminal Procedure Code, so that if circumstances call for a heavy sentence, then the same may be given up to the outside limit of seven years. A.I.R. 1936 Lah. 256=38 P.L.R. 437=37 Cr.L.J. 474 (1)=161 Ind. Cas. 591 (1).

10. Sentence.

—S. 376—Sentence.

The sentence of transportation is indefeasible for an offence of rape. The ordinary sentence for rape varies from three years to five years. In a very bad case, seven years is sometimes given. Even where the accused happens to be a Police constable, sentence of transportation is excessive, more especially where it is not a case of Police constable being on duty at the time when the offence is alleged to have been committed or a case of a Police constable taking advantage of his official position to rape a woman placed in his charge. A.I.R. 1942 Bom. 121=43 Cr. L.J. 621=44 Bom. L.R. 216=200 Ind. Cas. 261. (F.B.).

—S. 376—Double sentence, legality of.

A boy of 13 years was convicted under S. 376 and sentenced to some stripes of cane and four years' imprisonment in order that he may be sent to Reformatory School. The boy was accordingly detained for ten months. On revision in altering the sentence to one day's simple imprisonment.

Held, that if the sentence of imprisonment were to be remitted and the whipping upheld, the fact would remain that the accused would, for all practical purposes, be receiving a double sentence, namely, imprisonment in addition to whipping, nor could the sentence from four years to the term already undergone be reduced as the punishment suffered in Reformatory School could not be less than four years. A.I.R. 1934 All. 976=36 Cr.L.J. 368=57 A. 395=4 A.W.R. 669=153 Ind. Cas. 582.

—S. 376—Sentence—Offence under S. 376 should be put down with strong hand.

Crimes of violence upon women who are not in a position to defend themselves must be put down with a strong hand and it would be a very sad state of affairs, if criminals were to carry an impression that to criminally assault a woman or to rape her was not a very serious matter and that they could always satisfy their unholy passion if only they were prepared to undergo a comparatively short term of imprisonment. (Five years' rigorous imprisonment was awarded.) 116 Ind. Cas. 883=30 P.L.R. 437=30 Cr.L.J. 699=1929 Cr. C. 150=13 A.I.Cr.R. 97=A.I.R. 1929 Lah. 584.

—S. 376—Raped girl unchaste.

Where evidence showed that the girl who was raped was unchaste the sentence of seven years' rigorous imprisonment was held to be too severe. 100 Ind. Cas. 128=28 Cr.L.J. 256=A.I.R. 1927 Lah. 772.

—S. 376—Punishment.

When a person is convicted of rape, his punishment will be proportioned to the greater or less atrocity of the crime, his conduct and the defenceless and unprotected state of the injured female whether she is a low native or a high European. 82 Ind. Cas. 142=25 Cr.L.J. 1214=A.I.R. 1925 Nag. 74.

—S. 376—Rape—Sentence.

The punishment for an offence of rape should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of the injured female. The condonation of the offence, on being paid a sum of money, by the family should not be taken into consideration in determining the punishment to be inflicted. 20 Cr.L.J. 647=52 Ind. Cas. 423 (Nag.).

—S. 376—Sentence—Suicide by complainant.

An inference adverse to the accused in a case of rape, should not be drawn from the fact that the complainant was very much ashamed and even committed suicide owing to the shame brought on her. The fact of the complainant's suicide should not be taken into consideration in passing sentence in case of rape because that is neither the natural nor ordinary nor probable consequence of the accused's act. 19 Cr.L.J. 155=43 Ind. Cas. 443 (L Bur.).

—Ss. 376, 366—Offences under—Separate sentences can be passed.

A charge under S. 366 involves different elements and different questions of fact from a charge under S. 376, and therefore separate sentences for offences under Ss. 366 and 376 are not against the provisions of S. 71, Indian Penal Code: 8 Bom. L.R. 120, Foll. 99 Ind. Cas. 344=7 Lah. 484=27 P.L.R. 802=28 Cr.L.J. 136=A.I.R. 1927 Lah. 88.

—S. 376—Where the real offence is rape and the abduction is an aggravating circumstance separate sentences under both the sections should not be given. 89 Ind. Cas. 912=26 Cr.L.J. 1440=A.I.R. 1926 Lah. 114.

—S. 377—Offence under.

Carnal intercourse with a bullock through nose is an unnatural offence punishable under S. 377. A.I.R. 1934 Lah. 261=35 P.L.R. 73=35 Cr.L.J. 1096=150 Ind. Cas. 320.

—S. 377—"Coitus per os."

*Coitus per os* falls within the provisions of S. 377. 87 Ind. Cas. 97=19 S.L.R. 327=26 Cr.L.J. 945=A.I.R. 1925 Sind 286.



**—S. 377—Attempt.**

The offence made punishable under S. 377 requires that penetration, however little, should be proved strictly. Thus an attempt to commit this offence should be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of the accused in that particular direction ought to be proved strictly. A mere preparation for the operation should not necessarily be construed as an attempt.

Where there was an intention on the part of the accused to satisfy his lust by a carnal intercourse against the order of nature and he made every preparation to satisfy that lust, but before he could thrust his organ in, he spent himself; then he cannot be said to have done any act which might be construed as an attempt to commit the offence of sodomy. A.I.R. 1934 Sind 206=28 S.L.R. 330=36 Cr.L.J. 718=155 Ind. Cas. 435.

**—Ss. 377, 174 and 116—**Before a conviction under S. 377-114 can be recorded, it must be proved both that the offence was committed and that the abettor was present. If, however, the Magistrate's conclusion is that the accused was guilty of no more than an attempt, the conviction of the abettor who is present should be under S. 377, read with S. 116. A.I.R. 1935 Sind 78=36 Cr.L.J. 877=156 Ind. Cas. 189.

**—S. 377—Duty of Court.**

Subordinate Courts should comply fully and carefully with the requirements of S. 377. Every officer who has a judgment to write will do well to set forth the points for decision in such shape that at the first glance, it may be apparent both to himself and also to any appellate tribunal that nothing which is material has been over-looked. A.I.R. 1932 Sind 143=33 Cr. L. J. 900=140 Ind. Cas. 23 (D.B.).

**—S. 377—Medical evidence required in the case of an offence under S. 377.**

Where the case of the prosecution in regard to an offence under S. 377, Indian Penal Code, is not that the offence remained uncompleted the medical evidence could and should be definite against the accused. Where such evidence is to the effect that no marks of injury on the arms of the boy were found, but as the boy was grown up, there may be no marks of injury, it is somewhat inconsistent and does not go against the accused. Though there might be marks of semen on the dhoti of the accused, it is by no means a decisive factor. (1946) A.W.R. (H.C.) 574=229 Ind. Cas. 301=1946 A.L.W. 582=1947 A.Cr.C. 10=48 Cr. L. J. 376=A.I.R. 1947 A. 97.

**—S. 377—Chemical Examiner's Report.**

In a charge of sodomy stains of semen constitute important evidence. Great weight must therefore be attached to the Chemical Examiner's report. 122 Ind. Cas. 93=10 Lah. 794=31 Cr. L. J. 343=A.I.R. 1930 Lah. 318.

**—S. 377—Evidence.**

A charge under S. 377 is one very easy to bring and very difficult to refute. Therefore, the evidence in support of such a charge has to be very convincing. 94 Ind. Cas. 257=8 L.L.J. 180=27 Cr.L.J. 593=27 P.L.R. 353=A.I.R. 1926 Lah. 375.

**—S. 377—Evidence of complainant.**

In a complaint for unnatural offence, especially where it is found as a fact that the complainant was a perfectly willing party, it is not safe to convict the accused unless the complainant's evidence is corroborated in material particulars implicating the accused. It is true that in law, such corroboration is not requir-

ed, but as a matter of prudence, there ought to be no conviction without such corroboration, except in very exceptional cases. 165 Ind. Cas. 707=61 C.L.J. 883=39 C.W.N. 1051=38 Cr.L.J. 70.

**—S. 377—Evidence of—Person on whom the offence is alleged to have been committed—Uncorroborated testimony.**

In a charge of offence under S. 377, Indian Penal Code, it is as a rule unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed unless for any special reasons that testimony is entitled to special weight. 73 P.L.R. 1918=38 P.W.R. 1918 (Cr.)=19 Cr.L.J. 946=47 Ind. Cas. 670.

**—S. 377—Unnatural offence—Complaint—Uncorroborated testimony—Conviction.**

A conviction under S. 377, Indian Penal Code, can be safely based on the uncorroborated testimony of the victim, if it is not doubtful. The prosecution is not bound to produce witnesses who are not expected to speak the truth. 185 P.L.R. 1915=42 P.W.R. 1914 (Cr.)=16 Cr.L.J. 266=28 Ind. Cas. 154.

**—S. 377—Whipping.**

Sentence of whipping cannot be inflicted under S. 4 (b), Whipping Act in the case of attempts to commit offence. Section 4 (b) does not apply to convictions under S. 377 read with S. 511, Indian Penal Code. A.I.R. 1938 All. 16=1937 A.L.J. 944=39 Cr.L.J. 233=1937 A.W.R. 902=172 Ind. Cas. 905.

**—S. 377—Whipping.**

The punishment of whipping in case of bestiality e.g., sodomy on a boy of eight years is useful as a deterrent. A.I.R. 1937 Pesh. 22=38 Cr. L.J. 429=167 Ind. Cas. 655.

**—S. 377—Sentence.**

Where an offence under S. 377 is committed after using violence, a sentence of whipping in addition to rigorous imprisonment is eminently right and proper. A.I.R. 1936 Lah. 256=37 Cr.L.J. 474 (1)=38 P.L.R. 437=161 Ind. Cas. 591 (1).

**—S. 377—Sentence.**

The offence of sodomy is one of those offences for which there can hardly be extenuating circumstances and a sentence of four months' rigorous imprisonment is an over-lenient one. Ordinarily, such cases are committed to the Sessions Court so that the accused might receive condign punishment, the powers of a First Class Magistrate being restricted to giving only two years. A.I.R. 1933 Sind 87=34 Cr.L.J. 618=143 Ind. Cas. 605.

**—Ss. 378 and 379.****Synopsis.**

1. Abetment and Attempt.
2. Assertion of right.
3. Common intention.
4. Consent.
5. Dishonest intention.
6. Evidence and Proof.
7. Interpretation—"Taking."
8. Joint ownership.
9. Master and Servant.
10. Possession.
11. Sentence.
12. Subject of theft.



**13. Theft and Similar offences.****14. Miscellaneous.****1. Abetment and Attempt.****—Ss. 378 and 379—Accused standing by the thief—No other evidence—Accused is not guilty.**

The evidence against accused was that he was standing by the thief. There was no evidence at all to lead one to the conclusion that he was engaged in any conspiracy with the principal offender for the doing of the theft.

**Held**, he was not guilty of abetting the theft. 64 Ind. Cas. 510=3 P.L.T. 127=66 Ind. Cas. 334=23 Cr.L.J. 30=23 Cr.L.J. 270=1921 P.H.C.C. 96=A.I.R. 1923 Pat. 121.

**—Ss. 378, 379 and 114—Conviction under.**

Where an accused person is found to have been a member of an unlawful assembly the common object of which was to commit trespass and theft and it is found that theft was actually committed by certain members of the unlawful assembly and it is not found that that person himself committed any theft by removing any property or that he made any preparation for committing any theft or aided any one in the commission of theft.

**Held**, that the accused cannot be properly convicted of an offence under S. 379 read with S. 114. (1901) 8 C.W.N. 519.

**—Ss. 378, 379 and 511—Attempt.**

Accused caught while attempting to steal the purse of P from his pocket—P, however seizing the purse from outside his pockets and also the accused's hand.

**Held**, that the offence fell under S. 511 and not under S. 379. A.I.R. 1942 Mad. 521=(1942) 1 M.L.J. 591=55 L.W. 297 (1)=1942 M.W.N. 376=44 Cr.L.J. 501=206 Ind. Cas. 246.

**—Ss. 378, 379—Attempt is an intentional preparatory action—Entering into cattle enclosure which is prevented by owner is attempt to commit theft.**

When a man does an intentional act with a view to attain a certain end and fails in his object through circumstances independent of his own will, then that man has attempted to effect the object at which he aimed: 13 P.L.R. 1919 Cr. Foll.

Where the accused entered a thorned enclosure at the well of the complainant and was about to enter a smaller enclosure in which the cattle were tethered when he was interrupted by the complainant.

**Held**, that the accused intended to steal the cattle and that he could not carry out his intention on account of intervention by the owner and so he was guilty of attempt to commit theft. 89 Ind. Cas. 848=26 Cr. L.J. 1424=A.I.R. 1926 Lah. 147.

**—Ss. 378, 379—Where accused was caught at night time in the vicinity of some cattle which had been tethered on the complainant's square and near which complainant and his brother were sleeping.**

**Held**, he cannot properly be held guilty of an attempt to commit theft but no doubt that he committed the offence of criminal trespass. 71 Ind. Cas. 792=24 Cr.L.J. 248=A.I.R. 1924 Lah. 223.

**2. Assertion of right.****(a) Duty of court.****(b) Offence.****(c) No offence.**

12 F.Y.D.—25

**2. (a) Assertion of right—Duty of court.****—Ss. 378, 379—Bona fide taking of property.**

The removal of property in the assertion of a *bona fide* claim or right, though unfounded in law and fact, does not constitute theft although a mere colourable pretence to obtain or keep possession of property would not avail as a defence. The question whether the claim is *bona fide* or not must be determined upon all the circumstances of the case, and a Court ought not to convict unless it holds that the claim is a mere pretence. A.I.R. 1935 Sind. 115=29 S.L.R. 121=36 Cr.L.J. 1310=158 Ind. Cas. 282.

**—Ss. 378, 379—Theft committed openly—Inference of bona fide claim.**

Thefts are not always committed secretly and a *bona fide* claim cannot be inferred from the fact that the petitioners acted openly while cutting the timber not owned by them. A.I.R. 1934 Pat. 491=36 Cr.L.J. 120=1 B.R. 60=152 Ind. Cas. 477.

**—Ss. 378, 379—Bona fide claimant.**

A person who has a *bona fide* claim to property, even though it might be unfounded in law or fact, cannot be held to be guilty of the offence of theft unless the claim was a mere pretence. The question whether a person has a *bona fide* claim to title in the property must be determined on the facts and circumstances of each case. A.I.R. 1933 Oudh 50=9 O.W.N. 1196=34 Cr.L.J. 547=143 Ind. Cas. 208.

**—Ss. 378, 379—Claim of right being mere pretence—Jurisdiction of Criminal Court if ousted.**

To constitute an offence under S. 379, Indian Penal Code, the determining factor is the intention of the taker and where articles have been removed in the *bona fide* exercise of a right of ownership which is believed to exist the act does not amount to theft. The mere assertion of a claim is not sufficient to exclude the application of S. 378, Indian Penal Code. Where the claim is no more than a pretence, the jurisdiction of the criminal Court is not ousted.

*Per Curiam*.—Not uncommonly the Criminal Court is used as a lever to harass an inconvenient adversary. If there is a *bona fide* dispute as to the ownership in the property itself or as to right of way the straight course is to approach the Civil Court for the determination of the controversial questions of title as may arise between the parties. 1930 A.L.J. 457.

**—Ss. 378, 379—In a case under S. 379 where the accused alleges a bona fide claim of right to property to which the offence dealt with has reference, the question to be decided is not whether the alleged right would stand the test in a Civil Court; what is essential to consider is whether the accused establishes the plea as to the bona fide claim of right.** 103 Ind. Cas. 840=28 Cr. L.J. 760=A.I.R. 1927 Pat. 385.

**—Ss. 378, 379—The removal of property under a bona fide assertion of right does not constitute theft, even though the claim be one which is not valid in law. Where such a claim is raised, the Court has no right to convict unless upon the whole of the evidence it comes to the conclusion that the claim set up is not a genuine one.** 96 Ind. Cas. 879=27 P.L.R. 635=27 Cr. L.J. 1023=A.I.R. 1926 Lah. 683.

**—Ss. 378, 379—Bona fide claim—Complicated question of title.**

A clear question of *bona fides* having been raised in the case, the case was outside the cognizance of the Criminal Court. *Prima facie* the auction purchaser



is entitled to obtain possession of all the lands comprised within the writ of the Court, and every attempt should be made by a Criminal Court to maintain the auction—purchaser in possession of the property unless a clear right to possession is established by any other person. 1 Pat. L.T. 121=21 Cr.L.J. 374=2 U.P.L.R. (Pat.) 53=55 Ind. Cas. 854.

—Ss. 378, 379—Bona fide Claim of right.

Whenever there is an assertion of a claim of right it is the duty of the Court to enquire into the question whether that claim is a *bona fide* claim or is a mere pretence. If when that claim is actually put forward the Court fails to decide the question whether the claim is a *bona fide* claim or a mere pretence, the conviction cannot be sustained. 54 Ind. Cas. 992 (Pat.)

—Ss. 378, 379—Dishonest intention—Bona fide claim of title—Conviction—If illegal.

If the accused honestly sets up a title to the property in himself, he could not be convicted of theft. Where a claim of title is honestly made, a Criminal Court's jurisdiction is ousted. 1 Pat. L.W. 155=(1918) Pat. H.C.C. 47=18 Cr.L.J. 507=39 Ind. Cas. 475.

—Ss. 378, 379—Dishonest intention—Theft.

Mere defence of acting under legal rights is not enough. If the Court is satisfied of the *bona fides* of the accused and that he acted without dishonesty, he should not be convicted. 14 A.L.J. 399=17 Cr.L.J. 295=35 Ind. Cas. 167.

—Ss. 378, 379—Bona fide claim of right, when proper defence.

Where in a charge of theft the accused knew, that he had no possession of the property and gathered the produce grown on it by the complainant, the Courts will not conclude in favour of the *bona fide* assertion of a right to the property. 16 Cr.L.J. 458=29 Ind. Cas. 90 (Mad.).

—Ss. 378, 379—Theft—Accused alleging right to property—Decision of claim necessary before conviction.

An accused alleging his right to a property cannot be convicted of theft of the property, unless it is decided first that he is not entitled to it. 41 Cal. 433=18 C.W.N. 397=15 Cr.L.J. 298=23 Ind. Cas. 506.

—Ss. 378, 379—Dishonest intention—Question of possession doubtful.

An accused was convicted for dishonestly carrying away the produce of a tamarind tree though the accused claimed ownership of the tree.

Held, the conviction was bad as there was no clear finding as to the ownership of the accused or the possession of the complainant. 8 M.L.T. 118=11 Cr.L.J. 483=7 Ind. Cas. 416.

—Ss. 378, 379—Theft—Claim of title by the accused—Conviction for theft illegal, unless the Court finds the claim to be a pretence.

In a case of alleged theft of fish from a tank which the accused claimed to have been in their possession and not the complainant's.

Held, that if the accused assert a claim to the thing alleged to have been stolen by him he should not be convicted unless the Court is in a position to say that the claim is a mere pretence. (1909) 11 Cr.L.J. 248=5 Ind. Cas. 794=14 C.W.N. 408.

—Ss. 378, 379—Bona fide claim of right.

No conviction can be had for theft unless there is a finding that the accused had an intention to take

the property dishonestly out of a person's possession—more so, when the accused set up a *bona fide* claim of right. (1909) 11 Cr.L.J. 410=37 C. 194=11 Cr.L.J. 438=5 Ind. Cas. 999.

Ss. 378, 379—Civil claim—Theft.

One must be careful to see that the criminal law is not put in motion with a view to assistance in the prosecution of a civil claim. The Criminal Courts should not convict of theft any person who asserts a claim of right, unless it is in a position to say that that claim is a mere pretence. (1905) 9 C.W.N. 974.

—Ss. 378, 379—Bona fide belief of right—Government taking possession itself of land long enjoyed by another.

The possession of a trespasser is no possession within the meaning of S. 8, whether it be a private individual or Government. There can be conviction for theft unless the removal be dishonest, i.e., if the prisoner had *bona fide* believed he had a right to the property. If a Government officer takes summary possession of a man's land otherwise than under the Land Acquisition Act or other legal authority, his rights are no more affected by such illegal action than they would be by the illegal seizure of his land by a private person. In such a case the Revenue Officers are mere trespassers and there is nothing dishonest in the owner taking possession of his property. So where the Government took possession of A's land as being poramboke and informed him of the fact and A afterwards cut and removed some of the bamboos standing on the land alleging that they belonged to him.

Held, that the Court should find before a conviction (1) that the lands did not belong to A and (2) that he did not *bona fide* believe in his ownership. (1904) 28 M. 304.

—Ss. 378, 379—Clear plea of claim of right—Summary trial—Inadvisability.

Where there is a clear plea of *bona fide* title raised in a case under S. 379, Indian Penal Code, which take the case out of the province of the Criminal Court, the Magistrate should leave the parties to have their rights determined by a Civil Court. When from the nature of the dispute and specially from the plea taken by the accused it is clear that a complicated question of right and title is involved in the case, the Magistrate should not try the case summarily. 1 P.L.T. 121=55 Ind. Cas. 854=1922 P.H.C.C. 10=A.I.R. 1922 Pat. 265.

2. (b) Assertion of right—Offence.

—Ss. 378, 379—Removing property with no right to do so in asserting right to the property.

Where, in asserting a right to some property which a person believe to be good, if he does something which he knows he has no right to do, e.g., he takes the law into his own hands and removes the property in question from the possession of his opponent who claims the property for himself, he may be guilty of theft.

Where the complainant, having purchased a tree felled it, cut it up into suitable logs and then the accused, claiming that it belonged to the proprietors of the village removed the timber.

Held, that the act of the accused was unlawful and it could not be said to be covered by a *bona fide* claim, though the offence committed was of a technical kind. A.I.R. 1933 Lah. 481=34 P.L.R. 276=34 Cr.L.J. 843 (1)=144 Ind. Cas. 718.



—Ss. 378, 379—A person may be guilty of theft even if he be asserting a right to property which he believes to be a valid right if, in the assertion of such rights, he does something which he knows he has no right to do. A.I.R. 1933 Sind 90=34 Cr.L.J. 366=142 Ind. Cas. 584.

—Ss. 378, 379—Auction-sale and delivery of possession—Removal of bamboos by person in possession before delivery—Transfer of Property Act, Ss. 3, 8.

The auction-purchaser at a rent execution sale of a holding took delivery of possession and subsequently the persons who were in possession cut and removed certain bamboo clumps standing on the land. They were prosecuted and convicted under S. 379, and in revision it was contended that possession of the bamboos did not pass to the auction-purchaser along with possession of the land.

**Held**, that when the auction-purchaser acquired the land, he acquired the bamboos too and hence the accused were rightly convicted. A.I.R. 1932 Pat. 344=13 P.L.T. 519=34 Cr.L.J. 355=142 Ind. Cas. 504.

—Ss. 378, 379—Charge of cutting in private forest—Concerted move to create evidence of right—No *bona fide* claim.

The accused villagers were charged under S. 379 for illegally cutting and removing trees in the private forest of the proprietor. The entry in the Record-of-Rights that the jungle was private was not rebutted and the accused knew that they had no right to cut any trees and that to take without the landlord's consent would be theft. The *malu fides* of the cutting was evident from the fact that it was in wild excess of any reasonable requirements or of any customary right known. And it was in pursuance of a concerted movement to establish a right or rather to create evidence of a right to the only remaining jungle in the village in view of the approaching revisional settlement proceedings that the accused deliberately defied the law.

**Held**, that the defence of a *bona fide* claim of right was untenable as the accused had acted dishonestly. 119 Ind. Cas. 887=30 Cr.L.J. 1100=1929 Cr.C. 254=A.I.R. 1929 Pat. 502.

—Ss. 378, 379—Property in possession of A and A raising crops thereon—Removal of crops by B—Plea not open.

It is a well-settled principle of law that if property is taken under a *bona fide* claim of right, it will not amount to an offence under S. 379, even though the claim may be ill-founded in law or in fact.

It must, however, be remembered that the claim put forward by the accused must be an honest one and it will be of no avail to him as a defence if it is found to be a mere colourable pretence to obtain and keep possession of the property. The decision on this point will depend in each case on the circumstances of that particular case, but it may be safely laid down as a general proposition that in cases where the alleged theft consists in the removal of crops grown on land, the most vital question to be investigated is as to which of the parties had grown the crops and a decision on this point will in the majority of cases enable the Court to come to a definite conclusion as to whether the claim of the accused is made in good faith or is a mere pretence, but it cannot be laid down as a universal rule that in every case where A removes crops grown by B, A necessarily commits an offence under S. 379, Penal Code.

But where a person is not in actual possession of the land for a number of years and knows that the land is in possession of another person and that other person has grown the standing crops on the land and still removes the crops, he cannot contend that he removed them in a *bona fide* claim of right. 115 Ind. Cas. 684=10 P.L.T. 57=30 Cr.L.J. 511=12 A.I.Cr.R. 311=A.I.R. 1929 Pat. 86.

—Ss. 378, 379—Disobedience of judicial order.

Where a Magistrate issued an injunction on the accused restraining him from fishing in a certain tank but this he disregarded.

**Held**, that it was impossible to hold that the accused acted under a *bona fide* claim of rights. 109 Ind. Cas. 229=10 A.I.Cr.R. 209=29 Cr.L.J. 501 (Cal.).

—Ss. 378, 379—Existence of a *bona fide* claim—When removal amounts to theft indicated.

It is quite possible that a person may have a claim which he believes to be good and yet in asserting that right he may do something which he knows he has no right to do. For instance he may know perfectly well that his claim is disputed and that if he wishes to enforce it his proper course is to do so by having recourse to the Courts. If knowing that, he prefers to take the law into his own hands by removing the property from the possession of his opponent, knowing that his opponent also lays claim to the property, then his act is dishonest and amounts to theft. He has caused wrongful gain or possession to himself and wrongful loss of possession to his opponent. 109 Ind. Cas. 683=6 Rang. 54=29 Cr.L.J. 603=10 A.I.Cr.R. 290=A.I.R. 1928 Rang. 113.

—S. 378—*Bona fide* claim of right—'Bona fides'—What amounts to.

Where a person removes a tree under an honest belief that it belongs to him, but in doing so he betrays want of due care and attention, that is, good faith, in ascertaining the ownership of the same, he can be convicted of the offence of theft. Per *Aston, J.*:—There is a manifest difference between a mere assertion of a claim to property or right and a *bona fide* belief in such a claim. The mere assertion of a claim of right is not in itself a sufficient plea. (1902) 4 Bom. L.R. 936.

2. (c) Assertion of right—No offence.

—Ss. 378, 379 and 427—Act done in *bona fide* belief of right—Offence.

What the criminal Court has to ascertain in a prosecution for offenders under Ss. 379 and 427, Indian Penal Code, is not whether the act of the accused was high-handed or misconceived or has resulted in any loss to the complainant, but whether the necessary *mens rea* was present and was responsible for the acts committed by the accused. Where the parties have been quarrelling over boundary line of their respective properties for a long time, and the act of the accused is not incompatible with the accused's intention not to cause any mischief to the complainant but only to establish what the accused believed to be their right however ill-founded or misconceived it might be, it would not be safe to dismiss the plea of *bona fide* belief of their right and the Criminal Court must give the benefit of doubt to the accused and absolve them of any criminal intent. A conviction for the offence of mischief and theft in such circumstances is not justified and must be set aside. 16 Cut. L.T. 78=A.I.R. 1950 Orissa 196=51 Cr.L.J. 1333.



—Ss. 378, 379—Both sides setting up claims to, property in dispute—Evidence equally balanced—No preponderance in favour of prosecution—Conviction—Sustainability.

A Criminal Court is of course not concerned with the rights and wrongs of civil claims. At the same time it cannot shut its eyes to the fact that the transaction before it shows that both sides set up claims to the property in question, which is the subject-matter of the offence charged, namely, theft. Where both sides set up claims which are matters to be properly adjudicated upon by a Civil Court and the evidence is evenly balanced and there is no preponderance on the side of the prosecution, a conviction cannot be justified and the accused is entitled to be acquitted. 3 A.I.Cr.D. 538.

—Ss. 378, 379—Applicability—Removal of crops by person growing same—Title to land found to be in another—Absence of evidence of possession—Conviction—Sustainability.

A person pleading a *bona fide* claim of right cannot be convicted of theft unless it is found that the claim which he puts forward is a colourable pretence. Where it is found that crops which are the subject-matter of the alleged theft were raised and grown by the accused, it cannot be said that the removal of the crops by him was a dishonest act and he cannot be convicted of theft, merely because title to the land on which the crops were raised is found to be in another, in the absence of evidence of possession. 1946 P.W.N. 179=27 P.L.T. 173=229 Ind. Cas. 159=13 B.R. 287=A.I.R. 1947 Pat. 74.

—Ss. 378, 379—Theft of growing crop—Right of accused to possession at time of theft not *mala fide*—Conviction illegal. A.I.R. 1944 Pat. 274=11 B.R. 92=46 Cr.L.J. 83=215 Ind. Cas. 262.

—Ss. 378, 379—In execution of decree property belonging to other person than the judgment-debtor taken away by bailiff—Property taken back by person owning it and by his associates—No offence under S. 379. A.I.R. 1941 Lah. 217=42 P.L.R. 162=42 Cr.L.J. 601=194 Ind. Cas. 564.

—Ss. 378, 379—Property attached at instance of A—Claim by B to property allowed—Conviction under S. 379 read with S. 114 is bad. A.I.R. 1941 Mad. 799=1941 M.W.N. 671.

—Ss. 378, 379—Where the heir of the deceased and his servants removed the cattle belonging to the deceased a few days after the death of the deceased from the possession of the concubine of the deceased.

Held, that the heir and his servants could not be convicted under Ss. 379 and 448, Indian Penal Code. A.I.R. 1941 Mad. 674=42 Cr.L.J. 896=1941 M.W.N. 463=196 Ind. Cas. 541.

—Ss. 378, 379—No dishonest intention.

When a person takes another man's property believing under a mistake of fact and in ignorance of law, that he has a right to take it, he is not guilty of theft because there is no dishonest intention, even though he may cause wrongful loss within the meaning of the Indian Penal Code. Where the finding is that the accused persons thought that they could take away the animal of the complainant, as compensation for the injury done to the accused's animal without committing an offence, it is a mistake of fact in ignorance of the law. A.I.R. 1941 Pat. 383=7 B.R. 384=42 Cr.L.J. 293=22 P.L.T. 694=192 Ind. Cas. 403.

—Ss. 378, 379—Crops harvested under claim of right—Proceedings under S. 145, Criminal Procedure

Code dropped in respect of land—Civil suit pending—Complaint under Ss. 379 and 447, Indian Penal Code, dismissed on ground that it was a matter of civil nature—Sessions Judge's order for further enquiry, held was uncalled for. 1940 M.W.N. 871.

—Ss. 378 and 379—Property removed in assertion of right—No offence under S. 378, Penal Code. A.I.R. 1938 Lah. 759=40 P.L.R. 720=I.L.R. (1939) Lah. 100=179 Ind. Cas. 144.

—Ss. 378 and 379—Remedy of a creditor for recovery of a debt however small, is to proceed in Civil Court and not to remove any property of the debtor to which he may happen to have access to force payment—Such a course amounts to theft. 1938 N.L.J. 302.

—Ss. 378 and 379—If a person, in assertion of a *bona fide* title accruing before the attachment, removes the crops, he cannot be said to be acting dishonestly or fraudulently. A.I.R. 1935 All. 214=36 Cr.L.J. 340=1935 A.L.J. 63=1935 A.W.R. 59=57 A. 660=153 Ind. Cas. 428.

—Ss. 378 and 379—Gist of offence.

In order to constitute "theft" the factor of dishonest intention must be present. Intention is the gist of the offence of theft: it is the intention of the taker which must determine whether the taking or the moving of a thing is theft. If the taking is not done dishonestly, it will not amount to theft. As a dishonest taking involves the intention to cause wrongful gain to the taker or wrongful loss to another, it follows that where the circumstances show that property has been removed in the assertion of a *bona fide* claim or right, a dishonest intention cannot be attributed to the taker. In other words, where a person takes a thing believing genuinely and in good faith that he has a right to take that thing or that the thing is his, it cannot be said that he had the intention of causing wrongful gain to himself or wrongful loss to another. Gain to himself or loss to that other, wrongful or otherwise, may ensue, but the requisite dishonesty of intention cannot be attributed to the taker. A.I.R. 1935 Sind 115=29 S.L.R. 121=36 Cr.L.J. 1310=158 Ind. Cas. 282.

—Ss. 378 and 379—Accused found to have no *bona fide* claim of right.

Where it is found that the accused had no *bona fide* claim of right but it is not found that they did not *bona fide* believe that they had such a *bona fide* claim, the accused cannot be held to be guilty of theft. A.I.R. 1935 Cal. 675=37 Cr.L.J. 1=159 Ind. Cas. 36 (D.B.).

—Ss. 378 and 379—Distrain for an amount greater than the amount of arrears due is illegal. But removal by the owner of property distrained does not constitute an offence under S. 379, Penal Code. 1934 M.W.N. 889.

—Ss. 378 and 379—Rescue of cattle attached by real owner.

Where certain cattle were attached under a decree obtained against A and handed over to certain sureties and B, who was the real owner of the cattle rescued the cattle from the possession of the sureties:

Held, that B was not guilty of theft. A.I.R. 1933 Mad. 840=1933 M.W.N. 110=65 M.L.J. 732=38 L.W. 875=35 Cr.L.J. 463=147 Ind. Cas. 738.

—Ss. 378 and 379—Removal of crops attached with defective procedure.

Where certain growing crops were attached in execution of a decree by beat of drum without affixing



a copy of the warrant of attachment on the land and another copy on the outer door of the house of the judgment-debtor, as provided by O. 21, R. 44, Civil Procedure Code, and the accused cut and removed the crops on behalf of and with the consent of the judgment-debtor:

**Held**, that the accused were not guilty of theft as the attachment was irregular and the crops had not passed out of the possession of the judgment-debtor.

Unlike cases of other kinds of movable property in which attachment is made by actual seizure, *custodia legis* in the case of growing crops is symbolical and is effected only by affixation of warrants of attachment without which the crops do not pass into the possession of the Court. A.I.R. 1931 All. 142=32 Cr.L.J. 437=129 Ind. Cas. 715.

**—Ss. 378 and 379—Dhalbhum estate—Right of raiyats to take firewood from jungles for domestic purposes.**

Where a *raiya*t of the Dhalbhum estate who had paid his jungle dues took away some fire wood worth about four rupees from a jungle outside his village without a pass or permit issued by the estate and he was convicted of theft:

**Held**, that in view of the fact that the question of the right of a *raiya*t of the estate to take fire wood from a jungle outside the boundaries of his village was a vexed one and that jungle *kar* on the rent of the *raiya*ts was in vogue for a generation, the accused could not be considered to have acted 'dishonestly' and not in pursuance of a *bona fide* claim of right and the conviction for theft was illegal.

Consideration of the expediency of preserving jungle is not only irrelevant to a charge of theft but is nearly always a factor leading to judicial error and it must be strenuously resisted in the Criminal Court. A.I.R. 1931 Pat. 99=32 Cr.L.J. 617=12 P.L.T. 577=130 Ind. Cas. 806.

**—Ss. 378 and 379—**The seizure of a thing in the assertion of a *bona fide* claim of a right though illegal does not amount to an offence in the absence of proof of the element of dishonesty. 44 Cal. 63, Foll. 105 Ind. Cas. 661=28 Cr.L.J. 949=A.I.R. 1927 Nag. 404.

**—Ss. 378 and 379—Claim of right though unfounded is a good defence if the claim is bona fide.**

Removal of property in the assertion of a *bona fide* claim of right, though unfounded in law and fact, does not constitute theft but a mere colourable pretence to obtain or keep possession of property does not avail as a defence. The fact that the things alleged to be stolen were removed secretly and were despatched by railway under wrong description is not sufficient to indicate, that the accused had any dishonest intention in removing them. 81 Ind. Cas. 185=5 Lah. 56=25 Cr. L.J. 697=A.I.R. 1924 Lah. 453.

**—Ss. 378 and 379—**A person who cuts trees which he says to be his own cannot be said to be committing the offence either of theft or of mischief as defined in Chapter XVII of the Indian Penal Code. 71 Ind. Cas. 645=21 A.L.J. 213=4 L.R.A. Civ. 172=A.I.R. 1923 All. 428.

**—Ss. 378 and 379—Taking under bona fide claim cannot be theft.**

If there is a taking under a colour of right or in other words, under a *bona fide* claim, the taking cannot be dishonest or felonious, that is to say, it is not theft.

It is immaterial whether the claim is good or bad. It may be material in considering as a question of fact whether the claim was a *bona fide* claim, to consider whether or not there was any right at all. 71 Ind. Cas. 798=17 M.L.W. 104=1923 M.W.N. 182=32 M.L.T. 153=24 Cr.L.J. 254=A.I.R. 1923 Mad. 239=44 M.L.J. 138.

**—Ss. 378 and 379—Accused, declared to be in possession in a previous case, removing crops—Removal is not theft.**

Where the accused is declared to be in possession of the crops in a prior Criminal Case between the same parties he cannot be guilty under S. 379, if he removes them from the land, before the previous case is decided against him in appeal. 72 Ind. Cas. 945=1 Pat. L.R.Cr. 97=24 Cr.L.J. 481=A.I.R. 1923 Pat. 532.

**—Ss. 378 and 379—Bona fide claim, doubtful—Conviction is not justified.**

Where some persons were convicted under Section 379 for cutting certain trees and it was doubtful whether the cutting was done under a *bona fide* claim,

**Held**, the conviction was not justified; they must in any case have the benefit of the doubt. 81 Ind. Cas. 34=25 Cr. L.J. 546=A.I.R. 1922 Pat. 12.

**—Ss. 378 and 379—Bona fide assertion of claim of right.**

There is no theft by removal if it is in a *bona fide* assertion of claim of right. 2 U.B.R. (1916) 124=18 Cr.L.J. 355=10 Bur.L.T. 166=38 Ind. Cas. 739.

**—Ss. 378 and 379—Removal of property in assertion of bona fide claim of right.**

For a conviction under S. 379, dishonest intention to take property out of the possession of another person must be proved. When property is removed in assertion of a *bona fide* claim of right the removal does not constitute theft, if the claim of right be an honest one, though unfounded in law or in fact. 44 Cal. 66=20 C.W.N. 1270=17 Cr.L.J. 456=36 Ind. Cas. 136.

**—Ss. 378 and 379—Dishonest intention—Theft—Cutting of trees planted by tenant—Bona fide claim.**

Where a tenant *bona fide* believing that he is entitled to the trees planted by him on the holding removes them he could not be convicted of theft. The question whether the trees in a holding are the property of a Zemindar or a tenant admits of considerable doubt and the case is not a suitable one for Cr. Prosecution. 8 Cr.L.R. 275 (All.).

### 3. Common intention.

**—Ss. 378 and 379—Two persons going to steal particular article—One of them actually committing theft not able to find that article, and stealing something else—Both, if guilty of theft.**

If two persons go to steal a particular article and one who is actually committing the theft is not able to find that particular article but steals something else instead and they run off together, both must be held guilty of theft inasmuch as the other who did not actually steal the article must be taken to have acted in furtherance of a common intention to commit theft. A.I.R. 1942 Pesh. 50=43 Cr. L.J. 837=202 Ind. Cas. 379.

**—Ss. 379, 425, 295, 144 and 143—Hut on agricultural land used as a mosque without knowledge of landlord—Pulling down of such hut by plaintiff—Charges under Ss. 295:**

... against a ... cut and removed paddy *bona fide* from a land which had been delivered to the complainant in execution of a suit.

... to be attached was immaterial.



**Held**, that where the charges under S. 379 did not refer to the common object of the unlawful assembly but the charges of theft were intended by the Magistrate to refer to the acts of individual accused apart from their doing as members of the unlawful assembly and there was no finding that any of the accused individually took away any of the materials of the hut, the conviction under S. 379 against the accused cannot be sustained. A.I.R. 1941 Pat. 492=7 B.R. 785=42 Cr.L.J. 579=23 P.L.T. 81=194 Ind. Cas. 476.

—Ss. 378 and 379—Gang of persons going to land of another with intention of removing paddy by force—Some of them committing theft—All held responsible for both violence and theft. A.I.R. 1936 Rang. 70=37 Cr.L.J. 416=161 Ind. Cas. 90.

—Ss. 378 and 379—Where certain persons are found to be an unlawful assembly for the purpose of taking away grain, each one of the persons is guilty of the offence committed by any one of them. A.I.R. 1935 Pat. 263=14 Pat. 225=16 P.L.T. 380=36 Cr.L.J. 1026=1 B.R. 665=156 Ind. Cas. 921.

#### 4. Consent.

—S. 378—Licensee cutting timber not covered by license—Removal pass given under mistake—No consent.

Where the licensee cuts down trees in the Government forest which are not covered by his license and where the person authorized to give consent to remove them out of the possession of Government gives it by issuing removal pass and the bill of title to timber on the understanding that timber to be removed was timber covered by the license and thus the consent is given under a misconception of fact there is no such consent as is meant by S. 378 and in such circumstances offence of theft of timber is committed. 122 Ind. Cas. 273=7 Rang. 821=31 Cr.L.J. 387=A.I.R. 1930 Rang. 114.

—S. 378—Dishonest intention—Removal of property with consent—Onus.

Where a person was charged with theft, i.e., the removal of a box belonging to himself from the possession of the station master of the Railway administration and causing wrongful gain to himself in the form of compensation for the loss of the box, the conviction for theft could not be sustained for the reason that the accused removed the box with the implied consent of the station master when he paid for certain excess charged on him, that there was no dishonest intention and that burden of proving dishonest intention was on the prosecution. 14 A.L.J. 417=17 Cr.L.J. 468=36 Ind. Cas. 148.

—S. 378—Theft—Debtor giving property to creditor—Subsequent knowledge—Debt time-barred.

An essential ingredient of theft is the taking of the property out of the owner's possession and without the owner's consent. Hence where a debtor gave certain property to his creditor, and subsequently found out that the debt was time-barred:

**Held**, that the charge of theft could not be sustained against the creditor, inasmuch as there was a full and unqualified consent on the part of the debtor at the time of his giving away the property. (1904) 1 A.L.J. 508.

#### 5. Dishonest Intention.

(a) Burden of proof.

(b) Absence of.

(c) Presence of.

#### 5. (a) Dishonest Intention—Burden of proof.

—Ss. 378 and 379—Dishonest intention—Burden of proof.

“Dishonesty” is an essential ingredient of the offence of theft, and it is initially for the prosecution to prove that the accused acted dishonestly in the act, which is alleged to constitute the offence, so as to come within the mischief of the offence. In the absence of proof of the same, the accused cannot be convicted under S. 379, Indian Penal Code. 12 B.R. 768=226 Ind. Cas. 576=47 Cr.L.J. 992=A.I.R. 1947 Pat. 264.

—Ss. 378 and 379—Dishonest intention—Burden of proof as to.

“Dishonesty” being an essential ingredient of the offence of theft, it is initially for the prosecution to prove that the accused had acted dishonestly so as to come within the mischief of the offence of theft. (1946) 12 B.R. 768=226 Ind. Cas. 576=47 Cr.L.J. 992=A.I.R. 1947 Pat. 264.

—Ss. 378 and 379—Dishonest intention—Not proved.

Where there is a ground to suppose that accused may not have acted dishonestly, accused must be acquitted. 38 All. 40=13 A.L.J. 1058=16 Cr.L.J. 812=31 Ind. Cas. 828.

—Ss. 378 and 379—Dishonest intention—Burden of proof—Bona fide claim of right.

When a person is prosecuted for the offence of theft, the onus is on the prosecution to show that he was acting dishonestly. If there are circumstances to show that he was acting in the assertion of a *bona fide* claim of right, a dishonest intention cannot be attributed to him. 9 S.L.R. 75=16 Cr.L.J. 715=30 Ind. Cas. 1003.

#### 5. (b) Dishonest Intention—Absence of.

—Ss. 378 and 379—Where persons illegally seize cattle and take them to the pound, they do not commit an offence of theft inasmuch as there is no wrongful gain to persons seizing cattle or wrongful loss to the owners of the cattle even though they would have to incur expenses to get the cattle released. A.I.R. 1943 Oudh 280=1943 O.W.N. 202=44 Cr.L.J. 640=1943 A.W.R. 49=207 Ind. Cas. 374. But see A.I.R. 1946 Nag. 221 under Note.

—Ss. 378 and 379—Owner of cattle driving cattle home from pound.

Where the cattle belonged to and were throughout in the possession of the owners, but they had been taken to the pound, not by the persons whose crop had been damaged, but by one who did not have any connection with the crop (or the land) said to have been damaged and the owners of the cattle came to the pound and drove away the cattle to their home, and were subsequently convicted under S. 379, Penal Code.

**Held**, that at the time when the cattle were taken to the pound, neither the pound-keeper nor anybody on his behalf was there. The seizure by the person who had no connection with the affair was itself not legal, and it certainly conferred no right of possession either on himself or on persons whose crop had been damaged. This was not a case in which the custody of the animals had passed to the pound-keeper or anyone acting for him. The persons who removed the cattle from the pound were the owners who were in possession, and there could be no theft by an owner of goods belonging to him from his possession. A.I.R. 1939



Mad. 775=1939 M.W.N. 470=40 Cr.L.J. 908=184 Ind. Cas. 280.

—Ss. 378 and 379—Land of accused sold in execution of decree and its delivery ordered—Crops raised by accused's lessee after sale not ordered to be delivered—Accused removing such crops is not guilty under S. 379.

The land of the accused was sold in execution of a decree against him and the delivery of the land was ordered; the crop was raised by the lessee of the accused after the court sale and delivery of the crop was not ordered by Court. The accused removed the crop:

**Held**, that the removal could not be said to be dishonest and the accused could not be convicted under S. 379, Penal Code. A.I.R. 1941 Mad. 41=1940 M.W.N. 869=52 L.W. 346(2)=42 Cr.L.J. 294=192 Ind. Cas. 407.

—Ss. 378 and 379—Rent decree by S against R—S purchasing R's holding in execution and obtaining possession—Suit by R before such purchase to set aside rent decree as obtained by fraud—Pending such suit, R with companions removing crops from holding—Rent decree subsequently set aside—R and his companions, held could not be convicted under S. 379 as R could not be said to have dishonest intention in removing crops. A.I.R. 1941 Pat. 369=7 B.R. 489=42 Cr.L.J. 339=22 P.L.T. 214=192 Ind. Cas. 780.

—Ss. 378 and 379—Receiver appointed by Court taking possession of corn of third party—Third party re-taking possession peacefully is not guilty of an offence under S. 379. A.I.R. 1939 Sind 333=41 Cr.L.J. 103=I.L.R. (1940) Kar. 105=184 Ind. Cas. 799.

—Ss. 378 and 379—No offence of theft.

Where it was quite impossible to find dishonest intention on the part of the accused in removing the crop of the *pahanai* land and there was a likelihood of his having a right to do so:

**Held**, that it was for the Civil Court to determine the rights of the parties and that the accused had not committed the offence of theft within the meaning of S. 378. 166 Ind. Cas. 490=38 Cr.L.J. 223=3 B.R. 174.

—Ss. 378 and 379—If crops from land illegally attached are removed with the consent of the judgment-debtor, the person removing the crops is not guilty under S. 379, Penal Code. A.I.R. 1935 All. 214=36 Cr.L.J. 340=1935 A.W.R. 59=57 All. 660=1935 A.L.J. 63=153 Ind. Cas. 428.

—Ss. 378 and 379—Owner reserving cattle attached under warrant—Irregularities in warrant—Jurisdiction of amin to attach if affected—Attachment of cattle not permitted by law—Effect.

Under certain circumstances an owner of property may be guilty of stealing his own property if he takes it out of the possession of another person. Where an amin in good faith and under the authority of a warrant attached certain buffaloes belonging to the accused and the latter subsequently effected reserve of the cattle in the possession of the amin.

**Held**, that an offence under S. 379, Indian Penal Code had been constituted. In such a case the mere fact that there were certain irregularities in the warrant, namely, that it did not contain particulars of the date or month, or the circumstance that under the law the cattle were not liable to be attached was immaterial.

Per *Krishna Pandalai, J.*—"Only in cases where an irregularity goes to the root of the authority of the person executing a warrant does that warrant cease to be legal. The omission of the date although an irregularity was not such as to deprive the amin or his jurisdiction to execute the process". 1930 M.W.N. 90.

—Ss. 378 and 379—Suit for possession—Suit decree—Appeal pending—Delivery of possession given to decreeholder—Judgment-debtor cutting and removing crops—Offence under S. 379 is not committed.

The landlord sued A and B for possession of a holding transferred by A (plaintiff's raiyat) to B. The suit was decreed and an appeal was filed by A. In the meantime the landlord obtained delivery of possession but A cut and removed the crops after the delivery was given and he was convicted of theft.

**Held**, that under the circumstances the accused cannot be said to have any idea of causing wrongful gain to him or wrongful loss to the decree-holder. S. 379 is always of most doubtful applicability to this class of cases in which the question of property is only in course of determination in a civil suit. 99 Ind. Cas. 104=8 P.L.T. 79=28 Cr.L.J. 72=7 A.I.Cr. R. 446=A.I.R. 1927 Pat. 130.

—Ss. 378 and 379—Accused purchasing trees at auction held by President of the Municipality to whom they belonged—Accused removing the trees before confirmation of sale by the Board—Accused is not guilty. 98 Ind. Cas. 385=7 L.R.A. Cr. 140=27 Cr.L.J. 1313 (All.).

—Ss. 378 and 379—Accused removing crops honestly believing that they were his commits no offence.

Where the complainant and the accused had fields adjoining each other and the accused removed some crops from the complainant's field under the impression that the crops were owned by him and therefore he was entitled to them.

**Held**, that the accused was not guilty of theft in removing the crops. 72 Ind. Cas. 614=4 P.L.T. 608=24 Cr. L.J. 454=A.I.R. 1924 Pat. 125.

—Ss. 378 and 379—Crops removed by accused thinking them to be his—No offence.

Where accused removed crops on land which had passed to another under a Civil Court decree against the landlord of accused, the accused thinking that crops had not passed under the decree,

**Held**, the removal of crops was not dishonest 81 Ind. Cas. 345=2 Bur. L.J. 160=25 Cr.L.J. 809=A.I.R. 1924 Rang. 72.

—Ss. 378 and 379—Where a property is attached by an officer without a warrant for attachment and the accused removed the property.

**Held**, that there was no valid attachment and that the accused could not therefore be convicted for an offence under S. 379 of the Code. 59 Ind. Cas. 411=22 Cr. L.J. 107=2 U.P.L.R. (All.) 335.

—Ss. 378 and 379—Dishonest intention.

A conviction for theft could not be had against a judgment-debtor who, under a mistake as to his right, has cut and removed paddy *bona fide* from a land which had been delivered to the complainant in execution of a suit. 18 Cr.



**—Ss. 378 and 379—Dishonest intention—Crops sown and cut down by accused—Theft—Criminal Procedure Code, S. 145.**

Where an order under S. 145, Criminal Procedure Code, was made in favour of the complainant, but as a matter of fact the crops had been sown by the accused.

**Held**, that the crops being the property of the accused, the cutting down of these crops by them could not constitute the offence of theft. 17 Cr.L.J. 75=32 Ind. Cas. 667 (All.).

**—Ss. 378 and 379—Where no conspiracy between the cartman engaged by the person removing the goods and such person is established, no dishonest intention can be imputed to the cartman who would be entitled to an acquittal.** 167 Ind. Cas. 722=19 N.L.J. 187=38 Cr.L.J. 440.

**—Ss. 378 and 379—Respectable person taking away another's cycle.**

Where the important element of criminal intention has been found by the lower Appellate Court as a fact to be completely absent, and the accused has no criminal intent in taking away another's cycle and he does not take it dishonestly within the meaning of the term as defined in the Penal Code then his taking away of the cycle does not fall within the definition of theft. 161 Ind. Cas. 268=1936 O.W.N. 258=12 Luck. 92=37 Cr.L.J. 456.

**—Ss. 378 and 379—A criminal charge of theft depends, not on the question of title but on the question of intention.** Consequently, an acquittal of a charge under S. 379, Penal Code, will be proper on a finding that the accused believed the stolen property to be theirs. A.I.R. 1933 Pat. 179=34 Cr.L.J. 407=14 P.L.T. 71=142 Ind. Cas. 624.

**—Ss. 378 and 379—Sale of movable—Part of price not paid—Vendor's notice to vendee and removal of property sold.**

A woman contracted to deliver a barge to certain person on payment of money. Some earnest money and part payment were made and the barge was brought over to the place of its delivery. The vendee failed to pay the balance. After notices to the vendee the woman took away the barge.

**Held**, that under the circumstances there was no dishonest intention in seizing the barge and no theft was committed by the woman, when she took away her barge on giving notice to the vendee. 32 Bom. L.R. 1140=129 Ind. Cas. 350=A.I.R. 1930 Bom. 488.

**—Ss. 378 and 379—Complainant undertaking to repair certain article, but not finishing it in time—Accused removing that article by force is not guilty.**

The complainant took some article belonging to the accused for repairs on promise to finish them within 6 or 7 days. Not having finished with complete repairs within the time stipulated, the accused went to his shop and took forcible possession of the article.

**Held**, that the accused was not guilty of theft as the removal of the article was not dishonest. 90 Ind. Cas. 289=53 Cal. 174=29 C.W.N. 1011=26 Cr.L.J. 1505=A.I.R. 1926 Cal. 464.

**—Ss. 378 and 379—Accused believing that the property was his and removing it from vendee of his partner—No theft is committed.**

The essence of the offence of theft is dishonestly taking of movable property out of the possession of

the vendee of accused's partner under a mistaken notion of law, believing that the property belonged to accused and that he had the right to take the goods until the balance of the money due to accused from the vendor was paid, does not amount to an offence of theft. 91 Ind. Cas. 256=52 Cal. 1015=27 Cr.L.J. 80=A.I.R. 1926 Cal. 149.

**—Ss. 378 and 379—Theft—Guilty intention absent—Offence is not committed.**

Accused, an illiterate cultivator applied for Letters of Administration with the will annexed to the estate of his deceased uncle who had made a registered Will in favour of the accused. Before Letters of Administration were granted, but at a time when the accused had no suspicion that a caveat was likely to be entered by the uncle's widow, he removed certain property which was in the possession of the widow but which formed part of the property bequeathed to the accused under the Will. Subsequently, the widow entered a caveat and charged the accused with theft.

**Held**, that the conduct of the accused did not disclose the presence of a guilty intention and, therefore, he could not be convicted of theft. 85 Ind. Cas. 940=26 Cr.L.J. 652=A.I.R. 1926 Cal. 241.

**—Ss. 378 and 379—Intention to cause wrongful loss absent—Charge under S. 379—Charge under S. 427 is not sustainable.**

Where a Magistrate came to the conclusion that no charge could be framed under S. 379, there being no intention of causing wrongful gain to one person or wrongful loss to another person.

**Held**, that a charge under S. 427 cannot be sustained. 86 Ind. Cas. 284=23 A.L.J. 21=6 L.R.A. Cr. 60=26 Cr.L.J. 748=A.I.R. 1925 All. 311.

**—Ss. 378 and 379—Removal of some bricks which had been left lying for eight years is not necessarily an offence of theft.** 84 Ind. Cas. 435=26 Cr.L.J. 291=3 Bur. L.J. 197=A.I.R. 1925 Rang. 113.

**—Ss. 378 and 379—Detaining cow for 24 hours under S. 10—Cattle Trespass Act, is not theft, or any offence.**

A person, detaining cow in his custody for less than 24 hours as he is entitled under S. 10, Cattle Trespass Act, is not guilty of offence under S. 379, intention for causing wrongful loss being absent. Where the accused kept the cow in his custody for damages done over night for the purpose of impounding unless he received compensation.

**Held**, that he was legally entitled to keep it in his own custody for 24 hours before lodging it in the pound. 14 C.W.N. 238, Foll. 68 Ind. Cas. 47=23 Cr.L.J. 511=A.I.R. 1923 Nag. 64.

**—Ss. 378 and 379—Forcible removal to realise legal dues—No theft is committed.**

It is essential for theft, as defined in S. 378, Penal Code, that the removal of the property in question must have been done with the intention to take that property dishonestly. In other words, there must be an intent to cause wrongful gain to one person or wrongful loss to another person.

A forcible removal of property with a view to realise legal dues, and not with a view to make any wrongful gain out of it or to cause any wrongful loss to the complainant, is not theft. 14 C.W.N. 936 Foll. 63 Ind. Cas. 609=V.T. 583=22 Cr.L.J. 673=A.I.R. 1921 Pat.



**—Ss. 378, 379 and 24—Dishonest intention—Tenant cutting trees—Madras Est. Land Act, S. 12.**

A tenant cutting trees on *jayati* land for which he has executed a *Kadapa* under which a landlord can claim compensation for trees cut, does not act 'dishonestly' and is not guilty of theft. 1 L.W. 528=15 Cr.L.J. 586=25 Ind. Cas. 338.

**—Ss. 378 and 379—Dishonest intention—Passenger not having ticket—Ticket examiner taking hold of passenger's umbrella as security for payment of fare—Charge of theft of umbrella not sustainable.**

The accused employed by a Steam Navigation Company to see the tickets of passengers took hold of complainant's umbrella as security for his fare when he did not produce his ticket for inspection. The passenger lodged a complaint of theft against the accused who was convicted thereon.

**Held**, that the conviction for theft was bad as the accused did not intend either to get any wrongful gain to himself by compelling payment of fare or to cause wrongful loss to the complainant who was bound to pay his fare, only his zeal in discharging his duties to his employer led him to do what possibly he was not entitled to do. 14 C.W.N. 936=11 Cr.L.J. 444=7 Ind. Cas. 257.

**—Ss. 378 and 379—Dishonest intention—Removal of property.**

Where no dishonest intention can be attributed to the accused there cannot be a conviction for theft merely because the accused had removed the property. 8 Cr.L.R. 445 (Mad.).

**—Ss. 378 and 379—Theft—Pledge—Pledgor taking possession of the thing pledged from the custody of the pledgee—Dishonest intention.**

The complainant pledged some fishing nets with his creditor, accused 1. The nets remained in possession of the debtor as security for the debt, and the creditor was at liberty to sell the goods if within three years the debt was not paid. The debt remained unsatisfied. On the expiry of three years, the accused in order to assert his right, took away the nets from the complainant's possession.

**Held**, that on these facts, accused could not be convicted of theft, as it might fairly be contended that they *bona fide* supposed that they were justified in their act. (1902) 4 Bom. L.R. 56.

**5. (c) Dishonest Intention—Presence of.**

**—Ss. 378 and 379—Illegal seizure of cattle with a view to impound is theft.**

The taking for the purposes of S. 378 must be dishonest and according to the definition of 'dishonestly' in S. 24, Penal Code, the taking may be either with the intention of causing wrongful gain to one person or wrongful loss to another. It makes no difference in the accused's guilt that the act was not intended to procure any personal benefit to himself.

Where, therefore, a person illegally seizes cattle belonging to another with a view to impound them he commits theft though he has no intention of causing wrongful gain to himself. A.I.R. 1946 Nag. 221=I.L.R. (1946) Nag. 326=47 Cr.L.J. 348=223 Ind. Cas. 123=1946 N.L.J. 198. But see A.I.R. 1943 Oudh 280 under Note.

**—Ss. 378 and 379—Owner removing cattle from cattle pound.**

A person who removes cattle from a pound where they are secured, without paying the legitimate fee has

the dishonest intention of saving himself the fee and is guilty of theft; it makes no difference whether the man who so removed is the owner himself or a stranger. A.I.R. 1931 Mad. 18=1930 M.W.N. 529=33 L.W. 205=32 Cr.L.J. 354=129 Ind. Cas. 451.

**—Ss. 378 and 379—Complainant buying fish—Accused snatching it away from his hands.**

The complainant bought some fish from a local dealer. The accused snatched the fish from the complainant's hand at the same time taking all the fishes of the local dealer. When the complainant protested, the accused, together with others, surrounded him and threatened to assault him. The local dealer was a new comer and the accused who was the leader of the market wanted to maintain monopoly in the matter of purchase from the fishermen :

**Held**, that the accused clearly infringed the provisions of S. 379 in snatching the fish away from the complainant's hands. A.I.R. 1943 Cal. 73=43 Cr.L.J. 886=202 Ind. Cas. 659.

**—Ss. 378 and 379—Accused seizing cattle of complainant for certain dues although the complainant had already paid them—Accused subsequently attempting to return animal—Accused, held guilty under S. 379.** A.I.R. 1941 Lah. 221=42 Cr. L.J. 625=43 P.L.R. 179=194 Ind. Cas. 800.

**—Ss. 378 and 379—Theft of crops.**

The real test in a case of an alleged theft of crops grown on land is as to which of the parties had grown the crops. Where the complainant is shown to have grown the crops, the accused cutting and removing the same would be guilty of theft. A.I.R. 1941 Pat. 613=22 P.L.T. 765=8 B.R. 312=43 Cr.L.J. 294=198 Ind. Cas. 68.

**—Ss. 378 and 379—Person allowed to remove a certain number of beams removing more.**

When a man is trusted by another to go to a place where some of his property is stored, and help himself to a given quantity of material, and the other, taking advantage of the confidence thus reposed in him, takes away something in addition as well, it is more than a merely technical offence. There is an abuse of confidence, and the intention with respect to the property removed in excess is obviously dishonest and a conviction for theft is proper. 167 Ind. Cas. 722=19 N.L.J. 187=38 Cr.L.J. 440.

**—Ss. 378 and 379—Creditor taking property to coerce payment.**

A creditor by taking any moveable property of the debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt commits the offence of theft as defined in S. 378. 18 All. 88 and 22 Cal. 1017 (F.B.) Foll. 32 Bom. L.R. 351=A.I.R. 1930 Bom. 167=125 Ind. Cas. 911.

**—Ss. 378 and 379—X, a Mahomedan, sacrificed a cow in the house and with the apprehension that a she-calf in his house also would be similarly sacrificed by him. Hindus gathered near his house. With the interference of the police a compromise was arrived at and X agreed that the calf should be tied in the courtyard of his neighbour, who was a Hindu. But after the calf was so tied the petitioner arrived and at his order the calf was removed elsewhere.**

**Held**, that although the calf was at the time of removal in the neighbour's courtyard, it was still in the possession of X.

**Held**, further that the facts of the case brought the petitioner within Ss. 23 and 24 and so he was



guilty under S. 379 and a sentence of 3 month's rigorous imprisonment was not excessive. 115 Ind. Cas. 895=30 Cr.L.J. 546=10 P.L.T. 483=12 A.I.Cr.R. 360=A.I.R. 1929 Pat. 429.

—Ss. 378 and 379—Rightful owner of land allowing another to cultivate land and taking crops when ready is guilty of theft.

When a person is appointed guardian of a minor's property his duty is to get into his own hands all the property belonging to the minor that he can. But if it is held against him by others it is not his duty to take forcible possession of it. He should resort to the law Courts. If he allows others to prepare the land, sow and cultivate it and then when the crops are ripe with his companions takes forcible possession, the motive in doing so is clearly dishonest and he is guilty of theft. 77 Ind. Cas. 237=25 Cr.L.J. 349=A.I.R. 1924 Nag. 311.

—Ss. 378 and 379—Where crops sown by one are reaped by another without any right, the latter commits theft. It is immaterial whether the complainant has or has not a good title to the cultivation of the field in question. 67 Ind. Cas. 498=19 A.L.J. 961=A.I.R. 1921 All. 158.

—Ss. 378 and 379—Dishonest intention—Removal of trees by tenant—Custom—Onus of proof.

The tenants of a village, removed certain trees, the property of the Zamindar, which had been uprooted by a storm and alleged that, by a custom in the village, they had a right to do so and produced certain extracts from the *wajib-ul-arz*.

Held, that the extracts from the *wajib-ul-arz* did not evidence a custom authorising the removal of fallen trees without the consent of the landlord. The accused had failed to prove that the removal was not dishonest, and as the removal caused wrongful loss to the landlord and wrongful gain to the accused, the case fell within the illustration (a) to S. 378, Indian Penal Code. 42 All. 53=17 A.L.J. 974=20 Cr.L.J. 710=1 U.P.L.R. (H.C.) 133=52 Ind. Cas. 1790.

—Ss. 378 and 379—Dishonest intention—Theft—Tenant's right to cut standing crop—Ejectment—Tenant not paid price of crop.

Where a tenant was ejected from the holding under the Agra Tenancy Act and formal possession was delivered to the Zamindar but as he failed to tender the price of the standing crops, the tenant cut and removed them.

Held, that the tenant was not guilty of theft. 11 A.L.J. 270=13 Cr.L.J. 298=14 Ind. Cas. 762.

## 6. Evidence and Proof.

—Ss. 378, 379 and 147—Accused charged with rioting and theft.

In the case of theft with rioting, the evidence adduced by the prosecution of a general nature that the accused were present on the scene of the occurrence, is not enough, and unless something specific is mentioned in a rioting case, specially when the accused have also been convicted under S. 379, it is not safe to convict the accused even under S. 147. A.I.R. 1941 Pat. 613=22 P.L.T. 765=8 B.R. 312=43 Cr.L.J. 294=198 Ind. Cas. 68.

—Ss. 378 and 379—Accused charged with theft—Only evidence against accused being of person receiving stolen property—Judge, while charging jury, not pointing out unsafety of relying on such evidence with sufficient force—It amounts to misdirection. A.I.R. 1938 Mad. 464=1938 M.W.N. 96=47 L.W.

158=(1938) 1 M.L.J. 234=39 Cr.L.J. 580=175 Ind. Cas. 416.

—Ss. 378 and 379—The mere fact that an accused person points out the place in which the stolen property is concealed does not give rise to any presumption under S. 114, Evidence Act, or justify his conviction for the offence of receiving stolen property, still less for the offence of theft. A.I.R. 1938 Bom. 463=Bom. L.R. 927=40 Cr.L.J. 48=178 Ind. Cas. 330.

—Ss. 378 and 379—When the only incriminating circumstance against an accused is that his information led to the discovery of stolen property from places not belonging to him, he cannot be convicted either of being a thief or a receiver of stolen property. The fact that the accused had a previous conviction 20 years back is no ground to hold him guilty. A.I.R. 1934 Nag. 54=16 N.L.J. 246=35 Cr.L.J. 581=147 Ind. Cas. 1188.

—Ss. 378 and 379—As the place where articles lay buried under ground did not belong to the appellant nor was in his possession, the only conclusion that could be drawn from his having shown the place is that he knew that the ornaments were there and not that he had stolen the same or had actually participated in the act of concealing them there. 84 Ind. Cas. 321=5 L.L.J. 325=26 Cr.L.J. 257=A.I.R. 1923 Lah. 438.

—Ss. 378 and 379—The mere pointing out by an accused person of the place where stolen property is concealed which place is not in his possession, is not of itself sufficient evidence to maintain a conviction for theft or for dishonestly receiving stolen property. 73 Ind. Cas. 331=5 L.L.J. 87=A.I.R. 1921 Lah. 385.

—Ss. 378 and 379—Person found in possession of stolen property shortly after theft—Evidence Act, S. 114, Illus. (a).

Where a person is found in possession of stolen property shortly after it was stolen, the Court may presume that he is the thief under S. 114, Illus. (a), Evidence Act. The presumption, however, is not to be made invariably. The circumstances of each case have to be considered for arriving at the conclusion as to whether the person found in possession of stolen property soon after the theft should or should not be considered to be the thief. The mere fact that there was no direct evidence establishing that the accused had stolen the property will not necessarily warrant the expunging of the charge without going into the evidence. A.I.R. 1934 All. 455=35 Cr.L.J. 1092=150 Ind. Cas. 558.

—Ss. 378 and 379—Evidence and proof.

Accused were seen in the company of deceased on a previous night. Next morning accused were found to be in possession of clothes and other articles belonging to deceased.

Held, that in absence of direct evidence, circumstances, though raising a strong suspicion against accused are not sufficient to convict them either under S. 302, or under S. 392, but they are guilty either under S. 411 or S. 379. 112 Ind. Cas. 212=10 L.L.J. 525=29 Cr.L.J. 996=A.I.R. 1929 Lah. 61.

—Ss. 378 and 379—Recent and exclusive possession.

In order to raise legitimately the presumption of theft, the possession of stolen property should be exclusive as well as recent. 111 Ind. Cas. 732=23 S.L.R. 5=29 Cr.L.J. 924=A.I.R. 1929 Sind 9.



—**Ss. 378 and 379—Accused not in actual possession—Actual possession of his wife or servant or effective control must be proved.**

If the accused is not in manual possession of the stolen article, there must be evidence to prove that the stolen property was found either in the manual possession of the wife, clerk or servant of the accused, or that it was found in a place and under circumstances so as to justify the inference that the accused knew of its existence at that place and that the same was under his effective control. 111 Ind. Cas. 732=23 S.L.R. 5=29 Cr.L.J. 924=A.I.R. 1929 Sind 9.

—**Ss. 378 and 379—Conviction against more persons than one on the ground of joint possession of stolen property can be secured only on proving actual possession of each or constructive possession with intention of joint exclusive use.**

The secure conviction against more persons than one on the ground that all such persons were in joint possession of the stolen property, it must be proved that the stolen property was either in the physical possession of each one of the accused or else that it was in the possession, physical or constructive, of one or more of them on behalf of and to the knowledge of the other accused persons and that each one of them intended to possess it for their joint use and to the exclusion of persons other than themselves.

Applicants with two other porters and a constable were travelling in a train. At the station the van was searched. A jar containing ghee was found covered with bedding and clothing said to belong to applicants and other porters. On this evidence, the applicants were convicted of theft.

**Held**, that possession of the jar could not be attributed to any of the applicants, individually or jointly. The conviction was, therefore, bad. 111 Ind. Cas. 732=23 S.L.R. 5=29 Cr.L.J. 924=A.I.R. 1929 Sind 9.

—**Ss. 378 and 379—Possession of key of room from which property was stolen.**

Where the accused is charged with theft of property from a store house, the mere possession of a false key said to have been used in opening the lock of the room cannot raise a presumption that the accused is the thief or receiver of stolen property so as to throw the onus upon him to show how he came to be in possession of such stolen property. A.I.R. 1931 Sind 154=33 Cr.L.J. 106=135 Ind. Cas. 267.

—**Ss. 378, 379, 411—Possession of stolen property—Presumption of guilty knowledge—Property belonging to two different owners—Evidence Act, S. 114, Illus. (a).**

Possession after recent theft raises ordinarily a presumption either that the person in possession is the thief, or had dishonestly received the property knowing it to be stolen. Possession of the property stolen from two different owners is a circumstance which under S. 114, Ill. (a) of the Evidence Act must be borne in mind in estimating the probability of guilty knowledge in the accused. (1906) 9 Bom. L.R. 27=5 Cr.L.J. 63.

—**Ss. 378 and 379—Statement of accused.**

Where, in his statement, the accused, who is charged under S. 379 does not admit, from the very beginning, his dishonest intention and the record of the statement

is not a complete record of all that he has said, the statement should not be raised upon as a confession either in form or in substance. A.I.R. 1934 Pat. 651=15 P.L.T. 586=1 B.R. 237=36 Cr.L.J. 447=153 Ind. Cas. 922.

—**Ss. 378 and 379—Where, in a charge under S. 379, for theft of a crop found to have been grown by R on land included in his *patti* of which he was in possession and the accused was convicted, but on appeal, the Appellate Court issued his acquittal merely on the ground that there could be no conviction when the evidence did not conclusively prove that the plot in question was in the *patti* of R :**

**Held**, that the Appellate Court committed an error of law in basing his acquittal merely on that ground and although there would be difficulty in determining exactly who was in possession of the land, that fact did not excuse the Appellate Court from examining the evidence on the point and that the acquittal should be set aside. A.I.R. 1934 Pat. 302=35 Cr.L.J. 537=147 Ind. Cas. 1017.

—**Ss. 378 and 379—Accused cutting Jhalas in area not included in his right—Absence of right has to be proved by prosecution.**

An area of 1,100 bighas was attached and the accused cut jhalas within that area. Prior to the date of cutting the accused obtained delivery of possession of a portion of the attached area extending to about 345 bighas. The Trial Court below assumed, that, unless the petitioners proved that they cut from within the area of 345 bighas of which they got possession they must be considered to have committed theft and they were convicted of offences under Ss. 379 and 143, Penal Code.

**Held**, that it was for the prosecution to establish all the ingredients of the offence punishable under S. 379. The Crown ought to have shown that the petitioners were not cutting within that area of which they had obtained delivery of possession. 107 Ind. Cas. 529=29 Cr.L.J. 259=9 A.I.Cr.R. 543=A.I.R. 1928 Pat. 249.

—**Ss. 378 and 379—In a prosecution under S. 379, for stealing paddy from a plot, the accused relied on a *bona fide* claim of right. The accused were declared by the High Court to be in possession of two plots in proceedings between the same parties under S. 145, Criminal Procedure Code. The complainants were the lessees of six plots of a person from whom the two plots above referred to were bought by the accused.**

**Held**, that it was incumbent on the prosecution to prove that the plot in question was not comprised in the two plots of which the accused were declared to be in possession by the High Court and that in the absence of such evidence conviction cannot be sustained. 103 Ind. Cas. 840=28 Cr.L.J. 760=A.I.R. 1927 Pat. 385.

—**Ss. 378 and 379—Identity of property and ownership of complainant must be proved.** 81 Ind. Cas. 106=1 Rang. 520=25 Cr.L.J. 618=A.I.R. 1924 Rang. 91.

—**Ss. 378 and 379—Identification doubtful—Liability of accused.**

When the accused was found in possession of two freshly flayed skins of a goat and kid within 24 hours of the theft and was charged under S. 379, Indian Penal Code.



**Held**, (*Spencer, J., dissenting*) that it was absolutely necessary for the prosecution to establish that the skins were those of the goats stolen and that the accused should be given the benefit of doubt when the identification was suspicious. 16 Cr.L.J. 440=29 Ind. Cas. 72 (Mad.).

### 7. Interpretation—"Taking".

—S. 378—**Taking, meaning of—Cutting string of hass (a neck ornament)—And forcing its ends whether amounts to moving.**

The act of cutting the string of a *hass* (a neck ornament), and forcing the ends apart constitute a sufficient moving of the *hass* so as to bring the act under S. 378. 29 P.R. 1917 Cr.=18 Cr.L.J. 875=37 P.W.R. 1917 Cr.=41 Ind. Cas. 987.

—S. 378—**Taking, meaning of.**

(*Per Sundara Aiyar, J.*)—"Taking" means 'reducing to possession'. (*Per Benson and Miler, JJ.*) The 'taking' means should be 'out of the possession of the owner' rather than reducing to the thief's own possession. 11 M.L.T. 162=(1912) M.W.N. 119=13 Cr.L.J. 131=13 Ind. Cas. 819.

—S. 378—**Taking permanently.**

Under the Indian Law theft may be committed without an intention to deprive the owner of the property permanently. 34 All. 89=8 A.L.J. 1237=12 Cr.L.J. 580=12 Ind. Cas. 844.

### 8. Joint ownership.

—Ss. 378 and 379—A co-sharer in possession of a joint property has the undoubted right to remove movable property in his possession and also in the possession of other co-sharers from one spot of the joint land to another spot of the same land.

When certain persons, purchasing a share in the land and structures jointly owned by some co-sharers in execution of a decree against one of them took out possession through Court and utilized some of the old materials of huts belonging to the co-sharers which had been blown away and built a hut on the same land:

**Held**, that they were not guilty under S. 379 there being no dishonesty on their part or any wrongful loss to other co-sharers. Nor could they be convicted under S. 447 as being part owners of the land. They entered upon it for the purpose of exercising their rights of ownership. A.I.R. 1936 Cal. 261=37 Cr.L.J. 747=162 Ind. Cas. 660.

—Ss. 378 and 379—**Joint ownership.**

Jointly owned animal, in possession of one co-owner, taken away by the other—Latter is not guilty unless he acts dishonestly. 103 Ind. Cas. 847=28 Cr.L.J. 767=A.I.R. 1927 Lah. 650.

—Ss. 378 and 379—*Per Fatteett, J.*—It is not necessary that there should be 'exclusive possession.' There can be theft by a person who is in joint possession of the stolen property. 94 Ind. Cas. 881=27 Bom. L.R. 1391=27 C.L.J. 689=A.I.R. 1926 Bom. 122.

—Ss. 378 and 379—**Joint cultivation—Removal by one joint cultivator.**

A joint cultivator removing crops jointly cultivated cannot be convicted of theft, as he must be deemed to have been in possession of the property. 10 A.L.J. 527=14 Cr.L.J. 3=18 Ind. Cas. 146.

### 9. Master and servant.

—Ss. 378 and 379—Dispute as to property—Servant of one party removing property *bona fide* believing that it belonged to his master—Servant cannot be convicted of theft. A.I.R. 1943 Oudh 444=19 Luck. 399=1943 O.W.N. 363=1943 A.W.R. C.C. 97=45 Cr.L.J. 386=211 Ind. Cas. 400.

—Ss. 379, 23 and 24—Servant believing property to be his master's taking it away.

The Criminal Court should not convict of theft any person who asserts a claim of right unless it is in a position to say that that claim is a mere pretence.

A person cannot be said to act dishonestly that is, with an intention of causing wrongful gain to himself or his master or wrongful loss to another, when he takes movable property which he believes to belong to himself or his master. In short, if the person taking any movable property does it under a *bona fide* claim of right, then he cannot be found guilty of the offence of theft unless the claim to a mere pretence.

A servant may well be in a stronger position than his master because a servant might in certain circumstances, honestly believe that his master was the owner of certain property, whereas the master might well know that he was not. A servant should not be held guilty of the offence of theft when what he did was at his master's bidding unless it should have been shown that he participated in his master's knowledge of the dishonest nature of the acts. A.I.R. 1940 Pat. 588, 592=6 B.R. 550=41 Cr.L.J. 509=6 C.L.T. 73=187 Ind. Cas. 825.

—Ss. 378 and 379—**Hire purchase—Employees acting on *bona fide* mistake.**

Where, under an agreement of hire-purchase the employees of a company were justified in taking the parts of the machine supplied by them if instalments were not paid, and acting on a *bona fide* impression that instalments had not been paid, they removed the parts:

**Held**, that at most the employees acted on a *bona fide* mistake of fact and that there was no dishonest intention such as is required for a case of theft. 148 Ind. Cas. 892=58 C.L.J. 434=35 Cr.L.J. 761.

—Ss. 378 and 379—**Possession, when passes servant in possession on behalf of master, whether can give consent with regard to that property.**

Where a motor lorry is given by a company to a person on hire-purchase system under an agreement entitling the company to retake possession of the lorry in case of default of payment of hire by the purchaser, the company or its agents are not entitled, without the consent of the purchaser himself, to retake the possession of the lorry by force or by its removal from the hands of his servants who have no express or implied authority to give any consent on behalf of the purchaser. If the company or its agents do so, they are guilty of an offence under S. 378, Penal Code. The question whether the ownership had or had not passed to the purchaser is wholly immaterial, as S. 378, Penal Code, deals with possession and not ownership. The legal possession of the lorry is vested in the purchaser and the company or its agents are not entitled to recover possession of the lorry, even though default in payment of any instalments had taken place. It is not open to them to re-take possession of the lorry by taking refuge under the clause in the agreement authorising them to re-take possession. The possession of



the servants of the purchaser is the possession of their master and they have no power to give any consent on behalf of their master. A.I.R. 1942 Oudh 318=1942 O.W.N. 161=43 Cr.L.J. 578=1942 A.W.R.C.C. 112=17 Luck. 663=199 Ind. Cas. 757.

—Ss. 378 and 379—Servant taking away master's goods in lieu of wages without his consent—Theft is committed.

The accused was employed by the complainant on wages. His wages for several months were due from the complainant and so he took away 15 Baras worth about Rs. 16 belonging to the complainant and refused to give them back until his wages had been paid.

**Held**, that technically the offence of theft was committed. 102 Ind. Cas. 339=8 L.R.A. Cr. 77=7 A.I.Cr.R. 503=28 Cr.L.J. 531=A.I.R. 1927 All. 470.

—Ss. 378 and 379—Servant knowing his master had no right to complainant's goods and assisting in removing, commits theft.

Where accused, a servant of co-accused knew perfectly well that his master was removing the goods of complainant without even a pretence of right and yet he assisted him in doing so.

**Held**, that the servant clearly acted dishonestly and was guilty of theft. 90 Ind. Cas. 439=7 P.L.T. 272=26 Cr.L.J. 1559=A.I.R. 1926 Pat. 36.

—Ss. 378 and 379—Servants following their employer's orders.

Where the servants of the *daristimrardar* cut tree without the permission of the *istimrardar* in spite of the fact that the *istimrardar* had pointed out that they could not do it without his permission.

**Held**, that to follow the orders of the *daristimrardar* in such circumstances was to take the risk of being visited with the consequences and that in cutting the trees, these men had the guilty knowledge. A.I.R. 1934 Pat. 491=1 B.R. 60=36 Cr.L.J. 120=152 Ind. Cas. 477.

—Ss. 378 and 379—Master and servant—Removal of crop by order—Offence.

Where a crop was dishonestly cut out and removed, by the order of the accused, he himself being present, the accused is guilty of an offence under S. 397, Indian Penal Code. 19 Cr.L.J. 116=43 Ind. Cas. 404 (Pat.).

—Ss. 378 and 379—Master and servant.

A person plucking jack fruits in obedience to the orders of his employer from the trees standing on a plot, the right to share in the proceeds of which is desired to be asserted through the agent, is not guilty of theft, as no criminal dishonesty is proved. 18 Cr.L.J. 286=38 Ind. Cas. 318 (Cal.).

—Ss. 378 and 379—Master and servant—Servant obeying master.

A servant acting under the orders of his master cannot be convicted of theft in the absence of proof of his knowledge of his master's dishonest intentions. 15 C.W.N. 414=12 Cr.L.J. 7=9 Ind. Cas. 46.

—Ss. 378 and 379—Servant, act committed by.

The Criminal Courts should not convict of theft any person who asserts a claim of right unless it is

in a position to say that the claim is a mere pretence. A servant should not be held guilty of the offence of theft when what he did was at his master's bidding, unless it should have been shown by evidence that he participated in his master's knowledge of the dishonest nature of the acts. There must be some evidence before the Court from which such knowledge on the part of the servant can be inferred. (1905) 9 C.W.N. 974=2 Cr.L.J. 836.

#### 10. Possession.

—Ss. 378 and 379—Produce in possession of tenant before division with landlord—Tenant, if can commit theft in respect thereof. See PUNJAB TENANCY ACT, Ss. 12 (4) AND 17. A.I.R. 1950 Lah. 42=51 Cr.L.J. 454.

—Ss. 378 and 379—The offence of theft is an offence against possession and when the tenant who is in possession cuts down a tree standing on the land and removes the wood thereof, no offence of theft is committed. A.I.R. 1935 Pat. 472=16 P.L.T. 645=2 B.R. 77=37 Cr.L.J. 91 (1)=159 Ind. Cas. 346.

—Ss. 378 and 379—Landlord—Right to complain.

A landlord has no right to prosecute in respect of a theft of trees in the possession of his tenant. 1930 M.W.N. 914=131 Ind. Cas. 493=32 Cr.L.J. 757=A.I.R. 1931 Mad. 241.

—Ss. 378 and 379, Expln. I—Land in the possession of tenant—Trees belonging to landlord—Removal of trees by tenant.

Under a *kabuliyat* it was provided that if the tenant would cut any trees he would pay to the landlord compensation at a certain rate. It was found that the tenant *mala fide* cut some trees in order to injure the landlord.

**Held**, that although the tenant was in the possession of the land he committed theft by severing the trees from the ground, as they were in the possession of the landlord. 27 C.L.J. 228=19 Cr.L.J. 334=44 Ind. Cas. 350.

—Ss. 378 and 379—Theft by landlord of crop on the land in possession of tenant.

The tenant is entitled to exclusive possession till division of crop between himself and the landlord and a charge of theft against the landlord is maintainable. 1 Pat. L.J. 230=17 Cr.L.J. 473=2 Pat. L.W. 403=20 C.W.N. 1212=36 Ind. Cas. 153.

—Ss. 378 and 379—Trees in possession of tenants—Landlord jointly interested—Removal by tenant—Theft.

Removal of trees by tenant when in his possession is not theft though the landlord is jointly interested in them. (1914) M.W.N. 483=15 Cr.L.J. 440=241 Ind. Cas. 176.

—Ss. 378 and 379—Removal of crops by tenant.

The removal by tenant of heaps of grain in his possession and control, is not a theft unless he actually delivers to the landlord only his share of the grain and not the whole. (1914) M.W.N. 106=1 L.W. 178=15 Cr.L.J. 186=22 Ind. Cas. 762.



—Ss. 378 and 424—Zemindar and ryot—Zemindar entitled to share in crops—Removal by ryot without payment to Zemindar—Dishonest intention—Share in property before delivery.

A ryot in a Zemindary-holding on a Varam tenure taking away the crops reaped by him without paying the Zemindar's share is not guilty of theft, as he does not take away anything out of the possession of the Zemindar. But if the ryot remove the crops dishonestly or fraudulently i.e., with a view to defeat the Zemindar's right to be paid a share in the crops, the ryot is guilty of an offence under S. 424, *Quacre*—Whether a Zemindar acquires property in the share due to him before delivery. (1902) 13 M.L.J. 123=26 M. 481 (F.B.).

—Ss. 378 and 379—Land attached under S. 88, Criminal Procedure Code—Person removing crop.

Where land is attached under S. 88, Criminal Procedure Code, and actual possession is taken by posting a constable on the spot, a person removing standing crop from such land is guilty under S. 379, Penal Code. A.I.R. 1940 Cal. 163=I.L.R. (1939) 2 Cal. 419=41 Cr. L.J. 396=187 Ind. Cas. 125.

—Ss. 378 and 379—Where a mortgagee who is in possession of trees under the terms of mortgage-deed without having right to cut and appropriate them, cuts and appropriates the trees, he does not commit theft. A.I.R. 1940 Pat. 701=6 B.R. 854=41 Cr.L.J. 795=189 Ind. Cas. 737.

—Ss. 378 and 379—Cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown, and the taking of such cattle is theft and not criminal misappropriation. A.I.R. 1938 Rang. 138=1938 Rang. L.R. 63=39 Cr.L.J. 607=175 Ind. Cas. 515. See also 4 Bom. L.R. 626.

—Ss. 378 and 379—Land in possession of complainant—Crops grown by him—Delivery of symbolical possession to purchaser at sale against third party—Whether defence to theft charged.

Delivery of symbolical possession is only effective against the judgment-debtor. It is of no effect as against a third person and his possession is not disturbed or affected in the least by delivery of such possession to a purchaser at a court sale. By the delivery of symbolical possession, he is not dispossessed at all and unless dispossessed physically, no proceedings under O. 21, R. 100, Civil Procedure Code, would be maintainable at his instance.

Where, therefore, the complainant was found to have been in possession and to have grown crops, the fact that symbolical possession was delivered to a purchaser in an execution sale against a third party alleged to be the owner of the land is not proof that the possession of the crops had been transferred to the purchaser. It is no defence to a charge of theft of the crops. A mere claim that the property had passed to him is not enough. (1936) 165 Ind. Cas. 154=39 C.W.N. 1306=37 Cr.L.J. 1098.

—Ss. 378 and 379—Attached goods—Removal—Goods not in physical possession.

Actual touching or handling of articles is not necessary in order to constitute seizure for distraint. Physical contact is not necessary to complete physical

possession which depends on the physical possibility of the possessor dealing with the thing exclusively. 43 Bom. 550=21 Bom. L.R. 251=20 Cr.L.J. 391=50 Ind. Cas. 999.

—Ss. 378 and 379—Trespasser growing paddy—Possession given to complainant under decree—Subsequent removal of paddy.

The accused having been a trespasser on the land at the time the paddy was grown he had no right to go upon the land after the complainant had obtained possession under a decree of Court and removed the paddy. Consequently when the paddy was cut, accused had no right to remove it and there was no *bona fide* dispute. The accused was therefore guilty of theft. 28 C.L.J. 120=20 Cr.L.J. 38=23 C.W.N. 385=48 Ind. Cas. 678.

—Ss. 378 and 379—Theft—Railway godown.

Where a carter removed from the godown of a railway company a bag filled with pilferings, from a number of bags consigned to others, the bag being in possession of the railway as bailees, taking it out of the godown amounted to theft. 3 Pat. L.J. 354=19 Cr.L.J. 884=47 Ind. Cas. 80.

—Ss. 378 and 379—Dishonest intention—Theft of crop—Actual possession.

Before convicting a man of theft of crop of some and, it is necessary to find out who was in actual possession on that date. Mere order for delivery possession is not conclusive. 17 Cr.L.J. 81=32 Ind. Cas. 673 (Mad.).

—Ss. 378 and 379—Diverting water lowering the door of sluice—If amounts to theft.

A person who diverts more water by lowering sluice in a Government channel without the permission of the officers of Government is guilty of theft of water because water is in the possession of the Government which has taken elaborate steps and employed a large establishment to control the use of water in rivers and channels. A mere intention to take is sufficient and no actual taking is necessary. 11 M.L.T. 162=(1912) M.W.N. 119=13 Cr.L.J. 131=13 Ind. Cas. 819.

## II. Sentence.

—Ss. 379, 75 and 73—Sentence in case of simple theft—Previous convictions—Effect of—Direction for solitary confinement—When to be made.

Although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstance in which it was committed in assessing the punishment and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case. In the case of a simple theft without any aggravating circumstances a sentence of rigorous imprisonment for one year would more than meet the ends of justice even though the accused might have been convicted on several prior occasions under S. 379, Indian Penal Code.

A sentence of solitary confinement though legal must be awarded, if ever, only in the most exceptional cases of unparalleled atrocity or brutality. I.L.R. (1948) Mad. 359=60 L.W. 333=1947 M.W.N. 609=A.I.R. 1947 Mad. 386 (1)=(1947) 1 M.L.J. 336.



— **Ss. 379 and 75—Conviction under—Absence of any aggravating circumstances—Direction for solitary confinement—If justified.** See PENAL CODE, Ss. 73, 379 AND 75. (1947) 1 M.L.J. 410=A.I.R. 1947 Mad. 381 (1).

— **S. 379—Railway employee found guilty of stealing sleeper placed on railwayline—Sentence of imprisonment till rising of Court, held grossly inadequate—Sentence of six months' rigorous imprisonment, held proper.** A.I.R. 1941 Lah. 312=43 P.L.R. 420=42 Cr.L.J. 823=196 Ind. Cas. 230.

— **S. 379—Cattle theft.**

Offences of cattle theft are particularly mean and despicable offences in a community where so much depends upon cattle. They are inspired by no other motive than the ordinary motive of gain which, in many other cases, prompts a thief to steal, and it must be made plain to young men who steal cattle that if they are not going to prison, they will have at least to pay a heavy fine. The fine must be such as to make it clear that cattle-lifting is not profitable. A.I.R. 1939 Sind 33 = I.L.R. (1940) Kar. 88=41 Cr.L.J. 187=185 Ind. Cas. 428.

— **S. 379—Where, for stealing a cow worth about Rs. 50, the offender was sentenced to six years' rigorous imprisonment on the ground that the accused had been previously sentenced to five years' rigorous imprisonment :**

**Held,** that the sentence was far too severe. A.I.R. 1937 Mad. 231=44 L.W. 558=71 M.L.J. 536=1936 M.W.N. 985=37 Cr.L.J. 1150=59 M. 995=165 Ind. Cas. 387.

— **S. 379—Where cattle-stealing is very rife in a particular locality, a severe sentence should be passed.** 103 Ind. Cas. 107=28 Cr.L.J. 651=A.I.R. 1927 Lah. 393.

— **S. 79—Cattle theft in Sind—Deterrent punishment is necessary—Summary trial improper.**

In Sind, where cattle-thieving is so prevalent and the offences of cattle theft so often go unpunished, it is necessary that deterrent sentences should be imposed, and a Court which decides to try such a case summarily is not exercising its discretion in a proper manner. 105 Ind. Cas. 671=28 Cr.L.J. 959=9 A.I.R. 153=A.I.R. 1927 Sind 257.

— **Ss. 379, 454 and 457—When the offences charged are theft and house-breaking, if the Magistrate gives merely a nominal sentence of imprisonment till the rising of the Court, then, although he is complying with the letter of the law, he is, in fact, treating the accused more leniently than if he had applied S. 562 (1), Criminal Procedure Code. But theft and house-breaking are offences for which separate punishments can be given. If the accused is convicted under S. 379, theft, or S. 380, theft in a building, he may, in a proper case, be released on probation of good conduct. If he is convicted of house-breaking with intent to commit theft (Ss. 454 and 457), a sentence of imprisonment is obligatory. When therefore, the accused is convicted under both these sections and the Magistrate considers that it is not desirable to inflict a substantial sentence of imprisonment, his proper course is to direct the accused to execute a bond under S. 562 (1) for the offence of theft and to sentence him to imprisonment until the rising of the Court for the offence of house-breaking.** A.I.R. 1938 Bom. 463=40 Bom. L.R. 927=40 Cr.L.J. 48=178 Ind. Cas. 330.

— **S. 379—Theft of articles worth Rs. 15.**

Where the property removed in excess over that allowed to be removed was only worth Rs. 15, a fine of Rs. 100 was very heavy and should be reduced. (1937) 167 Ind. Cas. 722=38 Cr.L.J. 440=10 N.L.J. 187.

— **S. 379—Deliberate theft of motor wheels.**

In the case of three deliberate thefts of motor wheels, the mere fact that the thief is a first offender is not a sufficient reason for imposing a sentence of fine only especially when his crime, if undetected, might well have caused considerable financial profit to him. In such a case, a substantive term of imprisonment should be imposed. A.I.R. 1936 Pesh. 170=37 Cr.L.J. 1029=164 Ind. Cas. 822..

— **S. 379—Stealing of property belonging to another to bring pressure to restore other property stolen by him.**

Nobody has a right to steal the property of another in order to bring pressure to restore his property stolen by him :

**Held,** on facts that although the offence was not heinous, it was more than a purely technical offence and that a sentence of three months would be suitable. A.I.R. 1935 Lah. 769=37 Cr.L.J. 230 (1)=160 Ind. Cas. 118.

— **S. 379—Theft of article worth Rs. 8 only—Accused not a previous convict—Sentence of 2 years' imprisonment should be reduced to 6 months.** 1934 M.W.N. 1000.

— **S. 379—The mere fact that the thing stolen is not of itself of any value does not make the offence of no importance so as not to be punished at all.** 83 Ind. Cas. 893=17 S.L.R. 260=26 Cr.L.J. 189=A.I.R. 1925 Sind 21.

— **S. 379—Punishment for theft—Theft from Railway train—Previous conviction—Binding for good behaviour.**

When an accused has committed the offence of theft from a Railway train, the sentence should be of a deterrent nature, especially, where the accused had already been convicted of theft and had been repeatedly bound over for good behaviour. 14 Bom. L.R. 504=13 Cr.L.J. 531=15 Ind. Cas. 803.

— **Ss. 379 and 76—Punishment for theft—Rs. 3 stolen.**

A was found guilty of theft of property with only Rs. 3, but on account of his old convictions was transported for seven years.

**Held,** that the sentence was altogether disproportionate and was reduced to two years rigorous imprisonment. 4 Bur.L.T. 68=12 Cr.L.J. 243=10 Ind. Cas. 772.

## 12. Subject of theft.

— **Ss. 378 and 379—Fish in tidal and navigable river—Lessee of fishery from Government in river—Rights of—Catching fish in such river—If dishonest removal from possession of lessee—Offence—Conviction—Sustainability.**

The accused caught fish in a tidal and navigable river without taking the permission of the complainant who was a licensee of the fishery from the Government, and was convicted and sentenced for theft under S. 379, Indian Penal Code.

**Held,** Though fish in an enclosed space or in a tank closed on all sides might be the property of the owner



of the tank, in a tidal and navigable river, it cannot be said that they are property (of any one) until they are caught. The test is whether the fish are confined within a limited space. In a tidal and navigable river the fish can always escape and go wherever they like; they can always come from and go into the sea; they are in a state of *ferae naturae*, i.e., in a state of nature. The licensee or lessee of the fishery from the Government has nothing more than a right to catch fish in a particular area. The act of the accused in catching fish might amount to an act of trespass or an invasion of the right of the licensee, but it is not criminal trespass and it does not amount to the offence of theft, as there is no dishonest removal from the possession of an owner; the conviction could not therefore be sustained. I.L.R. (1949) Cut. 740=51 Cr.L.J. 885=A.I.R. 1950 Orissa 106.

#### —Ss. 378 and 379—Fish in pond.

As long as water flows in and out of the pond, thereby enabling fish to enter and leave it, the fish are free and in a state of nature; and so no more belong to the owner of the pond than a bird that settles on a tree in a person's garden belongs to that person; but when once the water has fallen to such a level that fish cannot leave it, then they are trapped and consequently, in the possession of the owner of the pond. That being so, any person who takes fish from that pond without the owner's consent with intention to cause him loss, necessarily commits theft. A.I.R. 1943 Mad. 34=55 L.W. 696=(1942) 2 M.L.J. 556=1942 M.W.N. 728 (1)=44 Cr.L.J. 173=204 Ind. Cas. 267.

#### —Ss. 378 and 379—Fish getting into and out of private fishery into river.

The accused were charged with having committed theft of fish from a tank. It was found that they had been in possession of the plot and of the tank for several years and had been selling fish to various persons. It was also in the evidence that this tank was connected with river and that the fish and water came from the river to this tank and vice versa:

**Held**, that the fish were *ferae naturae* and not in "the possession of the complainant." Where fish would get into or out of a private fishery, taking away fish from such a fishery did not constitute theft. The present case was still stronger inasmuch as the land in which the tank was situated was in tenancy and possession of the accused. A.I.R. 1939 Oudh 14=1938 O.W.N. 1096=1938 A.W.R. 100=14 Luck. 322=40 Cr.L.J. 22=178 Ind. Cas. 256.

#### —Ss. 378 and 379—Taking of fish from running stream.

Ownership of *talhar* right in running stream does not give such possession of the fish in it as to make the taking away of the fish theft within the meaning of S. 378 and no theft can be committed in respect of such fish. A.I.R. 1936 Pat. 152=17 P.L.T. 189=2 B.R. 333 (1)=37 Cr.L.J. 452=161 Ind. Cas. 477.

#### —Ss. 378 and 379—Fish able to go in or out of private fishery.

Where the fish are able to go in or out of a private fishery, the act of fishing, though followed by removal of the fish, does not amount to theft. A.I.R. 1931 Cal. 358=35 C.W.N. 455=32 Cr.L.J. 572=130 Ind. Cas. 503.

#### —Ss. 378 and 379—Fish in pond.

Fish confined in a pond from where they cannot escape, but can be caught by baling out the water, can be the subject of theft. (1914) M.W.N. 168.

Foll. 105 Ind. Cas. 826=51 Mad. 333=1 M.Cr.C. 185=9 A.I.Cr.R. 216=28 Cr.L.J. 1002=1927 M.W.N. 788=26 M.L.W. 651=39 M.L.T. 588=A.I.R. 1928 Mad. 20=53 M.L.J. 759.

#### —S. 379—Fish in enclosed tank.

The fish in a private enclosed tank the sluice of which remains closed so that the fish cannot escape are in the possession of the owner of the tank, and are liable to become the subject of theft. (1914) M.W.N. 168=15 Cr.L.J. 77=22 Ind. Cas. 429.

#### —S. 379—Removal of fish from irrigation tank—If amounts to offence.

Removal of fish from an irrigation tank will amount to an offence if the water is so low that fish could not escape. 36 Mad. 472=11 M.L.T. 23=(1912) M.W.N. 42=22 M.L.J. 184=13 Cr.L.J. 38=13 Ind. Cas. 278.

#### —S. 378—Fish in open water—Not capable of theft.

Fish in open water are *ferae naturae* and so not capable of possession and cannot form the subject of theft. 5 S.L.R. 122=13 Cr.L.J. 22=13 Ind. Cas. 214.

#### —Ss. 378 and 379—Chanks—Subject of theft—Ferae naturae—Property in Chank beds—Palk's Bay—Gulf of Mannar.

Palk's Bay being an arm of the sea land-locked by His Majesty's dominions and the islands in it also forming part of his territories is not to be regarded as an open sea outside the territorial jurisdiction of His Majesty, but is an integral part of His Majesty's dominions. Chanks are not fish. They are not *ferae naturae* but are *dominae naturae* and must be placed in the same category as oysters so as to be the subject of theft. The Rajah of Ramnad has the monopoly of taking chanks in Palk's Bay, and he or the person claiming under him must in law be regarded as being in possession of the chank-bed *propter impotentiam*. A person taking chanks out of the chank-bed in the possession of the Raja removes movable property out of the possession of the Raja and will be guilty of theft under S. 379. The Gulf of Mannar is also similar to Palk's Bay and chanks in the chank-beds of that gulf may also be subjects of theft. (1904) 14 M.L.J. 248=27 M. 551.

#### —S. 378—Removal of fish from ordinary irrigation tank not theft.

Fish in an ordinary irrigation tank is not in the possession of any person so as to be capable of being the subject of theft. Nor does the removal of such fish constitute any other offence. (1900) 24 M. 81.

#### —S. 379—Electricity.

Theft of electricity is an offence under S. 379, Penal Code, because of S. 39, Electricity Act. A.I.R. 1936 All. 742=1936 A.L.J. 955=1936 A.W.R. 842=38 Cr.L.J. 53=1.L.R. (1937) All. 102=165 Ind. Cas. 689.

#### —Ss. 378 and 379—Growing crops.

The taking of crop that is grown may cause wrongful loss to the grower and if it be dishonest, a conviction may be had for theft. A.I.R. 1934 Oudh 182=35 Cr.L.J. 797=11 O.W.N. 508=10 Luck. 1=148 Ind. Cas. 937.

#### —Ss. 379, 424 and 206—Attached movable property.

The case of 22 Mad. 151 is not an authority for holding that after attachment has been effected, dishonest removal of movable property cannot be an



offence under S. 206 or S. 379 or S. 424. 1933 M.W.N. 722.

—**Ss. 378 and 379—Crops attached by Magistrate—Removal of the crops, knowing attachment, amounts to theft.**

Where the Magistrate attached certain crops about which there was a dispute pending between the accused and the other party, and the accused subsequently removed the crops with the knowledge that the crops had been attached :

**Held**, that the subsequent removal of the crops was a dishonest removal and the offence committed was theft. 105 Ind. Cas. 813=22 S.L.R. 151=9 A.I.Cr.R. 165=28 Cr.L.J. 989=A.I.R. 1928 Sii 68.

—**Ss. 378 and 379—Where the property is attached by receiver, any person removing the same with knowledge of such attachment, from receiver's possession without receiver's knowledge is guilty of theft even though he may be a person legally entitled to the property.** 95 Ind. Cas. 940=48 All. 368=24 A.L.J. 364=7 L.R.A. (Cr.) 81=27 Cr.L.J. 860=A.I.R. 1926 All. 382.

—**Ss. 378 and 379—Buffalo attached—Accused claiming as owner and taking it away by force is guilty.**

Where the accused took away forcibly a buffalo which was under attachment:

**Held**, that he was guilty of theft notwithstanding he claimed the buffalo as his own. If he thought himself aggrieved he was bound to seek his remedy in a lawful way and was not entitled to take the buffalo out of the custody of the Court in which, so long as it was under attachment, it was. 8 A.L.J. 656, Foll. 86 Ind. Cas. 969=12 O.L.J. 159=2 O.W.N. 202=26 Cr.L.J. 905=A.I.R. 1925 Oudh 464.

—**Ss. 378 and 379—Cash is not property except if it can be identified in specie.**

Cash is not, strictly speaking, property except in so far as it is capable of being possessed and identified in specie. If it is certain that the actual coins found on the thieves or receivers of stolen property are the actual coins which have been the subject of theft then it is permissible to treat such cash as stolen property. It is often safer in such cases to inflict a fine and to apply the coins found on the person of the accused towards the payment of fine, and then to apply the amount of fine if necessary to compensation. But in no conceivable way can coins which have been put into circulation and passed on to the public be treated in the same way as stolen coins actually remaining in the possession of the thieves. The principle of *caveat emptor* never applies to currency coins. 89 Ind. Cas. 259=18 S.L.R. 218=26 Cr.L.J. 1315=A.I.R. 1926 Sind 17.

—**Ss. 378 and 379—Currency notes held up for destruction.**

A very clear distinction must be drawn between an intention to destroy and to abandon and an actual destruction and abandonment. The very fact that the owner of the property intends to destroy or abandon that property and hands it over to some person to effect those purposes is a clear indication that he still maintains his rights as the owner of that property and that those rights subsist until the abandonment or destruction is completed. As long as the destruction or abandonment is not fulfilled and as long as it is still in the hand of the owner to countermand such destruction or abandonment, the property is

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still the property of the owner and the taking it out of his possession is theft, and improper use of it is breach of trust. Abstraction of currency note which has been held up by the currency officer for destruction is theft though at the time of abstraction, the process of destruction had partly been done. 83 Ind. Cas. 893=17 S.L.R. 260=26 Cr.L.J. 189=A.I.R. 1925 Sind 21.

—**Ss. 378 and 379—If a person extracts one of the papers from the file in the possession of another, which the person extracting has been allowed to inspect, he is guilty of theft.** 86 Ind. Cas. 671=7 L.L.J. 118=26 Cr.L.J. 847=26 P.L.R. 95=A.I.R. 1925 Lah. 327

—**Ss. 378 and 379—Water.**

Water when conveyed in pipes and so reduced into possession can be subject of theft. 75 Ind. Cas. 159=45 All. 680=21 A.L.J. 654=4 L.R.A. (Cr.) 134=24 Cr.L.J. 911=A.I.R. 1924 All. 131.

—**S. 378—Running water, theft of—Cutting embankment and diverting running water.**

Running water not reduced to possession cannot be the subject of theft. (1908) 12 C.W.N. 534=35 C. 437. See also 1908 A.W.N. 55=5 A.L.J. 159.

—**S. 379—Clods of earth.**

In the absence of a notification from the officers regarding the injury to the pecuniary or other interests of the Government, removal of clods of earth of petty value from public channel beds is not theft unless the clandestine nature of the act imputes knowledge of injury to the Government. 18 Cr.L.J. 632=39 Ind. Cas. 1000 (Mad.).

—**Ss. 378 and 22—Moveable property—Stones quarried from the earth.**

Any part of the earth whether it be stones or sand or clay or any other component when severed from "earth" is moveable property and is capable of being the subject of theft under S. 378, 4 M. 228; 15 B. 702, and opinion of *Brandt, J.*, in 10 M. 255 followed. (Opinion of majority not followed.) Land and earth are not synonymous and there is a wide distinction between "earth" and "the earth." (1904) 14 M.L.J. 155=27 M. 531 (F.B.).

—**S. 378—Human body.**

Human body, living or dead, is not capable of theft, it not being 'moveable property' within the meaning of S. 378, and there being no 'dishonesty' in removing it. Human bodies or portions of them or mummies preserved in museums or scientific institutions may be capable of theft. (1902) A.W.N. 191=25 A. 129.

### 13. Theft and similar offences.

—**Ss. 379 and 411—Conviction under—Sustainability—Absence of evidence of theft.**

In the absence of sufficient evidence of theft a conviction under Ss. 411 and 379 cannot be sustained. (1948) A.W.R. (H.C.) 151.

—**Ss. 379 and 411—Animals scattered from herd in forest by cheeta scare—Subsequently accused, cattle dealer, selling them—There is no theft and hence no inference under S. 114 Illus. (a), Evidence Act, can be raised—Conviction under S. 379 or S. 411 cannot stand.** A.I.R. 1944 Mad. 26=56 L.W. 547=(1943) 2 M.L.J. 334=1943 M.W.N. 580=45 Cr.L.J. 220=210 Ind. Cas. 315.



**—Ss. 378 and 411—Theft or receiving stolen property—Removal of Chaukidar's Birth Register for producing in Court.**

The removal of the Chaukidar's Birth Register without his consent for producing it in Court does not amount to an offence under S. 411 or any other section of the Code. 19 P.W.R. 1914 Cr. = 57 P.L.R. 1914 = 15 Cr.L.J. 522 = 24 Ind. Cas. 834.

**—Ss. 378 and 414—Theft or receiving stolen property.**

Son of the accused stole away certain jewellery which the accused returned to the owner but refused to disclose the name of the thief. The Magistrate on trial found him guilty under Ss. 414 and 380 for assisting the son in the theft.

**Held**, that the accused has committed no offence as dealing with stolen property after theft does not amount to theft or abetment of theft. 1 U.B.R. (1910) 8 = 11 Cr.L.J. 493 = 7 Ind. Cas. 465.

**—Ss. 378 and 425—Theft of calf and subsequent killing of it.**

Where a calf is stolen and then killed, two distinct offences are made out and these two offences are distinct offences and constitute two different acts falling within the definitions of theft as well as of mischief. It cannot be said that simply because the accused has caused wrongful loss to another person by taking away his property without his consent, the subsequent act of destruction of that property would not be an offence because the wrongful loss is already caused by taking it away from its possessor. Separate convictions and separate sentences for the offences are quite legal. A.I.R. 1936 Bom. 172 = 38 Bom. L.R. 164 = 37 Cr.L.J. 553 = 60 Bom. 627 = 162 Ind. Cas. 283.

**—Ss. 378 and 379—Theft and Mischief.**

Where theft of an animal has been committed the mere killing of it afterwards by the person who stole it, for the purpose of eating it himself cannot add another offence. 84 Ind. Cas. 341 = 7 P.L.T. 36 = 3 Pat. 804 = 26 Cr.L.J. 277 = A.I.R. 1925 Pat. 34.

**—Ss. 379 and 429—Where after a thief has stolen and slaughtered an animal, another person joins him in skinning the dead body, the latter is not guilty either under S. 379 or S. 429.** 84 Ind. Cas. 341 = 3 Pat. 804 = 26 Cr.L.J. 277 = 7 P.L.T. 36 = A.I.R. 1925 Pat. 34.

**—Ss. 379 and 429—Theft or mischief—Killing animal.**

A person cannot be convicted separately under Ss. 379 and 429 for stealing an animal and afterwards killing it as the destruction of the animal after theft, simply benefits the offender but causes no more wrongful loss to the owner. 9 S.L.R. 204 = 17 Cr.L.J. 239 = 34 Ind. Cas. 655.

**—Ss. 378, Illus. (a) and 425—Theft or mischief—Cutting of trees—Intention to annoy—Offence.**

Theft is committed only if the trees were cut with the intention of being removed from the possession of the owner. It is not theft but mischief where the trees were cut merely to annoy the complainant. 16 Cr.L.J. 544 = 29 Ind. Cas. 672 (Mad.).

**—Ss. 379 and 426—Theft—Mischief—Separate sentences.**

A person who steals a fowl and then kills it cannot be punished separately for the offence of theft and mischief. 1903 5 Bom. L.R. 46.

**—Ss. 378, 379 and 392—Removing of property found by chance after quarrel.**

Where the inception of the struggle was only a quarrel and it was at the end that the accused found a chance of taking the *chaplis* and the sheet of the complainant in order to ensure the payment of the money due to him :

**Held**, that the offence was one under S. 378 and not under S. 392, Penal Code. A.I.R. 1935 Pesh. 49 = 36 Cr.L.J. 894 = 155 Ind. Cas. 952.

**—Ss. 379 and 392—Hurt caused to victim by his own resistance in not giving up—Offender, whether guilty of robbery or mere theft.**

Where the accused wrested a bundle from the hands of a woman and as the latter did not give up the bundle, she was dragged to some distance and hurt was caused to her :

**Held**, that the hurt was not caused for the purpose of committing theft and the accused was not guilty of robbery but only of mere theft. A.I.R. 1933 Lah. 407 = 35 Cr.L.J. 297 = 35 P.L.R. 186 = 147 Ind. Cas. 99.

**—Ss. 379, 392 and 401—A conviction under S. 401 cannot be considered bad in law merely because the evidence on the record would also have justified a conviction of a specific offence under S. 379 or 392.** 118 Ind. Cas. 423 = 6 O.W.N. 441 = 30 Cr.L.J. 922 = 1929 Cr.C. 143 = A.I.R. 1929 Oudh 321.

**—Ss. 379 and 406—"Larceny" and "embezzlement" in English Law.**

"Larceny" and "embezzlement" in English Law are the offences which represent what is known in India as theft, criminal misappropriation and criminal breach of trust. There is no exact equivalent in English Law of "criminal breach of trust". A.I.R. 1941 Rang. 342 = 1941 Rang. L.R. 547 = 43 Cr.L.J. 263 = 197 Ind. Cas. 797.

**—Ss. 378 and 379—Difference between offence of theft, cheating, criminal misappropriation and criminal breach of trust.**

An easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner. 106 Ind. Cas. 678 = 9 A.I.Cr.R. 282 = 29 Cr.L.J. 86 = A.I.R. 1928 Nag. 113.

**—Ss. 379 and 403—Theft or Criminal misappropriation.**

Taking property of another and retaining it without any intention of depriving the owner of the property is not theft. He may be proceeded against under S. 403. 1 Pat. L.W. 416 = 18 Cr.L.J. 564 = 39 Ind. Cas. 804.

**—Ss. 379 and 403—Theft or Criminal misappropriation.**

Bullocks following cows eluding search of the owner are lost to the owner, and no theft of them is possible but dishonest misappropriation under S. 403 was held a proper charge. 10 Bur. L.T. 261 = 18 Cr.L.J. 300 = 38 Ind. Cas. 332.



—**Ss. 379 and 406—Theft or Criminal misappropriation—Property attached and kept with third person—Appropriation by some of judgment-debtor—Offence committed.**

Where the property of a judgment-debtor is attached and kept with a third person and subsequently the former takes it himself and appropriates it to his own use he is guilty of theft and not misappropriation. 8 A.L.J. 656 = 12 Cr.L.J. 374 = 11 Ind. Cas. 142.

—**Ss. 379 and 405—Thefts or Criminal breach of trust—Harvesting of paddy.**

Where the accused were entrusted to watch the paddy crops of the complainant and they cut the crops and disposed of the same themselves, they were guilty of either theft or criminal breach of trust. 36 Cal. 758 = 10 Cr.L.J. 253 = 3 Ind. Cas. 189.

—**Ss. 379 and 442—Theft or house trespass.**

The mere surrounding of an open space by wall or fence would not convert it into a building within the meaning of S. 442 and a person entering it to commit theft cannot be convicted under S. 457. But he is guilty of an offence under Ss. 379 and 511. 24 P.R. 1914 Cr. = 16 Cr.L.J. 1 = 208 P.L.R. 1915 = 26 Ind. Cas. 305.

#### 14. Miscellaneous.

—**S. 378, Expl. (2)—**Under Expl. 2 to S. 378, a moving effected by the same act which effects the severance may be a theft. A.I.R. 1942 Oudh 423 = 1942 O.W.N. 444 = 43 Cr.L.J. 646 = 1942 A.W.R.C.C. 277 = 201 Ind. Cas. 243.

—**S. 379—Complaint of Court, when necessary.**

Where the properties are removed from the possession of the sureties with whom they were left by the *amin*, the complaint of Court is not necessary for a prosecution for the offence under S. 379. 199 Ind. Cas. 210 = 54 L.W. 248 = 1941 M.W.N. 675 = 43 Cr.L.J. 438.

—**S. 379—Charge-sheet under S. 379 setting out facts which constitute the offence under S. 163, cl. (a) (2), Madras Local Boards Act, amounts to a complaint as defined in S. 4, cl. (h), Criminal Procedure Code.** A.I.R. 1939 Mad. 839 = 1939 M.W.N. 615 = 50 L.W. 919 = (1939) 2 M.L.J. 39 = 41 Cr.L.J. 20 = 184 Ind. Cas. 471 (1).

—**Ss. 379 and 414—**Joint trial with regard to two offences, one under S. 379 and other under S. 414 is illegal. 1935 M.W.N. 652.

—**S. 379—Stealing fish—Accused separately engaged—No evidence as to common object—Convictions were set aside because of illegal joint trial.**

Several accused were tried together and fined under Ss. 379 and 447 for stealing fish in the course of the same transaction; they were all separately engaged in fishing and there was no evidence of common object or common intention. They were merely several poachers gathered in the same place at the same time.

**Held**, that their joint trial was not a mere irregularity, and that their conviction must be set aside. 98 Ind. Cas. 597 = 50 Mad. 735 = 24 M.L.W. 848 = 38 M.L.T. 37 = 27 Cr.L.J. 1381 = A.I.R. 1927 Mad. 177 = 51 M.L.J. 692.

—**S. 379—**Where an act constitutes theft as well as an offence under S. 24, Cattle Trespass Act, the offender may be punished under the Penal Code or under the Cattle Trespass Act, though he cannot be punished under both the enactments. A.I.R.

1931 Mad. 18 = 1930 M.W.N. 529 = 32 Cr. L.J. 354 = 33 M.L.W. 205 = 129 Ind. Cas. 451.

—**S. 379—**Theft of two articles belonging to two different persons, committed in one enterprise constitutes only one offence of theft and not two. 90 Ind. Cas. 151 = 26 Cr.L.J. 1495 = A.I.R. 1926 Nag. 89.

—**S. 379—**Where the accused in order to punish a boy tied him to a tree and then his cloth was taken away from him in order to put him to shame.

**Held**, that it was not a case of either theft or robbery. 77 Ind. Cas. 290 = 19 M.L.W. 272 = 34 M.L.T. 165 = 1924 M.W.N. 303 = 25 Cr.L.J. 354 = A.I.R. 1924 Mad. 587 = 46 M.L.J. 325.

—**Ss. 378 and 379—Accused acquitted because of incomplete evidence—Subject of theft should not be made over to him—Complainant retaining possession of the property cannot be required to execute bond till disposal of question of title.**

It is an ordinary rule of law that when an accused is acquitted of a charge of theft and the property found with him is not found to be the subject of theft he is entitled to recover that property but where the property is found to be the subject of theft and an acquittal is due to incomplete evidence property will not be delivered to him.

There is no authority for holding that a criminal Court is competent to direct the complainant to execute a fresh bond till the disposal of the question of title to the property, which was the subject of theft, by a civil Court. 99 Ind. Cas. 91 = 44 C.L.J. 205 = 28 Cr.L.J. 59 = A.I.R. 1927 Cal. 61.

—**S. 379—Offence charged must be explained to jury—Theft case—Removal must be dishonest—“Dishonestly” must be explained to jury.**

It is the duty of the Sessions Judge to explain clearly to the jury the offence with which the accused are charged and in doing so the Judge should keep before him the words of the section defining the offence.

In case of theft removal must be done dishonestly and the word “dishonestly,” must be explained to the jury. 97 Ind. Cas. 951 = 24 M.L.W. 415 = 27 Cr.L.J. 1191 = A.I.R. 1926 Mad. 1121.

—**Ss. 379 and 215—Applicability to thief himself.**

S. 215, Indian Penal Code, is not intended to apply to the thief himself and therefore when a man is convicted of theft he ought not to be convicted also under S. 215. 11 U.B.R. (1914) 43 = 16 Cr.L.J. 421 = 28 Ind. Cas. 997.

—**Ss. 379, 403 and 424—Theft or Criminal misappropriation—Conviction for theft, whether can be converted into one under S. 403 or S. 424.**

When the necessary ingredients of an offence under S. 403 or S. 424 have not been considered in a trial under S. 379, a conviction for theft cannot be converted into one under S. 403 or S. 424. (1914) M.W.N. 483 = 15 Cr.L.J. 440 = 24 Ind. Cas. 176.

—**S. 379—Conviction for extortion—Charge of theft.**

Conviction for a graver offence of extortion cannot stand on a mere charge of theft. 13 Cr.L.J. 597 = 16 Ind. Cas. 165 (Cal.).

—**S. 379—Age of the accused—Boy of fourteen years.**

A cow strayed away when returning from grazing. An immediate search was made and the animal was found being driven by two brothers A and B of the



ages 20 and 14, respectively, about half a mile away. Both were convicted of theft.

**Held**, that B, cannot be said to have acted with criminal intent as he being a child would naturally do whatever his grown-up brother told him without knowing what was meant. 34 P.R. 1910 Cr.=12 Cr. L.J. 56=8 Ind. Cas. 1166.

— **Ss. 378 and 379—Motive immaterial.**

The offence of theft is committed if the property is removed from the custody of the owner without his consent whatever may be the motive of the act and the fact that the owner receives compensation does not affect the character of the offence. 5 N.L.R. 17=9 Cr. L.J. 389=1 Ind. Cas. 800.

— **S. 380.** See also Ss. 368 and 379.

**Synopsis.**

1. Applicability of section.
2. Building.
3. Direction by Appellate court for prosecution of more serious offence.
4. Evidence and Proof.

1. Applicability of section.

— **Ss. 380 and 454—Applicability—Breaking open lock of another's room and removing his box of jewels without his consent—Offence—Bonafide claim of right—Plea of—Conditions of validity.**

Where a person breaks open the lock of a room occupied by another, though his relation, and removes a box of ornaments belonging to that other, without his consent, he is liable to conviction under Ss. 380 and 454, Indian Penal Code, unless he proved that he was not animated by a dishonest intention and was asserting a *bona fide* claim of right. Such a claim must be an honest claim, albeit unfounded in law or in fact and if it is not in good faith but merely a colourable pretence to obtain or keep possession of property, it will be of no avail as a defence. 4 C.P. L.R. 174; (1938) N.L.J. 302, foll. I.L.R. (1950) Nag. 526; 4 A.I.Cr. D. 30=A.I.R. 1950 Nag. 92=51 Cr.L.J. 510=1950 N.L.J. 346.

— Accused inducing M to deposit her moneys in bank and contriving to open account in joint names of both—Withdrawal of money by accused from bank under his own signature without M's knowledge—On complaint by M, the accused was charged under S. 380:

**Held**, that S. 380 could not apply. The money was never in the possession of the complainant; it was in the possession of the bank and was taken from the possession of the bank with the bank's consent. A.I.R. 1944 Cal. 224=45 Cr.L.J. 666=I.L.R. (1944) 1 Cal. 398=213 Ind. Cas. 401.

— **Ss. 380 and 395—Dacoity—No resistance from inmates of house—Consequent absence of use of force or show of force.**

Where the accused were charged with an offence under S. 395, Indian Penal Code, but they were convicted by the Sessions Judge only for an offence under S. 380, on the ground that probably the inmates of the house did not resist the dacoits seeing their large numbers and the dacoits peacefully and calmly without using any force or show of force, acquired the property:

**Held**, that the view that any dacoity in which no resistance is offered and no violence required will cease

to be dacoity and should be treated as a theft was wrong.

[Their Lordships enhanced the sentence passed on the accused.] A.I.R. 1933 All. 114=1932 A.L.J. 1078=55 A. 117=34 Cr.L.J. 448=146 Ind. Cas. 790.

— **Ss. 380 and 448—Bonafide claim.**

Where coins were unearthed from field and taken possession of by several individuals, without the landlord's consent, and then the landlord's manager exacted by force the coins from many persons by house searches and other means and took the man who had actually unearthed the coins, to the police station to get a statement from him,

**Held**, that the manager was acting under a *bona fide* claim of right and his offence fell under S. 448 and not S. 380. 84 Ind. Cas. 346=2 Pat. L.R. Cr. 205=26 Cr.L.J. 282=A.I.R. 1924 Pat. 665.

— **S. 380—Removal of goods from debtor's possession.**

Removal of goods from debtor's possession by force to compel the debtor to discharge the debt is theft. 81 Ind. Cas. 138=25 Cr.L.J. 650=A.I.R. 1925 Lah. 131.

— **S. 380—Removal of goods with dishonest intention.**

Accused entered into an agreement with the complainant that the complainant should advance him money up to Rs. 10,000 on the hypothecation of the goods to be deposited by him as security. The accused was entitled to take advances up to 70 per cent of the value of goods. Accused managed to secure somehow the key of the go-down and removed the hypothecated goods which were there and which were then in the possession of the complainant.

**Held**, that the removal was dishonest and that the accused was rightly convicted under S. 380. 76 Ind. Cas. 654=25 Cr.L.J. 222=A.I.R. 1923 Cal. 594.

— **S. 380—Property secured in accused's shop—Complainant's possession and bond in form No. 15-A of Appendix E and O. 21, R. 43, Civil Procedure Code—Accused taking forcible possession after judgment in his favour does not commit theft.**

Certain articles were attached by the complainant in execution, of a money decree and were in his possession under a bond in form No. 15-A of Appendix E and O. 21, R. 43, Civil Procedure Code. The same were subsequently adjudged to the accused in claim proceedings and he instead of taking delivery thereof through Court broke open the locks of the shop where the articles were and took forcible possession in complainant's absence.

**Held**, as the accused only took his own property secured in his own shop, it cannot be said that he intended to cause wrongful loss to complainant or wrongful gain to himself and hence he could not be convicted of theft. 72 Ind. Cas. 526=16 M.L.W. 15=24 Cr.L.J. 414=A.I.R. 1922 Mad. 405=42 M.L.J. 490.

— **Ss. 380, 201 and 511—Theft—Causing disappearance of document, attempt of.**

The accused removed a promissory note from the file of a Court. On being pursued they tore it to pieces.

**Held**, that they were guilty of an offence under S. 380, Indian Penal Code, and under Ss. 201 and 511 of the Indian Penal Code. 16 Cr.L.J. 791=31 Ind. Cas. 647 (All.).



## 2. Building.

—S. 380—Building—“Building includes structure whether covered or not and made of any material.”

A building within the meaning of Ss. 380 and 442, includes a structure whether covered or not and made of any materials whatsoever. The limitations imposed by the legislature on buildings referred to in Ss. 380 and 442 are not as to the nature of their structures or the materials of which they are made but to the use to which such structures are intended to be put.

A court-yard attached to the living rooms walled in on all sides and provided by a door leading to the street comes within the purview of the section. 35 P.R. 1879 Cr.; A.I.R. 1926 Lah. 28; 6 N.W.P.R. 307 and A.I.R. 1925 Lah. 117, Foll. 111 Ind. Cas. 459=22 S.L.R. 466=29 Cr.L.J. 875=A.I.R. 1929 Sind 17.

—S. 380—Owner of cattle rescuing them from cattle-pound, consisting of only a fencing, by opening its door—No offence under Ss. 380 and 454 but under Ss. 378 and 441.

The expression “building” must be regarded as indicating some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Any structure which does not afford any such protection by itself but merely serves as a fencing or other means of merely preventing ingress or egress cannot make the place a building or a house within the meaning of either of those two sections. Therefore, an owner of a cattle who rescues the cattle from such a cattle-pound by opening its door, does not commit an offence either under S. 380 or S. 454. He is guilty under Ss. 378 and 441, Penal Code, in addition to the offence under S. 24, Cattle Trespass Act. 100 Ind. Cas. 120=38 M.L.T. 163=28 Cr.L.J. 248=7 A.I.R. Cr. R. 410=A.I.R. 1927 Mad. 343=52 M.L.J. 143.

## 3. Direction by Appellate Court for prosecution of more serious offence.

—Ss. 380 and 395—Complaint of entry into house and stealing of property—Admission of case under S. 380—During pendency of case direction by Additional District Magistrate to treat the case as a preliminary register case under S. 395 without notice to accused and without hearing him—Legality of direction.

On a complaint alleging entry into the house of the complainant and stealing of some articles, the Magistrate admitted the case under S. 380, Indian Penal Code. When the case was pending the Additional District Magistrate was moved and he directed that the case should be treated as a preliminary register case and proceeded with under S. 395, Indian Penal Code.

On a contention that the order was without jurisdiction.

**Held**, that when a complaint is made, the trying Magistrate need not admit the case in respect of all the offences mentioned in the complaint. If after enquiry he finds that a more serious offence has also been committed, he can frame a charge and proceed with the trial. Therefore it cannot be said that the order of the trying Magistrate amounted to a dismissal of the complaint under S. 395, Indian Penal Code, to justify the order by the Additional Magistrate; for can it be said that in a case like this a prosecution nor a more serious offence can be ordered by an Appellate Court without notice to the accused and without hearing him. 1947 M.W.N. 492=49 Cr.L.J. 30=A.I.R. 1941 Mad. 95=(1947) 2 M.L.J. 137.

## 4. Evidence and Proof.

See also Note 6 under Ss. 378 and 379.

—S. 380 and Evidence Act (I of 1872) S. 114 (a)—Explanation as to possession of stolen articles—No proof of guilt—Conviction on presumption—Legality.

If the accused gives an explanation as to how he came by the possession of the stolen articles which explanation may possibly be true, the onus, still lies on the prosecution to prove the guilt of the accused. It should not merely rest content by asking the Court to draw the presumption under S. 114 of the Evidence Act. Where the prosecution does not discharge its onus and the only evidence is the production of the stolen articles by the accused with an explanation he cannot be convicted under S. 380, Indian Penal Code, by drawing a presumption under S. 114, Evidence Act. 63 L.W. 593=A.I.R. 1950 Mad. 778=(1950) 1 M.L.J. 792.

—S. 380—Persons found with stolen property—Inference.

Where certain persons are found the day after the burglary has taken place, with stolen property in circumstances suggesting that they were dividing up the booty, it is reasonable to infer that they are persons guilty of the burglary. Such an inference, however, is not one of law but one of fact based upon the common course of events and human conduct. A.I.R. 1944 All. 281=1944 A.W.R.H.C. 249=1944 A.L.J. 411=1944 O.W.N.H.C. 198=46 Cr. L.J. 155=I.L.R. (1944) All. 694=216 Ind. Cas. 248.

—S. 380—Stolen articles removed from accused's house—Identity of articles strictly proved.

Conviction under Ss. 380 and 457 read with S. 109 of the Penal Code cannot be based on the ground that certain stolen articles were recovered from accused's house, unless their identity is strictly established.

The distinctive name of stolen cloth should be mentioned in the list of stolen articles. 2 P.L.T. 125=A.I.R. 1921 Pat. 499.

—Ss. 380, 411 and 457—Proof of offence.

A person was charged under Ss. 457 and 390. There was however no direct evidence to prove house breaking and theft but the accused after some days surrendered the stolen goods. He is guilty of an offence under S. 411 and not under Ss. 457 and 380. 17 Cr.L.J. 179=33 Ind. Cas. 819.

—S. 380—Theft from a railway van—Property found in an adjoining van wherein four railway coolies were travelling.

On suspicion of theft of certain articles from a running goods train, a van on the train in which four railway coolies were travelling was searched. The property missed was not found, but, hidden under a heap of clothing belonging to the four coolies, were discovered 10 *thans* of cloth, which on investigation were ascertained to have been abstracted from the next van.

**Held**, that none of the four coolies travelling in the van where the 10 *thans* of stolen cloth were found could be convicted of the theft of the cloth in the absence of evidence to connect one or more of them individually with the possession of the cloth. 1901 A.W.N. 103=23 A. 306.

## 5. Sentence.

—Ss. 380 and 457—Passing of separate sentences.

It is quite possible to commit the offence of lurking trespass without stealing anything at all just as it is



possible to commit theft in a building without committing lurking house trespass. The offences are, therefore, quite distinct and hence separate sentences can be passed for each offence. A.I.R. 1945 Mad. 330 = 58 L.W. 75(1) = 1945 M.W.N. 106(1) = (1945) 1 M.L.J. 179 = 47 Cr.L.J. 157 = I.L.R. (1945) Mad. 896 = 221 Ind. Cas. 304.

—Ss. 380 and 457—Accused breaking house at night and committing theft :

**Held**, that there is no connection between S. 457 and 380 and hence the accused can be convicted under both the sections. A.I.R. 1942 Oudh 214 = 1941 O.W.N. 1365 = 43 Cr.L.J.W. 252 = 1942 A.W.R.H.C. 5 = 17 Luck. 513 = 197 Ind. Cas. 710.

—Ss. 380 and 457—There is nothing to prevent the Court from passing separate sentences for offences under Ss. 380 and 457. But the question is not of much practical importance as in an overwhelmingly large number of cases the punishment provided for any of these two offences will be sufficient and if the Court of Appeal finds that the trial Court has wrongly passed two separate sentences but the sentences taken together are not excessive, they can be consolidated. A.I.R. 1939 Pat. 349 = 40 Cr.L.J. 751 = 5 B.R. 907 = 20 P.L.T. 736 = 183 Ind. Cas. 217.

—Ss. 380 and 457—Sentence—Separate sentences under both are bad.

Separate sentences cannot be passed under S. 457 and S. 380 of the Indian Penal Code for housebreaking followed immediately by theft. 2 W.R.(Cr.) 63 ; 8 W.R.(Cr.) 31 ; 6 W.R.(Cr.) 49 ; 6 W.R.(Cr.) 92 and 5 W.R.(Cr.) 49 ; Foll. 96 Ind. Cas. 528 = 5 Pat. 464 = 7 P.L.T. 794 = 7 A.I.Cr.R. 3 = 27 Cr.L.J. 976 = A.I.R. 1926 Pat. 367.

—S. 380—In a case of an offence under S. 380, Indian Penal Code, Magistrate has two alternatives before him. He may send the offender to prison or in lieu thereof, he may either cause him to be whipped or send him to Borstal, but the power to order a person to be whipped is only in lieu of another punishment under the Code and once an order of detention in Borstal has been passed, there is no power to alter this order to a sentence of whipping. A.I.R. 1940 Rang. 81 = 1939 Rang. L.R. 744 = 41 Cr.L.J. 455 = 187 Ind. Cas. 405.

—S. 380—Theft under S. 380, Indian Penal Code, is included in offences mentioned in S. 3, Whipping Act. Therefore, an offender under S. 380, Indian Penal Code, can be sentenced to whipping but only in lieu of and not in addition to punishment of imprisonment or fine to which he is liable under the Code. A.I.R. 1939 Oudh 222 = 1939 O.W.N. 414 = 1939 A.W.R. 76 = 40 Cr.L.J. 521 = 14 Luck. 634 = 181 Ind. Cas. 79 (2).

—S. 380—Conviction for stealing bicycle—Accused young boy of respectable parentage and good education and first offender :

**Held**, that one of the surest guarantees that could be given against the commission of offences of this kind by anyone was the certainty that when the offence was committed and detected, the accused person would not go unpunished. The sentence of whipping passed was therefore, right even though the boy was the first offender. A.I.R. 1938 Rang. 112 = 39 Cr.L.J. 478 = 174 Ind. Cas. 842.

—Ss. 380 and 109—Sentence of whipping for offence under S. 380—'Concurrent' sentences, significance of.

The sentence of whipping passed for the offence under S. 380 read with S. 109 is not legal.

Double sentences of whipping are illegal and the position is no better if they are ordered to run concurrently because sentences of whipping cannot run concurrently. The word "concurrent" properly applies only to sentences of imprisonment. If it was applied to sentences of whipping, the literal meaning would be that the prisoner was to be flogged by two operators simultaneously. A.I.R. 1937 Rang. 310 = 38 Cr.L.J. 1013 = 171 Ind. Cas. 71.

—S. 381—Appeal against conviction under without passing of sentence—Maintainability—Conviction for theft and forwarding of accused under S. 380, Criminal Procedure Code, to Magistrate with jurisdiction to take action under S. 563, Criminal Procedure Code.

A Magistrate who convicted an accused of an offence under S. 381, Indian Penal Code, was of the opinion that since the accused was a young man without any previous conviction it would be proper to release him under S. 562 (1) (a) of the Criminal Procedure Code instead of awarding him a sentence. Since he was not empowered under that section he forwarded the accused under S. 380 of the Criminal Procedure Code to a First Class Magistrate for taking appropriate action, if he considered it fit, under S. 562 of the Criminal Procedure Code. An appeal against the conviction before action could be taken by the First Class Magistrate was dismissed as premature. On a reference by the District Magistrate,

**Held**, It cannot be said that the conviction is incomplete without a sentence for the purpose of exercising the right of appeal given in the Criminal Procedure Code against a conviction under S. 381 of the Indian Penal Code and the appeal against the conviction was maintainable. I.L.R. (1948) Mad. 434 = 48 Cr.L.J. 963 = A.I.R. 1948 Mad. 16 = 60 L.W. 421 = 1947 M.W.N. 523 = (1947) 2 M.L.J. 117.

—S. 381—Taking official papers out of officer's custody for showing to a party's wakil is theft by servant.

Where a clerk took official papers out of the possession of another clerk of the Tahsil office without Mamladar's consent with a view to show them to the wakil of one of the parties to the case.

**Held**, the facts constituted theft by clerk within S. 381. 94 Ind. Cas. 881 = 27 Bom. L.R. 1391 = 27 Cr.L.J. 689 = A.I.R. 1926 Bom. 122.

—S. 381—Jurisdiction—Third Class Magistrate.

The trial of an offence under S. 381 by a 3rd Class Magistrate is illegal. 2 Bur. L.J. 75 = A.I.R. 1924 Rang. 12.

—S. 381—Evidence of ownership—Absence of.

In the absence of evidence as to ownership of stolen property the conviction under S. 381, Indian Penal Code, cannot stand. 16 Cr.L.J. 640 = 30 Ind. Cas. 464 (Mad.).

—S. 382—Sentence for offence under.

Where the theft is by armed persons it is practically highway robbery and is a serious crime and a sentence of two year's rigorous imprisonment is not excessive even though the accused had been in custody for 6 months. A.I.R. 1950 Kut. 29 = 51 Cr.L.J. 657.

—S. 382—Mere possession of dagger, if enough justification for conviction.

The accused entered the betel plantation with intention to commit theft and was surprised there by the



owner and the latter's wife. The accused had with him a dagger of the kind used for cutting palm stems by toddy extractors. The owner of the plantation was a man of 65. The accused inflicted no injury with the dagger, and although thus armed, was actually overpowered and tied up by the old gentleman and his wife :

**Held**, that S. 382, Indian Penal Code, had no application in this case. The mere possession of a dagger did not justify a conviction under this section in the absence of any proof of any preparation to cause any of the acts mentioned in the section. A.I.R. 1937 Rang. 542=39 Cr.L.J. 277(2)=173 Ind. Cas. 144.

#### —S. 382—Conviction—Essentials.

Without proof of actual theft accused could not be convicted under S. 382. 77 Ind. Cas. 434=25 Cr. L.J. 386=A.I.R. 1923 Lah. 512.

#### —Ss. 383 and 384.

##### Synopsis.

1. Abetment.
2. Ingredients of offence.
3. Injury.
4. Sentence.
5. Miscellaneous.

##### 1. Abetment.

—Ss. 383 and 384—Abetment of extortion—Constable demanding bribe—Members of Civic Guard present with constable and not protesting but going with him in all his acts—Offence.

Where members of the Civic Guard are present with a police constable when he demands illegal gratification from a person carrying a tin of kerosene oil, and destroys the cash memo in respect of the tin, on refusal of payment of illegal gratification, make no protest against the act of the constable but go along with him, assisting and intending to assist him in his act of extortion, it must be held that the members of the Civic Guard have been a party to the demand of the constable, and that they intentionally aided the constable in his demand and were therefore guilty of the offence of abetment of the principal offence of extortion by the constable. I.L.R. (1945) 2 Cal. 478=230 Ind. Cas. 271=48 Cr.L.J. 587=A.I.R. 1948 Cal. 47.

##### 2. Ingredients of offence.

—Ss. 383 and 384—Ingredient of offence—Intention to cause wrongful loss.

The chief element in the offence of extortion is that the inducement must be dishonest. It is not sufficient that there should be wrongful loss caused to an individual, but the person putting that individual in fear of injury must have the intention that wrongful loss should be caused. I.L.R. (1950) Nag. 715=1950 N.L.J. 318. A.I.R. 1950 Nag. 214=4 A.I.Cr.D. 426.

—Ss. 383 and 384—Chief element of the offence under—Accused honestly believing that his money was taken by P.W. 1—Attempt to get it back by intimidation of P.W. 1—Necessary intention absent—No offence.

The chief element in the offence of extortion is intentionally putting a person in fear of an injury to that person or to any other and thereby dishonestly inducing the person so put in fear to deliver to any person any property or valuable security, etc. The inducement must be dishonest. It is not sufficient

that there should be wrongful loss caused to one individual, but the person putting that individual, in fear of injury must have the intention that wrongful loss should be caused.

Where the accused honestly believed, that P.W. 1 had taken the money belonging to him, his attempt to get it back could not be said to be with the intention of causing wrongful loss to P.W. 1. Hence neither that accused nor the other accused who were only present to assist him with a view to intimidate P.W. 1 can be guilty of an offence under S. 384, Indian Penal Code, as the necessary intention is entirely absent. 1948 M.W.N. 361=61 L.W. 400 (1)=A.I.R. 1948 Mad 513=50 Cr.L.J. 33=(1948) 1 M.L.J. 412.

—Ss. 383 and 384—Extortion—Essentials—Creditor filing false complaint in order to realise his debts.

Just as it is not an offence to deceive a person simpliciter, so it is no offence to put a person in fear of an injury, unless it is done with a criminal intention.

Institution of false criminal complaints would amount to putting a person in fear of injury within the meaning of S. 384, Indian Penal Code, but where the object is merely to realise debts which were admittedly due the second ingredient of the offence, namely, "dishonesty," is not established and the act does not amount to extortion. A.I.R. 1942 Lah. 253=43 Cr.L.J. 849=44 P.L.R. 429=202 Ind. Cas. 452.

—Ss. 383 and 352—Accused assaulting victim and forcibly taking his thumb impression on blank paper—Offence, nature of.

The definition of 'extortion' in S. 383, Indian Penal Code, makes it necessary for the prosecution to prove that the victims were put in fear of injury to themselves or to others, and further, were thereby dishonestly induced to deliver papers containing their thumb impressions. The forcible taking of the victim's thumb impressions on blank pieces of paper which can be converted into a valuable security does not necessarily involve inducing the victim to deliver papers with the thumb impressions. Hence, where the victim is assaulted by the accused and his thumb impression forcibly taken upon a blank piece of paper, the offence of extortion cannot be said to have been established. The offence is no more than the use of criminal force or an assault punishable under S. 352, Indian Penal Code. Nor does the offence amount to robbery in the absence of proof that the papers were taken from the victim's possession. A.I.R. 1941 Pat. 129=7 B.R. 514=21 P.L.T. 970=42 Cr. L.J. 361=193 Ind. Cas. 241.

—Ss. 383 and 385—Extortion includes offence under S. 385.

Extortion, as defined in S. 383, Indian Penal Code, includes, putting any person in fear of injury and covers S. 385, Indian Penal Code, which is a less serious offence punishable only with two years' imprisonment as against three years' imprisonment for an offence under S. 384. A.I.R. 1941 Sind 36=42 Cr.L.J. 460=193 Ind. Cas. 454.

—Ss. 383, 384 and 30—Minor boy forcibly made to execute promissory note.

Where certain persons forcibly took a minor boy to a place where, after being beaten, the boy was forcibly made to execute a promissory note :

**Held**, that the document was a valuable security within the meaning of S. 384 read with S. 30 and that it was immaterial that it might subsequently be held to be of no effect against the executant. A.I.R. 1933



Pat. 601 (1)=35 Cr.L.J. 123=15 P.L.T. 66=146 Ind. Cas. 519 (1).

—Ss. 383 and 384—Gist of offence.

A conviction under S. 384, Indian Penal Code, cannot be maintained when the accused had no dishonest intention in removing the property. 86 Ind. Cas. 426=26 P.L.R. 97=26 Cr. L.J. 794=7 L.L.J. 121.

—Ss. 383 and 384—Demanding money for doing what one is not bound to do.

A Nikah Khawan is not bound to read a Nikha for a person unless he chooses to do so, and it is certainly no offence for him to demand any fee he likes for doing so. 75 Ind. Cas. 542=4 Lah. 179=24 Cr.L.J. 958=A.I.R. 1924 Lah. 162.

—Ss. 383 and 384—Threat to omit to do some act which accused is not legally bound to do—If punishable.

After the crops of judgment-debtor were attached by officer of Court, the accused took money from judgment-debtor promising to get the crops released.

**Held**, no offence was committed.

Before a person can be said to put any person into fear of any injury to that person, it must appear that he has held out some threat to do or to omit to do what he is legally bound to do in the future. On the other hand if all that a man does is to promise to do a thing which he is not legally bound to do and says if money is not paid to him he would not do that thing, such an act does not amount to an offence.

But a threat held out by the accused that he would not release the cattle belonging to complainant and taken away by the accused without his consent, unless he was paid some money for their release, does amount to extortion inasmuch as he did put him in fear of injury to his property, namely the cattle, as he must have felt that his cattle would remain with the accused so long as the money was not paid to him. This would be sufficient injury within the meaning of S. 44 of the Indian Penal Code. 81 Ind. Cas. 609=46 All. 81=21 A.L.J. 850=4 L.R.A. (Cr.) 253=25 Cr. L.J. 961=A.I.R. 1924 All. 197.

—Ss. 383 and 384—Fines realised by picketing—Extortion.

Realising fines by means of picketing is extortion within the meaning of S. 383, Penal Code. 75 Ind. Cas. 764=25 Cr.L.J. 60=A.I.R. 1924 Nag. 19.

—Ss. 383 to 385—Levy of fine under threat of picketing—If extortion.

Accused threatened to put pickets if complainant sold foreign cloth and on complainant refusing to stop sale, was told that he would be required to pay a fine of 5 per cent, on the value of his stock and pickets were actually put effectually stopping the custom to the shop, on this the complainant paid the fine.

**Held**, the accused committed extortion.

When a man is told that certain men are going to watch his shop and he knows that in many instances the watching of shops not only leads to loss of business but has frequently led to loss of actual money and occasionally to personal injury to the shop-keeper, he legally must apprehend injury. 71 Ind. Cas. 110=45 All. 137=24 Cr. L.J. 62=20 A.L.J. 877=A.I.R. 1922 All. 529.

—Ss. 383 and 384—Essentials of extortion.

S. 384 demands that the complainant should be put in fear of injury with the object of inducing payment

of money from him. 15 A.L.J. 127=18 Cr.L.J. 317=38 Ind. Cas. 429.

3. Injury.

—S. 383—"Injury"—Threat by public servant to do duty under law and to report to proper authorities in case he were not paid sum of money—Offence.

To constitute "injury" within the meaning of S. 383, Indian Penal Code, there must be "illegal harm." A threat by a person to do what he was bound by law to do is not a threat to do an injury (i.e., an illegal harm) so as to amount to an offence under S. 383, Indian Penal Code. Where a public servant threatens a person that in case the latter were to entertain more than 25 guests at a feast, he would report the matter to the proper authority concerned, unless he paid him a sum of money, he cannot be held to be guilty of the offence of extortion so as to be convicted under S. 384, Indian Penal Code; no offence of extortion can be held to be made out in such a case. 4 A 1 Cr.D. 16.

—Ss. 383 and 385—Threat of divine displeasure by creditor to debtor, if injury.

There is nothing in any of the illustrations to S. 383, Indian Penal Code, to suggest that the fear of injury referred to in S. 383 and S. 385 is the fear of injury resulting from divine displeasure; the injury contemplated must be one which the accused can inflict or cause to be inflicted; a threat that God will punish a man for some act, is not such an injury as the section refers to. A.I.R. 1944 Sind 203=46 Cr.L.J. 149=I.L.R. (1944) Kar. 146=216 Ind. Cas. 216.

—S. 383—Injury—Threat of criminal charge, if injury.

The threat of a criminal charge for the purpose extracting money not legally due, is a threat of injury within S. 383 of the Code. 6 Bur.L.T. 92=14 Cr. L.J. 413=20 Ind. Cas. 237.

4. Sentence.

—Ss. 383 and 384—Member of Police force acting in role of oppressor and extorting money—Sentence.

In the case of an accused who is a public servant whose duty it is to help the helpless people of the village and protect them from oppression, but who, instead of doing that, adopts a role of an oppressor and disgraces the Police force by committing offences under Ss. 161 and 384, Indian Penal Code, deterrent sentence will serve as an example to others. A.I.R. 1942 Oudh 163=1941 O.W.N. 1255=42 Cr. L.J. 139=1941 A.W.R. C.C. 358=197 Ind. Cas. 277.

5. Miscellaneous.

—Ss. 383 to 387.

Offence coming within S. 161—Accused can be convicted under it though principal offence may have been under S. 384. A.I.R. 1944 Cal. 374=48 C.W.N. 632=46 Cr.L.J. 94=215 Ind. Cas. 298.

—Ss. 383 and 192—Offences under, if private disputes.

Charges of extortion and fabricating false evidence are not private disputes as neither of these offences is compoundable. A.I.R. 1936 Sind 146=37 Cr.L.J. 1086=30 S.L.R. 217=164 Ind. Cas. 1020.

—Ss. 384 and 406—Extortion and breach of trust—Charge.

The charges of criminal breach of trust and extortion, in respect of the same moneys are incompatible.



Consequently, a conviction both for criminal breach of trust and extortion is not proper when they are in respect of the same moneys. A.I.R. 1936 Sind 29=37 Cr. L.J. 457=161 Ind. Cas. 295.

—Ss. 384 and 420—Extortion and cheating.

Although there is a common feature between the offence of extortion and that of cheating, yet they cannot be regarded as two aspects of one offence. 112 Ind. Cas. 586=30 Bom. L.R. 967=29 Cr.L.J. 1082=A.I.R. 1928 Bom. 346.

—S. 384—Approximate amounts extorted—Charge.

In the case of extortion approximate amounts extorted from each and the nature of extortion should be stated. If the accused comes to know at the close of the evidence, the charge alleged against him, it is an irregularity fatal to the trial. 17 Cr. L.J. 411=35 Ind. Cas. 971 (All.).

—S. 385. See also Ss. 383 and 384.

—Ss. 385 and 383—"Injury," meaning of—Threat of divine displeasure, if injury.

Section 383 and hence S. 385 Indian Penal Code, must be interpreted with S. 44 of the Code and the word 'injury' according to S. 44 denotes any harm whatever, illegally caused to any person in body, mind, reputation or property and the harm threatened or caused to be threatened must be from something illegally done. No injury can be caused or threatened to be caused within the meaning of S. 385 unless the act done is either an offence or such as may properly be made the basis of a civil action. A.I.R. 1944 Sind 203=I.L.R. (1944) Kar. 146=46 Cr. L.J. 149=216 Ind. Cas. 216.

—S. 385—Requisites of the offence.

In order to constitute an offence under S. 385, it is not necessary that the threat should be of some conduct which might either constitute an offence in criminal law or which might be made the basis of a civil action for damages. Anything forbidden by law is unlawful and by virtue of the wide language of S. 43 illegal and the threat of any such act with a view to exact money constitutes extortion. 9 Pat. 725=128 Ind. Cas. 141=A.I.R. 1930 Pat. 593.

—S. 385—Offence under—Essentials of.

For the purpose of S. 385, Indian Penal Code, it is necessary that the accused should have put some person in fear of injury in order to extort some property from him. 'Injury' includes only such harm as may be caused illegally to a person's mind, body, reputation or property. 19 Cr.L.J. 445=44 Ind. Cas. 973 (Mad.).

—S. 385—Attempt—If punishable.

Section 385 does not expressly provide for the punishment of an attempt at extortion; and the limitation in S. 511 evidently relates to such offences as an attempt to commit suicide or an attempt to obtain illegal gratification which are expressly punishable by other sections of the Code. Therefore a charge under S. 384 read with S. 511 is not bad. 98 Ind. Cas. 60=27 Cr.L.J. 1244=A.I.R. 1927 Pat. 89.

—S. 387—Applicability of.

If the relatives of an abducted person are put in fear of the death of the victim, to compel them to ransom him, S. 387 would apply. 6 L.B.R. 160=14 Cr.L.J. 167=6 Bur. L.T. 77=19 Ind. Cas. 167.

—Ss. 387 and 390—Accused drunk—Threatening for payment of money with weapon in hand.

A who was drunk went to the house of B with a weapon in his hand and cried that if B would not give him money, he would cut him and his wife. A struck the door with the weapon. The door was closed. Then A went to another's house and struck his door with the weapon. As a consequence the door opened and fell down. He was charged under S. 393.

Held, that he was not so drunk as to be incapable of forming a dishonest intention, that he was guilty under S. 387, that it was doubtful whether his act amounted to an attempt of robbery and therefore he should have the benefit of doubt. 5 Bur. L.T. 175=13 Cr.L.J. 864=6 L.B.R. 100=17 Ind. Cas. 800 (F.B.).

—Ss. 387 and 34—Where it is not shown that an attempted extortion was in furtherance of a common object of theft, all accused cannot be held guilty under S. 387 read with S. 34, Indian Penal Code, for the act of one of the accused who threatened a person with death in order to extort the keys of an iron safe. 1931 M.W.N. 129.

—S. 390. See also S. 392.

Synopsis.

1. Essentials of offence.
2. Evidence and proof.
3. Restraint—Meaning of.

1. Essentials of offence.

—Ss. 390 and 392—Proof of theft is essential for convicting a person for robbery.

Before a person can be convicted of robbery, theft by him must be proved but where theft is not established, the accused is entitled to an acquittal of the offence of robbery. A.I.R. 1945 Sind 38=I.L.R. (1944) Kar. 420.

—Ss. 390 and 392—Where the victim is assaulted by the accused and his thumb impression forcibly taken on a blank piece of paper, the offence does not amount to robbery in the absence of proof that the papers were taken from the victim's possession. A.I.R. 1941 Pat. 129=21 P.L.T. 970=7 B.R. 514=42 Cr. L.J. 361=193 Ind. Cas. 241.

—Ss. 390 and 394—Accused first beating complainant and then committing theft—If offence under S. 394—committed.

The words 'for that end' used in S. 390, Indian Penal Code, clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by the theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances. Where it was established that the accused persons first belaboured the complainant and his servant and subsequently committed the theft of the cash:

Held, that in the circumstances, it could not be said that whatever injury was caused, it was caused when the assault was made with the primary object of enabling the accused to the committing of the theft. The assault or the beating had no relation whatever to the commission of the theft although the theft was committed at the same time or immediately afterwards. The accused were not, therefore, guilty of an



offence under S. 394. A.I.R. 1941 Oudh 476 = 1941 A.W.R. C.C. 367 = 42 Cr.L.J. 530 = 1941 O.W.N. 1262 = 194 Ind. Cas. 222.

— **Ss. 390, 392 and 397—Knife used for committing robbery—Weapon, if should be used against person robbed.**

Section 397, Indian Penal Code, does not require the use of a deadly weapon to be against the person robbed. Where the accused uses a knife, which is a deadly weapon at the time of committing robbery, by threatening the companions of the person robbed by frightening them and it strikes and causes injury to the person robbed, the accused should be convicted under S. 392 read with S. 397, Indian Penal Code. A.I.R. 1941 Mad. 718 = 1941 M.W.N. 382 = (1941) 1 M.L.J. 695 = 53 L.W. 718 = 42 Cr.L.J. 868 = 196 Ind. Cas. 437.

— **Ss. 390 and 323—A person is not said to be guilty of robbery if he rescued illegally attached bull by inflicting injury. He is guilty under S. 323 only.** 1935 M.W.N. 1295.

— **Ss. 390 and 392—Section 392, Indian Penal Code, contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property and should for that purpose, either hurt him or place him under wrongful restraint.** A.I.R. 1935 Pesh. 49 = 36 Cr.L.J. 894 = 155 Ind. Cas. 952.

— **Ss. 390 and 392—D who wanted to send by registered insurance post a letter with some currency notes asking accused to write the address on the envelop—Accused trying to substitute another envelop in place of the original one—D becoming suspicious and asking for the original envelop—Scuffle in which the original envelope and D's coat torn :**

**Held,** that the offence of robbery for which the accused could be held guilty was more or less technical the real attempt of the accused being that of criminal misappropriation. A.I.R. 1933 Sind 139 = 34 Cr.L.J. 802 = 144 Ind. Cas. 427.

— **Ss. 390 and 392—Before a person can be convicted of robbery, the prosecution must prove that hurt was caused in order to the committing of the theft or in carrying away or attempting to carry away the property obtained by the theft. The hurt contemplated must be a conscious and voluntary act on the part of the thief for the purpose of overpowering resistance on the part of the victim, quite separate and distinct from the act of theft itself.** A.I.R. 1933 Lah. 407 = 35 Cr.L.J. 297 = 35 P.L.R. 186 = 147 Ind. Cas. 99.

— **Ss. 390 and 392—Where the accused wrested a bundle from the hands of a woman and as the latter did not give up the bundle, she was dragged to some distance and hurt was caused to her :**

**Held,** that hurt was not caused for committing theft and accused was not guilty of robbery but only of theft. A.I.R. 1933 Lah. 407 = 35 Cr.L.J. 297 = 35 P.L.R. 186 = 147 Ind. Cas. 99.

— **Ss. 390 and 392—In a charge for robbery, it must be shown that there was not only violence or hurt or wrongful restraint but also that it was caused for the purpose of enabling theft to be carried out. There must be common intention of all persons charged, to commit robbery, and they must have acted conjointly. In case where the trial results in conviction of less than five persons, they should be at least five persons present when the offence was committed.** A.I.R. 1931 Mad. 481 = 1930 M.W.N. 1142 = 34 L.W. 349 = 32 Cr.L.J. 973 = 133 Ind. Cas. 7.

— **S. 390—Extortion and robbery—Essentials.**

It is not necessary that the extortion should follow immediately upon the restraint in order to constitute robbery, provided that there is fear of restraint at the time. 99 Ind. Cas. 596 = 25 M.L.W. 86 = 28 Cr.L.J. 164 = 7 A.I.C.R. 280 = A.I.R. 1927 Mad. 307.

— **Ss. 390, 392 and 404—Offence under S. 392—Direction to jury if jewels were removed after death—The offence was one under S. 404.**

Where shortly after the murder, the murdered girl's jewellery was discovered in the possession of the accused who was charged with robbery and murder and the Judge told the jury that, if it had been removed from her person after her death, the offence committed was one under S. 404, Indian Penal Code,

**Held,** that that was not a proper direction, but that the question for consideration was whether the murder had been committed for the purpose of stealing the jewels, and if it had been committed for that purpose, the offence was one under S. 392. 98 Ind. Cas. 488 = 27 Cr.L.J. 1368 = 7 A.I.C.R. 450 = A.I.R. 1927 Mad. 243.

— **Ss. 390 and 392—Accused breaking into a house and carrying away property stolen by him—Complainant trying to recover—Accused is guilty under Ss. 392, 394 and 457.**

Where the accused committed house-breaking in the house of the complainant and abstracted from it a chembu, and, when the complainant attempted to catch him and recover his property the accused, in order to the carrying away of this property caused him hurt :

**Held,** that the accused committed offences under Ss. 457, 392 and 394. 86 Ind. Cas. 715 = 21 M.L.W. 37 = 26 Cr.L.J. 850 = A.I.R. 1925 Mad. 466.

— **Ss. 390 and 392—Causing fear—If necessary.**

In order that the offence of robbery be committed it is not necessary that fear should be caused to the owner of the house after the robbers have entered the house. If the robbers scared away the owner on account of the fear caused in his mind before they had been able to make an entry in his house the offence of robbery would be quite complete. 83 Ind. Cas. 705 = 5 L.R.A.C. 81 = 26 Cr.L.J. 145 = A.I.R. 1924 All. 701.

— **S. 390—Thief attacking pursuers after leaving stolen property.**

Robbery is the committing of one or the other of the wrongful acts mentioned in S. 390 for the purpose of committing of theft or for the carrying away or attempting to carry away property obtained by theft and so a thief is not guilty of it when he uses violence against his pursuers after abandoning the stolen property. 19 Cr.L.J. 27 = 42 Ind. Cas. 987.

— **Ss. 390, 396 and 397—For that end—Meaning of.**

Dacoity consists in five or more persons acting conjointly in causing death or hurt or wrongful restraint or fear of such instant evils not only to commit theft or in committing it, or in carrying away property obtained by theft, but also for that end, which phrase cannot mean 'in those circumstances.' 18 Cr.L.J. 346 = 38 Ind. Cas. 730 (Mad.).

— **S. 390—Splitting of offence—Theft—Hurt—Robbery—Independent offences.**

It is not open to a magistrate to split up a graver offence into a number of smaller offences, which when



combined constitute that offence in order to give himself jurisdiction. When hurt or fear of instant of hurt is caused by five or more persons for the purpose dispossessing persons already in possession of some premises and has no relation to the commission of theft, although theft may have been committed at the same time as a perfectly independent act, it does not amount to robbery as defined in S. 390. (1900) 5 C.W.N. 372.

## 2. Evidence and proof.

—Ss. 390, 392 and 393—Merely standing in a crowd is not evidence of committing or attempting to commit robbery.

The evidence that a man was standing in a large crowd which overflowed into the public street cannot be said to be satisfactory evidence that he was actually committing a robbery, nor can it be an evidence that he was actually "attempting to commit" a robbery, nor even aiding in the commission of a robbery. A.I.R. 1945 All. 385=1945 A.W.R. (H.C.) 178=I.L.R. (1945) All. 651=47 Cr.L.J. 249=222 Ind. Cas. 136.

—Ss. 390 and 392—Prosecution evidence insufficient—Admission of accused that complainant paid hush money—Conviction if justifiable.

It is not open to a Court to base a conviction under S. 392, on insufficient evidence coupled with the mere fact that accused in his statement admitted to have taken the property from the complainant for some other purpose, which was not believed by the Court.

In the darkness of night, accused were alleged to have robbed the complainants of Rs. 50, which one of the complainants had on his person. The prosecution evidence was insufficient by itself to justify conviction. But the accused, while being examined under S. 342, Criminal Procedure Code, admitted receiving Rs. 50 by way of fine, to hush up a criminal offence committed by one of the complainants. This admission, though not believed by the Court, was taken into consideration while convicting the accused.

**Held**, that the evidence was insufficient by itself to justify the conviction of the accused. 120 Ind. Cas. 95=30 Cr.L.J. 1135=24 S.L.R. 10=1929 Cr.C. 683=A.I.R. 1929 Sind 255.

—Ss. 390, 392, 395 and 411—Pointing out place where stolen property is hidden.

Mere pointing out by the accused of the place where some of the stolen properties were concealed is not sufficient to support a conviction under S. 411, nor would it amount to taking part in a dacoity or robbery. 17 A. 576, Foll. 16 C.W.N. 238=13 Cr.L.J. 127=13 Ind. Cas. 783.

## 3. Restraint—Meaning of.

—S. 390—Restraint—Meaning—Person asleep if can be restrained.

"Restraint" implies abridgement of the liberty of a person against his will. Where he is deprived of his will power by sleep or otherwise he cannot while in that condition be subjected to any restraint. 109 Ind. Cas. 682=29 P.L.R. 90=29 Cr.L.J. 602=10 A.I.Cr. R. 274=A.I.R. 1928 Lah. 445.

S. 391. See S. 395.

S. 392. See also S. 390.

—Ss. 392 and 411—Separate convictions under—Legality.

Dishonest intention in the case of an offence under S. 411, Indian Penal Code, is contradistinguished from dishonest reception. In the former dishonest supervenes after the act of acquisition of possession, while in the latter dishonesty is contemporaneous with the act of acquisition. The act of dishonest removal under S. 379, Indian Penal Code, constitutes dishonest reception under S. 411, and hence the thief does not commit the offence under S. 411 merely by continuing to keep possession of the article he stole. So also with regard to S. 392 and S. 411. Where therefore a person has been convicted under S. 392, Indian Penal Code he cannot also be separately convicted under S. 411. 2 W.R. (Cr. R.) 12=2 W.R. (Cr. R.) 63, 2 N.W.P. H.C.R. 312=18 P.R. 1884, foll. 3 A.I.Cr.D. 627=A.I.R. 1950 E.P. 66=51 Cr.L.J. 581.

—S. 392—Sentence—Value of property is not the criterion.

Highway robbery is a very heinous offence and law-abiding citizens have every right to be protected. Therefore when deciding a case of such nature, the value of the stolen property should not be the criterion whereby the amount of punishment is to be determined. A.I.R. 1942 Oudh 221=1941 O.W.N. 1369=43 Cr.L.J. 416=1941 A.W.R. 402=17 Luck. 516=198 Ind. Cas. 714.

—S. 392—In the case of a previous convict charged with an offence under S. 392, a sentence of 7 years' rigorous imprisonment is by no means too severe. A.I.R. 1934 Oudh 122=35 Cr.L.J. 566=147 Ind. Cas. 1176.

—S. 392—Sentence—Essentials—Imprisonment.

A sentence of imprisonment is an essential sentence under S. 392 of the Indian Penal Code. To this a fine may be added. And under S. 4 of the Whipping Act a sentence of whipping may be imposed where in the commission of a robbery, hurt is caused. 66 Ind. Cas. 418=44 All. 538=20 A.L.J. 388=23 Cr.L.J. 274=A.I.R. 1922 All. 245.

—Ss. 392 and 395—Robbery and dacoity—Charge for one and conviction for another.

The offence of robbery cannot be converted to dacoity where excepting a simple allegation there is not adequate proof on the prosecution side that five or more persons have taken part in committing or attempting to commit the crime. 26 P.W.R. 1915 Cr.=16 Cr.L.J. 634=30 Ind. Cas. 458.

—Ss. 392 and 458—Difference in offences.

An offence under S. 458 is graver offence than one under S. 392 of the Code (1911). 1 U.B.R. 98=13 Cr.L.J. 429=14 Ind. Cas. 978.

—Ss. 393 and 398—Criminal Procedure Code, S. 537—Charge under S. 398—Omission to specify section.

In a charge and finding under S. 398, Indian Penal Code, the substantive S. 393 as well as the supplementary S. 398 should be mentioned. The omission



to specify the section would, however, be covered by S. 537, Criminal Procedure Code. Where the heads of the charge did not mention the allegation that two of the three accused were carrying *Das*, and the Judge omitted to ascertain from the jury whether they found that the said two accused were armed with *Das*.

**Held**, that it was possible that the jury overlooked, the serious nature of the charge. The convictions were altered to S. 393 from S. 398, and the sentences reduced. 4 Bur.L.T. 198=12 Cr.L.J. 468=11 Ind. Cas. 1004.

— **S. 394—Proof of offence—Medical evidence not proving death from throttling—Confession not made to Magistrate—Ornaments recovered not connected with deceased.**

Where the medical evidence did not prove that the deceased died from asphyxiation by throttling, some symptoms favouring that view and some not favouring it and the confession was not made before a Magistrate but was only stated to have been made in the village to three villagers whose evidence was of little weight to prove that a confession was made, and although the evidence of ornaments stolen being found in the house of the accused might be correct, yet the prosecution failed to connect those ornaments with the deceased :

**Held**, that the prosecution had not proved the charge against the accused under S. 394, Indian Penal Code, and they were entitled to an acquittal. A.I.R. 1935 All. 549=1935 A.L.J. 478=36 Cr.L.J. 636=1935 A.W.R. 388=155 Ind. Cas. 119.

— **S. 394—Nature of offence.**

The offence under S. 394 cannot be said to be a minor offence so far as dacoity is concerned. 105 Ind. Cas. 831=28 Cr.L.J. 1007=9 A.I.Cr.R. 211=1 M. Cr.C. 196=A.I.R. 1928 Mad. 207.

— **S. 394—Robbery and murder—Robbery by four—Murder by two—Offences.**

Where four persons armed with deadly weapons fully prepared to commit murder in the event of resistance and two of them actually committed murder before any resistance was offered to them.

**Held**, that each of the robbers is equally guilty of the offence of murder. A.I.R. 1925 P.C. 1 (P.C.), Foll. 89 Ind. Cas. 718=26 Cr.L.J. 1406=A.I.R. 1926 Lah. 63.

— **S. 394—Sentence—Whipping—When justifiable.**

Before a sentence of whipping, in addition to imprisonment, can be passed on a person found guilty under S. 394, Indian Penal Code, there must be also a finding that he himself caused hurt while committing the robbery. 109 Ind. Cas. 810=6 Rang. 48=29 Cr.L.J. 618=10 A.I.Cr.R. 276=A.I.R. 1928 Rang. 112.

— **Ss. 394 and 397—Consecutive sentences—Legality.**

Consecutive sentences in respect of convictions under Ss. 394 and 397 are illegal, if they are based on the same set of facts. 89 Ind. Cas. 390=26 Cr. L.J. 1350=A.I.R. 1926 Lah. 47.

— **S. 395.**

#### Synopsis.

1. Charge and conviction.
2. Competency to try.
3. Conviction of less than five persons.

4. Essentials of offence.

5. Evidence and proof.

6. Sentence.

#### 1. Charge and conviction.

— **S. 395**—Where the evidence recorded by committing Magistrate discloses an offence under S. 395, Indian Penal Code, Sessions Judge is justified in framing a charge under the section despite the fact that the Magistrate does not believe the evidence when the accused is not in any way prejudiced by the alteration of the charge. A.I.R. 1933 Oudh 375=10 O.W.N. 738=35 Cr.L.J. 63=146 Ind. Cas. 424.

— **Ss. 395 and 427**—Charge under S. 395—Conviction under S. 427—Legality. See CRIMINAL PROCEDURE CODE (V OF 1898), S. 238. A.I.R. 1950 All. 471.

— **Ss. 395, 323, 452, 147 and 148**—Accused charged of having committed dacoity, if can be convicted under Ss. 452 and 323 or under Ss. 147 and 148.

An accused charged merely in general terms of "having committed dacoity" should not be convicted under Ss. 452 and 323, Indian Penal Code, as the latter offences are not necessarily cognate offences and in committing dacoity, one does not necessarily commit house trespass or simple hurt. The provisions of S. 342, Criminal Procedure Code, are very important and the Court, before it can convict the accused under S. 452 and 323, Indian Penal Code, is bound to put to the accused points brought out in the evidence of the prosecution witnesses so that the accused might have an opportunity to give his explanation. Whether there was or was not prejudice caused to the accused would depend, in each case, on the facts of that case. The Court may have also to take into consideration the line of defence and the evidence that was given. If, from the language of the charge and from other materials, it is clear that the accused knew definitely the case that he had to meet and surprise was not sprung on him, S. 537, Criminal Procedure Code, would enable the Court to uphold the conviction in spite of the charge being defective.

The accused cannot be convicted under Ss. 147 and 148, Indian Penal Code when the charge against them was merely under S. 395, Indian Penal Code, unless the case is one to which Ss. 236 and 237, Criminal Procedure Code, are applicable. A.I.R. 1945 All. 87= (1945) A.L.J. 141=46 Cr.L.J. 495=1945 O.W.N. (H.C.) 138=I.L.R. (1945) All. 432=1945 A.W.R. (H.C.) 145=218 Ind. Cas. 372.

— **Ss. 395, 147 and 148**—Essentials for proving a charge under S. 395 are different from those for proving a charge under Ss. 147 and 148—Alteration of conviction from one under S. 395 to S. 148—S. 535, Criminal Procedure Code, held not applicable.

The particulars necessary for proving a charge under S. 395, Indian Penal Code, are different from particulars necessary for proving a charge under S. 147 or S. 148, Indian Penal Code. The existence of an unlawful common object is an essential ingredient for a charge under S. 147 or 148. Hence, in a case when conviction of an accused under S. 359, was altered to one under S. 148, it was held that the accused was seriously prejudiced and the principle laid down in S. 535, Criminal Procedure Code, was not applicable. A.I.R. 1945 Pat. 376=225 Ind. Cas. 114.

— **Ss. 395, 398**—Charge and conviction.

In the case of charge for dacoity only, the actual offender, or offenders who were armed with deadly



weapons can be convicted under S. 398, Indian Penal Code. A.I.R. 1932 Lah. 367=34 P.L.R. 449=33 Cr.L.J. 460=137 Ind. Cas. 196.

**—S. 395—Charge and conviction—Common object—Proof of.**

A conviction for dacoity founded on a common object not charged, or on evidence, which does not prove the necessary ingredients of the offence, is not sustainable. 77 Ind. Cas. 444=19 M.L.W. 211=34 M.L.T. 307=1924 M.W.N. 238=25 Cr.L.J. 396=A.I.R. 1924 Mad. 584=46 M.L.J. 311.

**2. Competency to try.**

**—S. 395—**A Judge who is empowered by the Local Government to try cases under Ss. 121-A, 122, 121 and 396, Indian Penal Code, is not competent to try an offence under S. 395 when no murder is involved. A.I.R. 1933 Rang. 116=34 Cr. L.J. 929=145 Ind. Cas. 251.

**3. Conviction of less than five persons.**

**—S. 395—Charge of dacoity against more than five persons—Evidence showing at least six persons involved—Acquittal of four—Conviction of two—Sustainability.**

The fact that five or more persons are not convicted at a trial for dacoity is no ground for holding that there should be no conviction of any one at all under S. 395, Indian Penal Code. Where more than five persons are separately charged with dacoity, but the jury acquits all but one or two, the evidence showing that there were at least six persons concerned in the affair, the conviction of the rest is not illegal or unsustainable. The mere fact that the evidence was not sufficient to convict four of the accused actually charged would not in any way affect the question of the number of persons engaged. 1946 N.L.J. 566=47 Cr.L.J. 822=226 Ind. Cas. 78=A.I.R. 1947 Nag. 57.

**—S. 395—Conviction of less than five persons—Misdirection to jury.**

Where the jury brings in a verdict of guilty on a charge under S. 395 in respect of less than five persons, it cannot be said that there is a duty upon the Court to satisfy itself that in coming to such a verdict, there has been present in their minds the necessity of at least five persons being concerned in the offence. But where the Judge has adequately explained in his charge what is necessary to constitute the offence of dacoity, he has done all that can reasonably be expected of him.

Before the High Court interferes with a conviction in a trial by jury, it has to be satisfied that there was a misdirection on the part of the Sessions Judge or that there was improper admission or exclusion of evidence. A.I.R. 1932 Cal. 295=33 Cr. L.J. 477=137 Ind. Cas. 497.

**—Ss. 395 and 391—Five persons charged—One acquitted—Others also concerned—Conviction under S. 391—Propriety.**

Where the charge itself only charged five persons with the offence of dacoity and one of them was acquitted, but the Court believed there were other persons concerned in the dacoity committing robbery with violence, a conviction of the four persons under S. 391 is not improper. 1930 M.W.N. 1138.

**—Ss. 395 and 396—Proof of dacoity by five—Identification of four only—Liability.**

Where it is fully established that a dacoity was committed by a party of five persons one of whom

committed a murder and the identity of four of them is established beyond question, the fifth remaining unidentified the four accused are equally guilty under S. 396, though it is not possible to trace and identify one of the culprits. 120 Ind. Cas. 490=31 Cr.L.J. 112=A.I.R. 1930 Lah. 263.

**—Ss. 395 and 392—Five alleged to have committed dacoity—One turning approver—Two acquitted—Remaining two if can be convicted under S. 395.**

Where a dacoity was alleged to be committed by 5 persons, one of whom turned an approver and two were acquitted.

**Held,** the remaining two cannot be convicted of dacoity but should be convicted under S. 392 (robbery): 39 All. 348; (1910) M.W.N. 52, Foll. 102 Ind. Cas. 483=28 Cr.L.J. 547=8 A.I.Cr.R. 191=A.I.R. 1927 Lah. 519.

**—S. 395—Five charged of dacoity—One acquitted—Others if can be convicted.**

Where three known and named persons were charged with dacoity along with two other unknown men and the jury acquitted one of the three and convicted the other two of dacoity.

**Held,** that the conviction is not illegal. It was open to the jury, while holding that one of the accused who was supposed to have been known to the witnesses had not been properly identified, to find that the total number of dacoits was five but at the same time the Judge ought to have asked the jury whether they had considered the possible result of the acquittal and whether they found, even after the acquittal of one accused that the number of robbers was five. 106 Ind. Cas. 341=1927 M.W.N. 853=29 Cr.L.J. 5=9 A.I.Cr.R. 248=1 M.Cr.C. 72=A.I.R. 1928 Mad. 144=53 M.L.J. 732.

**—S. 395—Dacoity, conviction for—Accused less than five—Validity.**

Less than five persons cannot be convicted of dacoity unless it is proved that at least five persons took part in it. 39 All. 34=15 A.L.J. 205=18 Cr.L.J. 491=39 Ind. Cas. 331.

**—Ss. 395 and 396—Charge of dacoity.**

When out of a number of persons charged with having committed a dacoity half are acquitted, the charge of dacoity does not necessarily fail. 15 C.W.N. 434=12 Cr. L.J. 193=10 Ind. Cas. 684.

**—Ss. 395 and 391—Three of the six accused under S. 391 acquitted—Effect.**

When six persons are charged under S. 391 and three of them are acquitted, the remaining three cannot be convicted under S. 391. (1910) M.W.N. 52=7 M.L.T. 305=11 Cr.L.J. 249=5 Ind. Cas. 797.

**—Ss. 395 and 347—Dacoity—Absence of fifth person—Validity—Alteration of offence.**

In the absence of evidence as to the existence of an alleged fifth person which is necessary to constitute the offence of dacoity, a conviction under S. 395 of the Indian Penal Code is illegal and in the circumstances of the case the accused could only be convicted of an offence under S. 347. The sentence should be reduced when the conviction is altered to one under S. 347, Indian Penal Code. 7 Cr. L.R. 147 (Mad.).



#### 4. Essentials of offence.

##### —S. 395—Illegal distraint of cattle—Forcible removal.

Some accused *pattadar* holding *ryoti* land under *zamindar*—Estate authorities distraining their cattle for recovering arrears of rent—Accused, along with others, forcibly recovering cattle and inflicting injuries on opposite parties—No proof of exchange of *muchi-likā* between *zamindar* and accused or the continuance of valid *patta*—Arrears of more than one *fasli* attempted to be recovered by single distraint—Distraint being wholly illegal, accused, held were within their right and no offence of theft or dacoity held was committed. A.I.R. 1941 Mad. 763=1941 M.W.N. 679=(1941) 2 M.L.J. 207=54 L.W. 482=43 Cr.L.J. 106=197 Ind. Cas. 71.

##### —S. 395—Detention of produce under the bonafide belief of right to do so—Assault.

Where the accused who were *taradagars* under the complainant refused to give *batai* to the complainant who thereupon applied to the *Tahsildar* for division of the harvest and the *girdawar* was deputed to divide the produce, and some altercation about the receipts after the division of the produce led the accused to detain the produce and assault the complainant :

**Held**, that although the accused had no right to detain the produce, they presumably did so in the *bona fide* belief that they were justified in their action as no receipts were given to their satisfaction, and therefore, under the circumstances, the requisite criminal intention for a charge under S. 396, Indian Penal Code, could not be said to be established. 146 Ind. Cas. 295=34 Cr.L.J. 1258=34 P.L.R. 956.

—Ss. 395 and 380—Accused charged with offence under S. 395—Dacoity—No resistance from the inmates of the house—Accused not using any force or show of force and acquiring property—Sessions Judge convicting the accused under S. 380 only :

**Held**, that the view taken by the Sessions Judge was wrong as it indicated that any dacoity to which no resistance is offered and no evidence required will cease to be dacoity and should be treated as a theft. [Sentence enhanced]. A.I.R. 1933 All. 114=1932 A.L.J. 1078=55 All. 117=34 Cr.L.J. 448=146 Ind. Cas. 790.

##### —S. 395—Dacoity and rioting—Mahomedan rioters—Common object proved—Any person taking part in disturbance guilty of riot as well as dacoity.

Where it is established that the common object of the Mahomedan rioters was both to hurt any members of the Hindu community whom they might happen to find and to rob the shops and houses of the Hindus, any person who is proved to have taken a part in the disturbance must be found guilty not only of the offence of riot but also of the offence of dacoity. 99 Ind. Cas. 238=2 Luck. 264=3 O.W.N. (Sup.) 304=28 Cr.L.J. 110=A.I.R. 1927 Oudh 70.

##### —Ss. 395 and 391—Robbery with violence by five or more persons.

Taking the words of the section in the most literal sense and strongly in favour of the Crown, they point to robbery with violence by five or more persons.

Where accused Nos. 4, 5, and 6 stood by and encouraged accused Nos. 1, 2 and 3 who were making a sort of raid on their brother's property or what their brother claims as his property, and when he tried to re-take what his brothers had taken from him, two

of them, the younger one probably instigated by accused No. 4, tried to prevent the complainant from re-taking his property.

**Held**, accused Nos. 4, 5 and 6 were no party to any robbery, nor could they in any sense be called robbers or dacoits. 71 Ind. Cas. 877=1922 M.W.N. 326=15 M.L.W. 552=24 Cr.L.J. 269=A.I.R. 1922 Mad. 195.

##### —Ss. 395 and 391—Dacoity—Essentials.

The essentials of the offence of dacoity are that the theft should be perpetrated by means either of actual violence or of threatened violence. The threatened violence may be implied in the conduct and character of the mob. It is not necessary that the force or menace should be displayed by any overt act. It cannot assist the accused or reduce the gravity of their offence that no actual hurt was caused for the reason that no one dared to resist the overwhelming show of force, which was sufficient to terrify those whose business it was to protect the property. (1908) 10 Bom. L.R. 632.

#### 5. Evidence and Proof.

See also NOTE 2 under S. 396

##### (a) General.

##### (b) Identification.

##### (c) Duty of court.

##### (a) General.

##### —S. 395—Confession without corroboration.

When there is absolutely no evidence to connect any of the accused persons with the dacoity except their confessions which were retracted by them before the committing Magistrate as well as in the Sessions Court and there are many circumstances which leave doubt whether the confessions were voluntary and true the conviction was not safe and proper. A.I.R. 1945 Bom. 484=47 Bom. L.R. 648=47 Cr.L.J. 252=222 Ind. Cas. 143.

##### —S. 395—Dacoity case—Prosecution witnesses not consistent regarding parts played by various dacoits—Discrepancies point rather to truth than falsity.

Where the prosecution witnesses are not quite consistent about the parts that were played by various dacoits, the discrepancies of this kind would point rather to the truth than to the falsity of the prosecution case. Mistakes in observation are likely to be made by witnesses to a crime of this nature. A.I.R. 1945 All. 100=1945 A.W.R. (H.C.) 18=46 Cr.L.J. 525=219 Ind. Cas. 24.

##### —Ss. 395, 412 and 411—Articles found in possession of accused—Conviction under S. 395, when proper—No evidence that accused knew that property was stolen—Conviction.

It is quite meaningless to convict the accused both under S. 395 and under S. 412 with regard to the evidence about the finding of certain articles in their possession. If the jury are prepared to draw an inference from the fact that particular person is a thief there would be no difficulty in convicting him under S. 395, when it is proved that the actual property was stolen in the course of a dacoity. If they are not so satisfied, the position becomes very different because there being no evidence from which a jury could be asked to say that these individual accused knew or had reason to believe that the stolen properties were transferred by the commission of dacoity. If the



charge under S. 395 failed, the only alternative would be one under S. 411. A.I.R. 1944 Cal. 39=45 Cr.L.J. 468=211 Ind. Cas. 624.

**—Ss. 395, 411 and 399—Evidence as to recovery of stolen property attacked—Alternative hypothesis.**

When the evidence of recovery of stolen property is attacked, the Court has to examine the evidence in the light of the following alternative hypothesis. Hypothesis enunciated. A.I.R. 1943 Lah. 5=44 Cr.L.J. 62=44 P.L.R. 545=203 Ind. Cas. 62.

**—Ss. 395 and 148—Dacoity—Substantial property stolen—Motive, evidence of—Prosecution giving evidence of past conduct of accused in guise of evidence of motive—Prejudicing jury against accused.**

In cases of dacoity and cognate offences, where it is alleged that substantial property has been stolen, it is entirely unnecessary to consider motive at all. The taking of the booty in such cases itself provides a sufficient motive for the offence, if any motive is required. Where, in the guise of evidence of motive, the prosecution has in fact led a mass of evidence relating to the conduct of the accused in the past, such evidence is extremely likely to prejudice the jury. Such evidence has no bearing whatsoever on the fact which the jury has to try, namely whether the accused entered the house and committed theft therein. A.I.R. 1942 Pat. 199=7 C.L.T. 82=8 B.R. 264=43 Cr.L.J. 230=21 Pat. 130=23 P.L.T. 494=197 Ind. Cas. 647.

**—S. 395—**On a charge of dacoity it is not enough to establish presence of the accused amongst the dacoits. 1937 M.W.N. 737.

**—Ss. 395, 411 and 412—Accused pointing out article stolen in dacoity a month after dacoity—Whether proves that he took part in dacoity—Possession contemplated.**

The dacoity took place on 26th May, 1935, and the silver ornament was recovered a month later on 25th June, 1935, through the help of the accused :

**Held**, that the fact that the accused knew where the ornament belonging to the sister-in-law of the complainant had been buried would not go to show that he actually took part in the commission of the dacoity; he may have seen the actual dacoit or some other person to whom the dacoit had handed over this ornament burying it under a tree in the field.

**Held further** that the possession contemplated by Ss. 411 and 412, Indian Penal Code, is exclusive possession, otherwise the receiver or the possessor of the stolen property would run the risk of losing the stolen property, if someone else could get hold of it. In the circumstances of this case, the accused could not be said to be in exclusive possession of the stolen property. Although strong suspicion attached to the accused that he either had something to do with the commission of the dacoity or in the disposal of the stolen property obtained by the commission of this dacoity, still the evidence was not legally sufficient to justify his conviction either of an offence under S. 395, Indian Penal Code, or under S. 411 or S. 412, Indian Penal Code. A.I.R. 1937 Oudh. 157=1936 O.W.N. 295=37 Cr.L.J. 454=12 Luck. 88=161 Ind. Cas. 271.

**—S. 395—Dacoity—Circumstantial evidence—Pointing out place where stolen property found—Whether sufficient.**

Where the sole evidence of a person charged with dacoity was that he had pointed out the place where

some of the stolen property was found, the evidence is not sufficient as it did not exclude other theories compatible with his innocence. 1 O.L.J. 74=15 Cr.L.J. 404=23 Ind. Cas. 1004.

**—S. 395—Production of stolen articles—Other evidence doubtful.**

The mere fact that a person accused of dacoity made incriminating statements about himself before several prosecution witnesses and even produced some of the stolen articles, is not convincing or conclusive of his guilt. 31 P.W.R. 1913 Cr.=314 P.L.R. 1913=14 Cr.L.J. 601=21 Ind. Cas. 473.

**—S. 395—**Two dacoity cases—Material witnesses examined separately—Carbon copies of statements of merely formal witnesses in one case filed in the other—Sessions Judge held can easily rectify the irregularities as he has ample powers to summon and examine them in his own Court. A.I.R. 1935 Oudh 9=11 O.W.N. 1308=36 Cr.L.J. 175=152 Ind. Cas. 428.

**—S. 395—Accused recently wounded and unable to give satisfactory explanation of injury—Inference.**

The mere fact that the accused had been recently wounded and that he has failed to give a satisfactory explanation as to how he was wounded, combined with the fact that he was conveyed away from his house to a place of hiding shortly after the dacoity, is of some corroborative value, but may be capable of explanation other than that of his complicity in this particular dacoity. A.I.R. 1934 Pesh. 53=35 Cr.L.J. 860=148 Ind. Cas. 760.

**—Ss. 395 and 391—Personal grievance—If necessary.**

For the offence of dacoity, it is not necessary, that the accused should have known their victims previously and should have some personal grievance against them before they would commit dacoity. 117 Ind. Cas. 787=29 M.L.W. 396=1929 M.W.N. 194=2 M.Cr.C. 31=30 Cr.L.J. 843=A.I.R. 1929 Mad. 135=56 M.L.J. 103.

**—S. 395—Evidence—Stolen property not found in accused's possession—Their names not entered in the first information report—No identification proceedings by any Magistrate—Conviction solely based on testimony of complainant—Legality.**

Where no stolen property was found in possession of the accused charged under S. 395 and their names were not entered in the first information report and no identification proceedings were conducted by any Magistrate.

**Held**, their conviction solely based upon the testimony of the complainant was not sustainable. 112 Ind. Cas. 109=5 O.W.N. 732=29 Cr.L.J. 989=A.I.R. 1928 Oudh 417.

**—S. 395—Taking part in dacoity—Proof of—Knowledge of dacoity—Sufficiency of.**

The facts were that a gang of thirteen persons had assembled at the accused's hut at night before the dacoity was committed, that he was aware of their purpose, that he did not give any information to the authorities and that after the dacoity was over the dacoits once more came to his hut and told him what had happened. He, next morning, informed the Mukhia. Some property proved to have been stolen in the dacoity was found in the crop surrounding the accused's hut, and this was thrown away by the dacoits because he began to raise an alarm.



**Held**, the evidence was insufficient to prove that the appellant actually took part in the dacoity. 81 Ind. Cas. 597=11 O.L.J. 356=25 Cr.L.J. 949=A.I.R. 1924 Oudh 367.

— **S. 395—Dacoity—Association—Evidence of.**

Mere association with persons who are afterwards proved to have participated in a dacoity may create suspicion, but is not proved of the fact that the person so associating took part in the dacoity. 14 N.L.R. 192=19 Cr.L.J. 79=43 Ind. Cas. 111.

— **Ss. 395 and 396—Evidence—Accused sent to prison for not being able to furnish security—Relevancy.**

The fact that the accused was sent to jail for being unable to furnish security under S. 110, Criminal Procedure Code, is irrelevant in a proceeding against him under S. 396, Penal Code. A presumption under S. 114, Evidence Act, will not alone justify fixing a person with more than knowledge that the goods were obtained by dacoity. 59 Ind. Cas. 204=22 Cr.L.J. 60=32 C.L.J. 89.

(b) **Identification.**

— **S. 395—Evidence of identification of those taking part in dacoities at night is apt to be unreliable.** A.I.R. 1941 Bom. 146=43 Bom. L.R. 157=I.L.R. (1941) Bom. 338=42 Cr.L.J. 519=194 Ind. Cas. 122.

— **S. 395—In case of dacoity, conviction can be based on identification evidence alone if it is established that the dacoits continued to plunder the house for a long time and that during that interval, their victims had full opportunity of noticing their features and that there was sufficient light for them to be able to do so.** A.I.R. 1934 Lah. 641=35 P.L.R. 499=36 Cr.L.J. 121=153 Ind. Cas. 531.

— **S. 395—Identification, value of.**

In dacoity cases, evidence adduced as to identification of dacoits ought not to be accepted too readily but should be looked at with great caution. A.I.R. 1932 Oudh 317=9 O.W.N. 3=33 Cr.L.J. 920=7 Luck. 511=139 Ind. Cas. 751.

— **S. 395—Identification doubtful—Acquittal.**

Complainant who said he followed the dacoits on a dark night to Railway station came to the station later on and the accused the appellants on suspicion without being certain that they were the men who had been at his village for dacoity.

**Held**, the identity of the appellants with persons who might have trespassed in complainant's house had not been established beyond the possibility of reasonable doubt and it was not possible to support the conviction. 5 L.L.J. 82=A.I.R. 1923 Lah. 161.

— **S. 395—Evidence of identification.**

Dacoity cases require great caution on the question of evidence as to identification of dacoits. 4 O.L.J. 83=18 Cr.L.J. 456=39 Ind. Cas. 296.

— **S. 395—Dacoity—Identification—Complicating evidence.**

Where in the first report, only two dacoits are alleged to have been recognised at time of commission of dacoity, subsequent evidence that they were all identified cannot be relied upon unless strongly corroborated. 8 P.W.R. 1915 Cr.=16 Cr.L.J. 204=93 P.L.R. 1915=27 Ind. Cas. 764.

— **S. 395—Dacoity—Identification of the accused—Benefit of doubt.**

Where the evidence regarding the identification of the accused is not reliable they could not be convicted

of any offence. 71 P.L.R. 1910=2 P.W.R. 1911 Cr.=11 Cr.L.J. 598=8 Ind. Cas. 239.

(c) **Duty of Court.**

— **S. 395—Jury trial under Trial with aid of jury acting as assessors under Ss. 148 and 46c—Duty of Judge in matter of expressing definite opinion on credibility of prosecution witnesses, while dealing with non-jury charge—Omission to place before jury evidence against each individual accused—Trial, held vitiated.** A.I.R. 1942 Pat. 199=7 C.L.T. 82=8 B.R. 264=43 Cr.L.J. 230=21 Pat. 130=23 P.L.T. 494=197 Ind. Cas. 647.

— **S. 395—Directions to jury—Duty of Judge in dacoity and robbery cases.**

In case of offences under S. 395, Indian Penal Code, (dacoity) the Judge ought to explain to the jury what is necessary to constitute the offence of robbery as that offence is defined in Section 390 of the Indian Penal Code. If he does not, it is a real and not merely a technical defect. It is not to be assumed that every jurymen knows the legal distinction between theft and robbery and the defect arising from the omission by the Judge to explain to the jury the essential elements of the offence of robbery is not cured by the fact that evidence was given in the particular case which if believed by the jury would warrant their conviction of the accused on the charge of dacoity. 81 Ind. Cas. 953=11 O.L.J. 315=25 Cr.L.J. 1129=A.I.R. 1924 Oudh 411.

— **S. 395—Several accused—Discussion of evidence against each separately.**

The only satisfactory way of dealing with the evidence and identification of accused in a dacoity case, is to give at first a general outline of the case, the dacoity, the course of the investigation and the arrest of the various accused, then the case against and for each accused should be dealt with in detail, and a conclusion arrived at with regard to each individual. 76 Ind. Cas. 573=2 Bur. L.J. 199=25 Cr.L.J. 205=A.I.R. 1924 Rang. 67.

— **S. 395—Finding as to number of persons.**

The offence under S. 395 can be committed only if the number of persons concerned in the robbery is not less than five. Hence a finding as to the number of persons concerned being five or more is essential. 88 Ind. Cas. 513=6 Lah. 24=26 Cr.L.J. 1153=26 P.L.R. 139=A.I.R. 1925 Lah. 337.

6. **Sentence.**

— **S. 395—Sentence—Dacoity not characterised or accompanied by brutality—Non-infliction of severe injuries—Sentence of transportation and heavy fine—If justified—Receiver of property stolen at dacoity—Distinction.**

In the case of a dacoity not characterised by any unusual circumstance of brutality, no severe injuries having been caused to any one, a sentence of transportation for life would not be justified, even having regard to the prevalence of dacoity. Nor are heavy fines appropriate in such cases. The sentences of fine in such cases ought to be set aside and the sentences of transportation should be reduced. A sentence of ten years' rigorous imprisonment would be adequate.

But in the case of receiver of property stolen at a dacoity, he deserves no sympathy, and when one is caught, he deserves an absolutely deterrent sentence (both imprisonment and fine). 4 A.I. Cr. D. 314.



**—S. 395—Committing of dacoity in broad daylight—Stealing of fairly large sum—Sentence of six years' rigorous imprisonment upheld.**

The accused committed dacoity in broad daylight and stole a fairly large sum of money from the complainant. They were convicted and sentenced to six years' rigorous imprisonment each :

**Held**, that the case did not justify interference with the discretion of the lower Court in awarding the sentence.

**Held further** that the fact that the accused returned a part of the stolen property to the complainant the next day would not justify the High Court in reducing the sentences. A.I.R. 1945 All. 100=1945 A.W.R. (H.C.) 18=46 Cr.L.J. 525=219 Ind. Cas. 24.

**—S. 395—Accused committing dacoity under influence of liquor—No serious injuries caused.**

Where the circumstances indicated that the dacoits might have been under the influence of liquor at the time of the occurrence and possibly the dacoity committed by them was committed under the influence of liquor and no serious injuries were caused to anybody in the commission of the dacoity :

**Held**, that the sentence of seven years' rigorous imprisonment each was unduly severe.

[Sentence was reduced to two years' rigorous imprisonment each]. A.I.R. 1943 Cal. 32=I.L.R. (1942) 2 Cal. 136=44 Cr.L.J. 386=205 Ind. Cas. 459.

**—S. 395—Fight between dacoits and villagers—Several people injured—One of dacoits found in possession of loaded revolver :**

**Held**, that four years' imprisonment was inadequate. [Sentence enhanced to ten years]. A.I.R. 1942 All. 339=1942 A.L.J. 376=43 Cr.L.J. 867=I.L.R. (1942) All. 892=1942 A.W.R. 293=202 Ind. Cas. 586.

**—Ss. 395 and 392—Dacoity on highway between sunset and sunrise must be treated as aggravation of offence. A.I.R. 1942 Pat. 156=43 Cr.L.J. 615=8 B.R. 647=23 P.L.T. 475=200 Ind. Cas. 208.**

**—Ss. 395 and 397—Fact that S. 397 imposes minimum sentence of seven years does not mean that sentence less than seven years should be passed on persons against whom it is impossible to prove that they used deadly weapons or caused grievous hurt. In serious cases maximum sentence or sentence approaching it should be passed under S. 395. A.I.R. 1941 All. 359=1941 A.L.J. 490=1941 A.W.R. 263=43 Cr.L.J. 97=197 Ind. Cas. 19.**

**—S. 395—Punishment ordinarily should be seven years.**

Dacoity is a most serious crime which it is difficult to detect in the sense of bringing home the offence to the culprits and it is an offence which gives rise to a great deal of misery. In ordinary circumstances, a sentence of rigorous imprisonment for a period of seven years is the least sentence which should be passed.

Where five men concerned in a dacoity go into apartments occupied by three defenceless women with intention of committing robbery and they catch hold of one of the women by the throat and wound the others, but do not succeed in their object of committing theft, due to the fact of neighbours immediately coming to the assistance of the women, the offence is not merely a technical dacoity but a serious crime.

[Sentences of two and one years were enhanced to ten and seven years, respectively]. A.I.R. 1936 All.

311=1936 A.W.R. 214 (2)=37 Cr.L.J. 595=1936 A.L.J. 739=162 Ind. Cas. 499.

**—S. 395—Offences of dacoity and robbery in respect of cultivators, which have come to be of common occurrence in a district should be severely punished. A.I.R. 1936 Rang 70=37 Cr.L.J. 416=161 Ind. Cas. 90.**

**—Ss. 395, 396, 300—Dacoity—Gunners having lightmen to spot out persons—Shot fired only on lower part of body—Injury on stomach—Death.**

**Held**, that the intention of the dacoits was not to kill but only to cause some injury as would disable the deceased from offering resistance either by his acts or his shouts and the bodily injury was not sufficient in the ordinary course of nature to cause death and the first two clauses of S. 300, were excluded. The accused were, hence guilty not under S. 396 but only under S. 395.

**Held, also**, that as the dacoity planned and committed was of the worst possible description, deterrent punishments were called for. A.I.R. 1935 Cal. 580=39 C.W.N. 188=36 Cr.L.J. 1322=158 Ind. Cas. 176.

**—S. 395—Sentence—First offender—Transportation for life—If proper.**

Where in a case of dacoity against a number of persons none of the accused had ever been tried or convicted of an offence before and they had all more or less means of livelihood and were not certainly confirmed dacoits but acted under an impulse of a transitory spirit of lawlessness.

**Held**, the sentence of transportation for life and rigorous imprisonment for 10 years were too severe. 9 O.L.J. 500=A.I.R. 1923 Oudh 39.

**—S. 395—Addition of whipping—When proper.**

Where a dacoity is committed with great cruelty an additional sentence of whipping besides a substantive sentence is appropriate. 61 Ind. Cas. 525=22 Cr.L.J. 397=19 A.L.J. 610=A.I.R. 1921 All. 408.

**—Ss. 395 and 397—Dacoity—Torture—Leniency in sentence.**

A person found guilty of dacoity with torture should not, in the matter of sentence, be treated with any leniency. 2 U.P.L.R. (All.) 115=56 Ind. Cas. 771 (All.).

**—Ss. 395 and 396—Offence under—Separate sentence is not necessary inasmuch as a man is not to be punished twice for the same criminal act. A.I.R. 1944 Sind 113=I.L.R. (1943) Kar. 371=45 Cr.L.J. 704=213 Ind. Cas. 317.**

**—S. 396 : see also S. 395.**

1. Applicability of section.
2. Evidence and proof.
3. Sentence.
4. Miscellaneous.

**I. Applicability of section.**

**—S. 396—One dacoit having gun—Death caused by shot—Liability of every dacoit for murder.**

Every person who has taken part in a dacoity must have known that the gun with which one of them was armed was intended to be used, and every one of them is liable for the murder caused by shot of the gun by reason of the provisions of S. 396, Indian Penal Code. A.I.R. 1943 Pat. 413=10 B.R. 464=45 Cr.L.J. 577=212 Ind. Cas. 186



—S. 396—Rioters leaving scene of occurrence only after murder of a person—Liability to punishment for murder and dacoity.

Section 396 applies even where murder was committed for facilitating the escape of the perpetrators of the crime while retreating. Consequently, where the rioters only left the scene of dacoity after they had practically killed the Sub-Inspector and seriously wounded certain constables, all the members of the unlawful assembly, in virtue of the provisions of Ss. 396 and 302 read with S. 149, rendered themselves legally liable to punishment for the offence of murder and dacoity. A.I.R. 1935 Oudh 190=1935 O.W.N. 145=153 Ind. Cas. 978.

—S. 396—A common intention to carry out an unlawful design at all costs, even at the cost of overcoming resistance or evading capture by taking life, is sufficient. Without mincing matters, the presumption of a common intention to add murder, if necessary to robbery, is not easily avoided, where all, or some to the knowledge of the rest of those engaged in the enterprise, are proved to have carried fire-arms, and fire-arms have been used with fatal effect. A.I.R. 1935 Rang. 89=36 Cr.L.J. 605=13 R. 210=154 Ind. Cas. 881 (F.B.).

—Ss. 396, 149—Liability of members of dacoit band for murder.

Where a person is shot with the object of removing opposition which he raised to the approach of the dacoit band to his house, and the person dies, the murder is committed in committing the dacoity and hence S. 396, Indian Penal Code, is applicable and every member of the dacoit band is guilty of the murder by reason of Ss. 149 and 396, Indian Penal Code. A.I.R. 1934 Rang. 30=35 Cr.L.J. 863=148 Ind. Cas. 1064.

—S. 396—In order to render the other dacoit, liable under S. 396 for the act of one of their associates it is not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted its commission. Indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be or had in fact been, committed. But nonetheless they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the members of the gang "in the commission of the dacoity." A.I.R. 1933 Lah. 977=35 Cr.L.J. 322=35 P.L.R. 51=15 Lah. 84=147 Ind. Cas. 2.

—S. 396—Murder committed in course of dacoity.

Where certain persons who had committed dacoity were pursued in hot haste after the act of dacoity and being brought to bay, one of the dacoits stabbed and murdered a man who was pursuing him :

**Held**, that the act of murder was not a separate transaction but an offence committed "in committing the dacoity" within the meaning of S. 396. A.I.R. 1932 Cal. 818=33 Cr.L.J. 722=139 Ind. Cas. 213 (F.B.).

—S. 396—The mere fact that the dacoits had dropped the booty before the murder took place did not make any difference to the applicability of S. 396. A.I.R. 1932 Cal. 818=33 Cr.L.J. 722=139 Ind. Cas. 213 (F.B.).

—S. 396—Joint commission of murder—Necessity for proof.

For a charge under S. 396 it is not necessary for the prosecution to prove that the murder was commit-

ted jointly by all the accused. 91 Ind. Cas. 233=27 Cr.L.J. 57=A.I.R. 1926 Oudh 245.

—S. 396—Shot fired to keep off rescue party.

A dacoity begins as soon as there is an attempt to commit robbery. A shot fired in order to keep off the rescue party, and allow the theft to be committed, is an act committed in committing dacoity. 89 Ind. Cas. 452=12 O.L.J. 421=2 O.W.N. 550=26 Cr.L.J. 1364=A.I.R. 1925 Oudh 723.

—S. 396—Murder committed while retreating for facilitating escape.

Murder committed by dacoits while retreating or carrying away the stolen property in order to facilitate their escape is murder committed in the commission of the dacoity and all the accused are liable to the enhanced punishment. 81 Ind. Cas. 188=25 Cr.L.J. 700=A.I.R. 1925 Lah. 142.

—S. 396—Applicability—Murder while carrying off booty.

The fact that the murder was committed in the compound of the house raided, at a time when the dacoits were making good their escape is not sufficient to take the case out of section 396. 76 Ind. Cas. 1039=25 Cr.L.J. 319=A.I.R. 1923 Lah. 329.

—S. 396—Murder during retreat with booty.

Murder committed by dacoits while carrying away the stolen property is "murder committed in the commission" of dacoity. 2 Bom. L.R. 325 and 17 M.L.J. 118, Foll. 63 Ind. Cas. 623=2 Lah. 275=12 P.L.R. 1921=22 Cr.L.J. 687=A.I.R. 1921 Lah. 615.

—Ss. 396 and 460—Dacoity—Murder.

Where death was the result of blows given on the right side which caused the rupture of liver and the fracture of four ribs, and the accused left the house taking a lot of jewellery.

**Held**, that it had not been made out that the accused intended to kill the deceased or to cause him such injury as he knew to be likely to cause death. The offence committed by him was one falling under S. 460, Indian Penal Code. 1 Lah. L.J. 252.

—Ss. 396, 390—In so "committing".

Murder committed by dacoits while carrying off the stolen property is murder committed "in the commission" of dacoity or robbery as the case may be, and is punishable under S. 396. (1906) 17 M.L.J. 118.

—S. 396—Dacoity with murder—Murder committed while dacoits were escaping.

Where after the commission of a dacoity, in which however the dacoits being interrupted by the villagers, did not get any plunder the dacoits were attempting to escape, and one or more of them, in order to facilitate the escape, attacked and killed one of the pursuing party, it was,

**Held**, that S. 396 did not apply. But only the person or persons actually taking part in the killing were liable therefor. 1906 A.W.N. 47.

—S. 396—Dacoity—Murder by one dacoit—Liability of all dacoits.

If any one of the dacoits who jointly commit the dacoity commit murder in so committing dacoity, all of them are responsible for that one's act and should be punished as such under S. 396, Indian Penal Code.



It is not necessary for the prosecution to prove that the others expected that murder would be committed. (1904) 6 Bom. L.R. 248.

**—S. 396—Elements of offence—Violence not used to obtain carrying away property.**

The first essence of an offence under S. 396 is that the dacoity is the joint act of the persons concerned, and the second essence of the offence is that the murder is committed in the course of the commission of the dacoity in question. The essence of the offence of robbery involved in the offence under Ss. 395 and 396 is that the offender for the end of committing theft or carrying away or attempting to carry away properties obtained by theft, voluntarily causes or attempts to cause to any person death or hurt, or wrongful restraint or fear of instant death or of wrongful restraint. Where several persons are found to have attacked and assaulted some other person or persons not for the purpose of carrying out the object of looting property, but quite independently of it, the main element which constitutes the offence under S. 395 read with S. 396, is wanting and there can be no conviction of the accused for that offence. (1901) 6 C.W.N. 72.

**2. Evidence and Proof.**

(See also NOTE 5 UNDER S. 395)

**—S. 396—**The accused who was a *Hur* was, four days after the dacoity and the murder committed by *Hurs*, found in possession of the property taken when *B* was murdered in the dacoity and his property stolen. No explanation was given by the accused as to his possession of the stolen property :

**Held,** that the accused was guilty of the offence under S. 396. A.I.R. 1944 Sind 113=I.L.R. (1943) Kar. 371=45 Cr.L.J. 704=213 Ind. Cas. 317.

**—S. 396—Approver's statement corroborated on three significant points—Corroboration, if enough.**

Where, in a case under S. 396 Indian Penal Code, the question was whether the evidence of the approver ought to be accepted, the evidence given by the various witnesses showed quite conclusively that there was corroboration on three significant points, viz. (1) the approver's statement that he was fetched from his own house on the night of the occurrence to take part in this dacoity, (2) the evidence to the effect that the accused had purchased an axe which was subsequently found, and (3) the evidence of a witness who recognized the accused as being one of the party of dacoits at the time when they were retreating after the occurrence :

**Held,** on the evidence, that there was ample corroboration in several material particulars and that these three points were in themselves more than sufficient to connect the accused with the crime with which he was charged. A.I.R. 1934 Cal. 719=35 Cr.L.J. 1335=151 Ind. Cas. 473.

**—S. 396—Corroboration—Approver's story—Sufficiency of.**

Where some common things were found in the search and some other things found, claimed by the accused to be their own, were not mentioned in the first report and a gun and a sword were found which were proved to belong to complainant but which were concealed because the complainant did not hold a license.

**Held,** that there was no sufficient corroboration of approver's story to justify conviction. 76 Ind. Cas. 716=25 Cr.L.J. 252=A.I.R. 1923 Lah. 385.

**3. Sentence.**

**—S. 396—Sentence of transportation can be passed.**

Section 396 does not mean that all the accused convicted under it must be sentenced to death. The sentence of transportation for life can also be passed. A.I.R. 1944 Sind 113=I.L.R. (1943) Kar. 371=45 Cr.L.J. 704=213 Ind. Cas. 317.

**—Ss. 396, 395—**It is true that since a person convicted of an offence under S. 396, Indian Penal Code, may be sentenced to death, reasons must be given under S. 367 (5), Criminal Procedure Code, for not passing the death sentence ; but although reasons must be given for not passing the death sentence, that does not mean that the death penalty is the normal sentence. Where persons take part in armed dacoities and are of mature age and there is no special circumstance of mitigation, the normal sentence is one of seven years. This, of course, if the circumstances were aggravated, would be insufficient.

Accused and one other person who were unarmed, entered a house to commit dacoity and the rest of the accused party remained outside the house. While the accused was inside, a person who came from outside was speared by the persons who had remained outside :

**Held,** that the accused was guilty only of dacoity and the sentence of five years' rigorous imprisonment was proper. A.I.R. 1942 Rang. 49=1941 Rang. L.R. 595=43 Cr.L.J. 525=14 Rang. 269=199 Ind. Cas. 147.

**—Ss. 396, 302—Distinction between, in matter of sentence.**

As a general rule, a sentence of death should necessarily not follow a conviction under S. 396, Indian Penal Code, where death has been caused and this section differs from S. 302, Indian Penal Code, in that respect. The rule under S. 302 is that a sentence of death should follow unless reasons are shown for giving a lesser sentence. A.I.R. 1938 All. 625=1938 A.W.R. 642=1938 A.L.J. 943=I.L.R. (1938) All. 875=40 Cr.L.J. 132=178 Ind. Cas. 694.

**—S. 396—Dacoits present at dacoity in which wanton murder is committed :**

**Held,** on facts that sentence should not be enhanced to one of death. A.I.R. 1936 Rang. 75=37 Cr.L.J. 414=161 Ind. Cas. 14.

**—S. 396—Murder not in self-defence nor in retreat—Use of heavy fire-arms—Extreme penalty should be inflicted.** A.I.R. 1935 Rang. 504=37 Cr.L.J. 267=160 Ind. Cas. 234.

**—S. 396—Dacoity with murder—Sentence.**

In a case of dacoity with murder the accused must normally be awarded the maximum punishment. A.I.R. 1932 Pat. 603=1 B.R. 85=36 Cr. L. J. 184(2)=152 Ind. Cas. 636.

**—S. 396—Sentence of 14 years' transportation passed upon some of the accused in respect of a charge under S. 396 is an illegal sentence and should be set aside.** A.I.R. 1934 Oudh 354=35 Cr.L.J. 1066=11 O.W.N. 831=10 Luck. 119=150 Ind. Cas. 509.

**—S. 396—Death penalty—Non-imposition of, for offence under—Reasons to be given.**

As S. 396 contemplates an offence for which death penalty can be imposed, where such penalty is not inflicted, reasons for not imposing it must be given.

Where a dacoity was started in a normal fashion with no particular savagery and the accused were



taking part in it in a normal way and there was nothing on the record to show that a general disregard for human life might be imputed against all of them and one of the dacoits who was watching outside shot at a woman who was running away and killed her :

**Held**, that under the circumstances, death sentence should not be imposed on the accused. A.I.R. 1933 Rang 61=34 Cr.L.J. 699=144 Ind. Cas. 146.

—**S. 396**—An important consideration in determining the sentence to be imposed on a dacoit who commits murder under such circumstances is the duty that lies upon the Court of seeing that all proper protection is given to any member of the public who tries to arrest dacoits. A.I.R. 1932 Cal. 818=33 Cr.L.J. 722=139 Ind. Cas. 213. (F.B.).

#### 4. Miscellaneous.

—**Ss. 396, 395, 397 and Criminal Procedure Code (V of 1898), Ss. 238 and 403—Acquittal for an offence under S. 396, Indian Penal Code—Bar of fresh trial and conviction under S. 395 or 397, Indian Penal Code.**

Offences under Ss. 395 and 397, Indian Penal Code, are minor offences under S. 238, Criminal Procedure Code, when considered in relation to a offence under S. 396, Indian Penal Code, and an accused who already had the benefit of an acquittal for an offence under S. 396, Indian Penal Code, cannot be tried again and convicted for an offence under S. 395, or S. 397, Indian Penal Code, on the same set of facts. S. 403, Criminal Procedure Code, is a bar to a fresh trial. 1948 M.W.N. 676=50 Cr.L.J. 227=A.I.R. 1949 Mad. 195=61 L.W. 562 (1)=(1948) 2 M.L.J. 267.

—**Ss. 396 and 395**—Trial for offence under S. 396—Conviction for offence under S. 395—Legality.

See CRIMINAL PROCEDURE CODE (V OF 1898), S. 238. (1947) 2 M.L.J. 203=A.I.R. 1948 Mad. 96.

—**Ss. 396 and 395/120B—Evidence merely circumstantial supporting charge under S. 396—No evidence admissible under S. 10, Evidence Act, given—Charge of conspiracy should not be framed.**

Where the evidence of association, if believed, would merely amount to a circumstantial evidence in support of the charge under S. 396 and no evidence is given in the case which could have been admissible only under the provisions of S. 10, Evidence Act, it is always desirable to limit the number of charges to the absolute minimum and not to complicate the trial by the unnecessary addition of a conspiracy charge. A.I.R. 1946 Cal. 36=I.L.R. (1944) 2 Cal. 287=47 Cr.L.J. 446=222 Ind. Cas. 411.

—**S. 396—Jurisdiction—Dacoity in British India—Murder in State.**

Where, in the above circumstances, the dacoity was committed in British India and the murder in a Native State, the British Indian Court has jurisdiction to try the offenders under S. 396, Indian Penal Code, without certificate under S. 188, Criminal Procedure Code.

In all these cases jurisdiction to try the offence primarily vests in the Courts of the place where the dacoity was committed, though the offenders may also be liable to be tried for one or other of the offences by the Court within whose jurisdiction the previous hurt or death was caused. A.I.R. 1933 Lah. 977=35 Cr.L.J. 322=35 P.L.R. 51=15 L. 84=147 Ind. Cas. 2.

—**S. 396—Dacoity and murder—Separate charges under S. 395 and S. 302 are unnecessary.**

Where dacoits who murdered several persons in the commission of the dacoity and set houses on fire were sentenced to death for the offences under S. 302, Indian Penal Code and to ten years' imprisonment, for each of the offences under Ss. 395 and 436.

**Held**, that it would have been proper to charge the accused persons with an offence under S. 396, Indian Penal Code, rather than with the two offences of murder and dacoity. 88 Ind. Cas. 513=6 Lah. 24=26 Cr.L.J. 1153=26 P.L.R. 139=A.I.R. 1925 Lah. 337.

—**S. 397.**

#### Synopsis.

1. Applicability of section.
2. Constructive liability for offence.
3. Interpretation.
4. Punishment.
5. Section does not create offence.
6. Miscellaneous.

#### 1. Applicability of section.

—**S. 397**—Stolen property recovered from accused—Accused identified by prosecution witnesses—No allegation that he was armed with deadly weapon or that he caused grievous hurt by death—Section 397 does not apply. A.I.R. 1937 Lah. 561=39 Cr.L.J. 119=172 Ind. Cas. 351.

—**Ss. 397 and 398—Applicability—Using weapon.**

Where a dacoity has been committed and not merely attempted and weapons were not merely carried by dacoits but were actually used by them, may be only by being shown or brandished even without verbal threats of using them, S. 397 and not S. 398 applies to the case. 82 Ind. Cas. 45=25 Cr.L.J. 1181=A.I.R. 1925 Nag. 136.

#### 2. Constructive liability for offence.

—**S. 397—Scope—Constructive liability for offence—If arises.**

It is now well-settled that S. 397, Indian Penal Code, cannot be applied constructively, and relates only to the offender who actually uses the weapon himself. The section does not provide for joint liability as S. 149 does. 25 Pat. 227=A.I.R. 1947 Pat. 157.

—**S. 397—Who can be convicted under.**

Section 397 does not apply to every member of a gang of dacoits some of whom are armed with deadly weapons. Section is confined to the case of a particular offender or offenders against whom it is proved that he or they used any deadly weapon or caused grievous hurt to any person or attempted to cause death or grievous hurt to any person. A.I.R. 1945 All. 344=1945 A.L.J. 184=I.L.R. (1945) All. 527=1945 A.W.R. (H.C.) 172=1945 O.W.N. (H.C.) 289.

—**S. 397**—Section 397 applies only to those persons who come within the four corners of the enactment and to no other because this section does not create an offence but merely regulates the measure of punishment. A.I.R. 1937 Lah. 561=39 Cr.L.J. 119=172 Ind. Cas. 351.

—**Ss. 397, 149—S. 397, whether provides for joint liability.**

Section 397 does not provide that if a gun is used at a dacoity by a person or persons unknown, all of the dacoits must be punished with at least seven years' imprisonment. In other words, the section does not



provide for joint liability as S. 149 does. A.I.R. 1935 All. 132=36 Cr.L.J. 617=4 A.W.R. 1171=154 Ind. Cas. 1015.

—**S. 397**—Section 397 can only be applied to persons who actually used deadly weapons at the time of the commission of the dacoity or caused or attempted to cause death or grievous hurt at the time. A.I.R. 1933 Nag. 252=35 Cr.L.J. 594=148 Ind. Cas. 157.

—**S. 397**—Where, in a case under S. 397, Indian Penal Code, the Judge stated in his charge to the jury that in order to convict the accused persons or person under S. 397 it was necessary to find that the accused used deadly weapon and caused grievous hurt or attempted to cause death or grievous hurt and that these acts were done during commission of robbery or dacoity :

**Held**, that although the mere omission to tell the jury that a finding that each individual accused used deadly weapon was necessary in order to convict him under S. 397 was not a misdirection or non-direction, yet it would have been safer for the learned Judge to have done so, and as there was some doubt as to whether the jury really directed their minds to the question in point, the accused should be given the benefit of the doubt. A.I.R. 1931 Pat. 49=32 Cr.L.J. 476=130 Ind. Cas. 257.

—**Ss. 397, 34—S. 34, whether applies to S. 397.**

Section 34 has no application to the provisions of S. 397, and an accused person can be convicted under S. 397 only if the Court finds that that particular person used a deadly weapon. A.I.R. 1931 Pat. 49=32 Cr.L.J. 476=130 Ind. Cas. 267.

—**S. 397—Applicability.**

Section 397 is wholly different in scope from S. 34 or 149. To render S. 397 applicable it must be established that "the offender" himself committed the act. 108 Ind. Cas. 689=9 A.I.Cr.R. 194=9 L.R.A. (Cr.) 27=29 Cr.L.J. 449.

—**S. 397**—Section 397 only applies to a person who himself uses a deadly weapon or causes grievous hurt. 28 All. 404 and 23 All. 404n, Foll. 102 Ind. Cas. 216=4 O.W.N. 459=28 Cr.L.J. 520=A.I.R. 1927 Oudh 193.

—**S. 397—Offender not using deadly weapon himself.**

It is only the offender who actually uses the deadly weapon that can be convicted under S. 397, and the constructive liability of his companions in the crime does not arise under the section : A.I.R. 1924 Lah. 409, Foll. 99 Ind. Cas. 412=28 Cr.L.J. 156=A.I.R. 1927 Lah. 791.

—**S. 397—Common intention—One alone carrying deadly weapon.**

Section 34 does not apply to S. 397, so that if one in a party of dacoits carries a deadly weapon it cannot be said that it would increase the gravity of the offence in the case of his associates who were not similarly armed. A.I.R. 1923 Lah. 104, Foll. 16 P.R. 1901 and 15 P.R. 1901, Not Foll. 99 Ind. Cas. 49=28 Cr.L.J. 17=A.I.R. 1927 Lah. 149.

—**Ss. 397 and 398—Person actually armed.**

Both Ss. 397 and 398 of the Indian Penal Code are what may be styled individualistic. They only apply to the person actually armed, and cannot be utilized as against companions, who themselves were not armed with deadly weapons at the time when the substantive offence in question was committed. 98 Ind. Cas.

181=5 Bur. L.J. 103=27 Cr.L.J. 1285=A.I.R. 1926 Rang. 207.

—**S. 397—Several committing dacoity—One causing hurt—Liability of others.**

In a case where a number of persons jointly commit robbery or dacoity, S. 397 applies to those only who actually use any deadly weapon but the others cannot be convicted under S. 397: A.I.R. 1926 Lah. 48 Foll. 97 Ind. Cas. 362=27 Cr.L.J. 1098 (Lah.).

—**S. 397—Person actually causing hurt.**

The section only applies to the person who actually causes grievous hurt or is himself armed with a deadly weapon. 28 All. 404=15 P.R. 1901 Cr.; and 16 P.R. 1901 Cr. Foll. 88 Ind. Cas. 456=7 L.L.J. 537=26 P.L.R. 398=27 P.L.R. 829=26 Cr.L.J. 1144=A.I.R. 1926 Lah. 48.

—**Ss. 397 and 398—Actual offenders—Associates.**

The terms "offender" and "such offender" in Ss. 397 and 398, denote those persons only who have personally committed the acts therein described, and do not refer to other persons who in combination with such persons have committed the offences of robbery or dacoity: 28 All. 404; 22 M.L.J. 186, Foll. 81 Ind. Cas. 800=51 Cal. 265=25 Cr.L.J. 1024=A.I.R. 1924 Cal. 643.

—**S. 397—Person actually using the weapon.**

The words "such offender" in S. 397 clearly refer to the offender who uses a deadly weapon or causes grievous hurt to any person and not to those who jointly commit robbery or dacoity with him. 16 P.R. 1901 Cr. Dissented from. 72 Ind. Cas. 517=24 Cr.L.J. 405=A.I.R. 1924 Lah. 409.

—**S. 397—Use of deadly weapons by some—Liability of others.**

Where several persons join in committing a dacoity and some of them use deadly weapons all of them are liable to be punished under S. 397 of the Indian Penal Code. The provision of S. 34 of the Indian Penal Code are applicable to such a case. 68 Ind. Cas. 817=5 L.L.J. 224=A.I.R. 1923 Lah. 104.

—**S. 397—Deadly weapon—Carrying of, by one robber.**

There can be no conviction of a robber under S. 397 of the Code simply on the ground that one of his associates carried a deadly weapon. 6 Bur. L.T. 88=14 Cr.L.J. 432=7 L.B.R. 26=20 Ind. Cas. 416.

—**S. 397—Dacoity with use of deadly weapons—Applicability of section.**

**Held**, that S. 397 applies only to the actual person or persons who at the time of committing robbery or dacoity may use any deadly weapon, or may cause grievous hurt to any person or may attempt to cause death or grievous hurt to any person. A.W.N. 1899, p. 187, foll. (1906) A.W.N. 61=28 A. 404.

—**S. 397—Exclusion of Ss. 34 and 114.**

The words of S. 397 are not such as to exclude the operation of Ss. 114 and 34 of the Code. 82 Ind. Cas. 45=25 Cr.L.J. 1181=A.I.R. 1925 Nag. 136.

### 3. Interpretation.

(a) "Deadly weapon".

(b) "Uses" any deadly weapon.



### 3 (a) Interpretation—"Deadly weapon".

#### —S. 397—Deadly weapon—Lathi or Dang.

A lathi or dang is not a deadly weapon within S. 397. 99 Ind. Cas. 49=28 Cr.L.J. 17=A.I.R. 1927 Lah. 149.

#### —S. 397—Lathi, if a deadly weapon.

A Lathi cannot be described as a deadly weapon within the meaning of S. 397 of the Code. 19 P.W.R. 1912, Cr.=11 P.L.R. 1912=13 Cr. L.J. 182=13 Ind. Cas. 998.

#### —S. 397—Sticks.

In a country like this where many murders if not most are committed with sticks, sticks are deadly weapons within the meaning of S. 397, Indian Penal Code. 82 Ind. Cas. 45=25 Cr.L.J. 1181=A.I.R. 1925 Nag. 136.

### 3 (b) Interpretation—"Uses" any deadly weapon.

#### —S. 397—Robbers exhibiting weapons but not inflicting blows with it.

If robbers so exhibit dangerous weapons as to intend that by their exhibition of them, the persons robbed or sought to be robbed are likely to be further intimidated and that the commission of robbery might be facilitated, the robbers can be punished under S. 397, Indian Penal Code, although they do not actually inflict blows with these weapons. A.I.R. 1938 Mad. 477=39 Cr.L.J. 323=1938 M.W.N. 215=173 Ind. Cas. 450.

#### —S. 397—Operation of section is not confined to case of actual causing of injury or attempt to cause injury.

Section 397 is intended to cover the case of a person who displays a deadly weapon to frighten his victims or their neighbours or who makes use of any deadly weapon for other similar purposes. Its operation is not confined to cases where the weapon is used actually for causing injury or for attempting to cause an injury, to another. A.I.R. 1934 Lah. 522=35 P.L.R. 555=36 Cr.L.J. 253=153 Ind. Cas. 51.

#### —S. 397—The using of a deadly weapon includes the carrying of it and employing it to overawe. It need not be used to inflict an injury. 1933 M.W.N. 727.

#### —S. 397—"Uses" meaning of.

The word 'uses' in S. 397 must be given a much wider meaning than cutting, stabbing or shooting; it includes carrying the weapon for the purpose of overawing the victim. A.I.R. 1933 Lah. 35=33 P.L.R. 1081=34 Cr.L.J. 45=140 Ind. Cas. 528.

#### —S. 397—The words "uses any deadly weapon" in S. 397 are wide enough to include a case in which a person levels a revolver in the hands of another person to overawe him. A.I.R. 1932 Oudh 103=7 Luck. 543=9 O.W.N. 152=33 Cr.L.J. 926=139 Ind. Cas. 742.

#### —S. 397—Accused overawing victim with deadly weapons.

If a robber or dacoit carries with him a gun or sword and by that means overawes his victim, he is using that gun or sword although he may not actually fire the gun or wound or stab the person attacked with the sword, and he can be convicted under S. 397, Indian Penal Code, if robbery or dacoity has been actually committed. A.I.R. 1931 All. 367=32 Cr.L.J. 567=130 Ind. Cas. 640.

### —S. 397—"Uses" Meaning.

The word "uses" in S. 397 should be construed in a wide sense so as to include not merely cutting, stabbing, shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed.

Where the complainant overawed by the deadly weapon carried by the accused made no resistance and the accused effected his purpose by a mere blow with the handle.

Held, that the offence committed falls under S. 397 and the Legislature requires his imprisonment for not less than seven years. 92 Ind. Cas. 750=20 S.L.R. 46=27 Cr.L.J. 334=A.I.R. 1926 Sind 150.

#### —S. 397—"Uses a deadly weapon", meaning of.

The words 'uses a deadly weapon' in S. 397, include the carrying of a weapon for overawing the person robbed. 5 Bur. L.T. 9=6 L.B.R. 41=13 Cr.L.J. 267=14 Ind. Cas. 651.

### 4. Punishment.

#### —S. 397—Sentence—Period of imprisonment.

Where a convict under S. 397, Indian Penal Code has been sentenced to four years' rigorous imprisonment when the minimum sentence provided for by S. 397 is seven years' rigorous imprisonment, the sentence must be enhanced from four years to seven years' rigorous imprisonment. 106 Ind. Cas. 451=29 Cr.L.J. 35=9 P.L.T. 572=9 A.I. Cr. R. 279.

#### —S. 397—Punishment.

Section 397 provides minimum punishment for the substantive offences created by Ss. 392 and 395. As there is no substantive offence created by S. 397 there can be no punishment under S. 397 only. The highest punishment under S. 397 can be inflicted only on the offender who actually uses a deadly weapon or causes or attempts to cause death or grievous hurt. S. 34 cannot be applied to other offenders to make them liable to enhanced punishment. 62 Ind. Cas. 865=13 Bur. L.T. 158=22 Cr.L.J. 593=10 L.B.R. 269.

### 5. Section does not create offence.

#### —S. 397—Scope—No Substantive offence—Effect.

Section 397 of the Indian Penal Code does not contain any substantive offence, but merely prescribes the minimum punishment which can be passed if robbery or dacoity is attended with certain circumstances mentioned therein. Therefore, a conviction merely under S. 397 has no meaning. The conviction in the case of a dacoity should be under S. 395 read with S. 397 of the Indian Penal Code. 85 Ind. Cas. 714=47 All. 59=6 L.R.A. Cr. 10=26 Cr.L.J. 570=A.I.R. 1925 All. 305.

#### —S. 397—Limiting Punishment.

Neither S. 397 nor S. 398 creates an offence. They merely limit the minimum of punishment which may be awarded if certain facts are proved. 81 Ind. Cas. 800=51 Cal. 265=25 Cr.L.J. 1024=A.I.R. 1924 Cal. 643.

—S. 397—Section 397 does not constitute a separate offence. When five or more persons conjointly commit robbery they are said to have committed dacoity, an offence which is punishable under section 395. Where a confession was made and articles were found which were identified as taken in dacoity.



**Held**, there was sufficient corroboration of approver's story. 76 Ind. Cas. 819=25 Cr.L.J. 259=A.I.R. 1923 Lah. 389.

#### 6. Miscellaneous.

—**S. 397 (as amended by Burma Act IV of 1940)—Offences committed before 16th March 1940—Amending Act IV of 1940, does not apply—Offence before 16th March 1940, but conviction after that date.**

The provisions of Burma Act, IV of 1940, have no application to offences which were committed before 16th March 1940. Consequently, the provisions of S. 397, Indian Penal Code, as they existed prior to the amendment, must be applied in a case where the accused committed the offence before 16th March, 1940, but was convicted after that date, for it is by reason of the commission of the offence that the offender incurs the punishment and not by reason of his conviction by a Criminal Court. The trial, ending in a conviction, is merely the means whereby a Court of criminal justice ascertains that the accused is the person who has incurred the punishment by having committed the offence. This is made clear by S. 5, General Clauses Act. A.I.R. 1941 Rang. 149=1941 Rang. L.R. 58=42 Cr.L.J. 615=194 Ind. Cas. 720.

—**S. 397—The Special Assistant Agent of Chica-cole empowered under S. 30, Criminal Procedure Code, is not competent to try the offence under S. 397, Indian Penal Code.** 1934 M.W.N. 1286.

—**S. 397—Charge and conviction—Charge for dacoity—Conviction for grievous hurt—Legality.**

Dacoity is an offence against property, whereas Ss. 325, is an offence affecting human body. It is therefore not open to the Court to charge the accused under Ss. 392-397, and to convict them of an offence under S. 325. 110 Ind. Cas. 795=5 O.W.N. 601=11 A.I.Cr.R. 41=29 Cr.L.J. 763=A.I.R. 1928 Oudh 373.

—**Ss. 397, 511—Use of arms in endeavouring to effect escape.**

Where many persons broke into a house, and some of them used arms in trying to effect their escape, they could not be convicted under S. 397 read with S. 511. 23 A. 78=1900 A.W.N. 202.

—**S. 398—Who can be convicted under.**

**Obiter.**—It is only the robbers who are actually armed with deadly weapons who can be charged and convicted under S. 398. A.I.R. 1941 Mad. 489=I.L.R. (1941) Mad. 592=52 L.W. 175=1941 M.W.N. 91=(1941) I M.L.J. 236=42 Cr.L.J. 821=196 Ind. Cas. 119.

—**Ss. 398, 392 and 397—Section 398 is applicable only to a case of an attempt to commit robbery and has no application to a case in which the robbery has actually been committed.** A.I.R. 1932 Oudh 103=7 Luck. 543=9 O.W.N. 152=33 Cr.L.J. 926=139 Ind. Cas. 742.

—**S. 398—Construction.**

Section 34 has no application in the construction of S. 398. 107 Ind. Cas. 705=29 Cr.L.J. 383=10 A.I.Cr.R. 11=30 Bom. L.R. 88=52 Bom. 168=A.I.R. 1928 Bom. 52.

—**S. 398—Interpretation—'Offender' Meaning.**

The word "offender" appearing in the section refers only to the person who is proved to have been armed with any deadly weapon and not to any other

who, in combination with such person, may have committed robbery. 107 Ind. Cas. 705=52 Bom. 168=30 Bom. L.R. 88=29 Cr.L.J. 383=10 A.I. Cr.R. 11=A.I.R. 1928 Bom. 52.

—**S. 398—Scope—No substantive offence—Charge under S. 114 with S. 398—Legality.**

Section 398 does not relate to a substantive offence. It only regulates the measure of punishment when certain facts are found to exist in the commission of the substantive offence which is robbery, and a charge under S. 114 read with S. 398 is not sustainable. A.I.R. 1924 Cal. 643, Foll. 107 Ind. Cas. 705=52 Bom. 168=30 Bom. L.R. 88=29 Cr.L.J. 383=10 A.I.Cr.R. 11=A.I.R. 1928 Bom. 52.

—**S. 398—Abetment.**

A man cannot be convicted of abetting an offence under S. 398, Indian Penal Code. 98 Ind. Cas. 181=5 Bur. L.J. 103=27 Cr.L.J. 1285=A.I.R. 1926 Rang. 207.

—**S. 398—No substantive offence.**

Section 398, does not create a substantive offence. It merely provides that if any member of gang of dacoits is armed with lethal weapon during the commission of a dacoity such member is to suffer a minimum punishment of 7 years. A.I.R. 1923 Lah. 66.

—**S. 398—Sentence—Adequacy.**

A sentence of five years in a dacoity case where a gun was fired to keep villagers away from coming to the help of the complainants is very inadequate. 27 O.C. 29=11 O.L.J. 210=25 Cr.L.J. 785=A.I.R. 1924 Oudh 314.

—**S. 399—Preparation for dacoity—What constitutes.**

Under S. 399, Indian Penal Code, it is an offence to make any preparation for committing dacoity. No hard and fast rule can be laid down that any particular act or any particular kind of steps are necessary to constitute preparation. The essential thing is that the prosecution must show that there were persons who had conceived the design of committing dacoity. Once the existence of such conspiracy has been established then any steps taken with the intention and for the purpose of forwarding that design may justify the Court in holding that there has been preparation within the meaning of the section. 1943 Pat. 82, applied. 3 A.I.Cr.D. 365=A.I.R. 1949 E.P. 340=51 Cr.L.J. 167=51 P.L.R. 116.

—**Ss. 399, 402—"Preparation" and "attempt" distinguished—Assembling and preparation for dacoity are different.**

It is ordinarily no offence to make preparation for committing a crime until the stage of preparation has passed and that of attempt is reached. But it is an offence under S. 399, Indian Penal Code, to "make any preparation for committing dacoity." No hard and fast rule can be laid down that any particular act or any particular kind of steps towards the commission of an offence are necessary to constitute "preparation." The essential thing is that the prosecution must show that there were persons who had conceived the design of committing dacoity. Once the existence of such a conspiracy has been established, then any step taken with the intention and for the purpose of forwarding that design may justify the Court in holding that there has been preparation within the meaning of the section.



Per *Varma J.*—Preparation consists in devising or arranging means necessary for the commission of an offence; an attempt is the direct movement towards the commission after preparations are made.

[Distinction between assembling for purpose of committing dacoity and preparation for a dacoity drawn.]

Where the members of the assembly about 13 in number covered a distance of 40 miles and some of them were inquiring about substantial man :

**Held**, that they passed the stage of assembly and that they were making preparations to commit dacoity. A.I.R. 1943 Pat. 82=9 B.R. 185=44 Cr.L.J. 337=21 Pat. 667=205 Ind. Cas. 69.

—S. 399—Band of armed men with unlicensed fire-arms held, made preparation to commit dacoity.

Where a band of armed men, some of them with unlicensed fire-arms, who were moving about many miles from their villages attempting to conceal their presence, threatened those who enquired who they were, resisted pursuit and fired at those who pursued them, the only reasonable inference that can be drawn is that the men were dacoits and had made preparation to commit dacoity. A.I.R. 1943 Sind 212=I.L.R. (1943) Kar. 132=45 Cr.L.J. 130=209 Ind. Cas. 282.

—S. 399—Accused found with gun, lathis, etc. in a room—Prosecution proving offence under S. 399—Accused offering no explanation of incriminating circumstances :

**Held**, prosecution evidence must be accepted. A.I.R. 1935 Oudh 471=36 Cr.L.J. 1003=1935 O.W.N. 770=156 Ind. Cas. 815.

—S. 399—Group of persons sitting round fire—Some of them having fire-arms—No evidence of intention to commit dacoity—On seeing headman, persons running away :

**Held**, conviction under S. 399 could not be sustained A.I.R. 1935 Rang. 294=36 Cr.L.J. 1384 (2)=158 Ind. Cas. 500.

—S. 399—Preparation, what is.

The mere "assemblage" to commit dacoity does not amount to "preparation" within the meaning of S. 399, Indian Penal Code; but where the members of the gang take into their possession instruments of house-breaking and arms for the purpose of offence and defence and actually proceed to a place near the scene of the contemplated dacoity, they are guilty of an offence under S. 399; 6 P.R. 1916 Cr., Foll. 109 Ind. Cas. 593=9 Lah. 550=29 Cr.L.J. 577=10 A.I.Cr.R. 293=A.I.R. 1928 Lah. 193.

—S. 399—Persons hiding near a village armed with gun—Conviction for preparation for committing dacoity—If proper.

Where certain persons were found attempting to conceal their identity and were also found armed with a gun which they used while pursued by the villagers.

**Held**, that they were rightly convicted for preparation to commit dacoity : 6 P.R. 1916, Foll. 97 Ind. Cas. 745=8 L.L.J. 406=27 P.L.R. 752=27 Cr.L.J. 1161.

—S. 399—Essentials.

To establish an offence under S. 399, Indian Penal Code, it is not necessary that the persons shown to be making the preparation should be five or more in number. But it is necessary to prove that the raid

for which they were making preparation was to be committed by five or more persons. Otherwise it would not be dacoity but merely robbery and mere preparation for committing robbery, unless it ends in an actual attempt is not punishable by law. 71 Ind. Cas. 360=24 Cr.L.J. 136.

—S. 399—Preparation for committing dacoity.

To constitute preparation for committing dacoity, the commission of overt acts is not necessary. It is sufficient if some act to get ready for dacoity is done. A mere assemblage to commit dacoity is not such preparation but possession of instruments for house breaking and of arms for offence and defence, and actual visit to the scene of contemplated dacoity, show such preparation. The formation and such preparation by each member of the gang need not be proved. 6 P.R. 1916 Cr.=17 Cr.L.J. 280=37 P.W.R. 1916, Cr.=34 Ind. Cas. 1000.

—Ss. 399 and 402—Making preparations—Mere proposals.

Mere discussing the possibilities of committing dacoity and various suggestions to loot several places without evidence that accused assembled for committing a dacoity or for preparations, do not make the persons liable under S. 399 or S. 402. 17 Cr.L.J. 97=32 Ind. Cas. 833 (Cal.).

—Ss. 399 and 148—Onus on prosecution to prove intent—Common object—Proof of.

The onus is on prosecution under S. 399 to show that there was an intent to commit dacoity or that there was any step towards committing it. If no proof was forthcoming that the common object was dacoity or any force or violence was used up to the time when they were separated no charge under S. 148 is possible. 17 Bom. L.R. 906=16 Cr.L.J. 745=31 Ind. Cas. 345.

—Ss. 399 and 402—Charges under Ss. 399 and 402—Treated not alternately but additionally—Acquittal under former section—Whether operates as acquittal under latter—Repugnancy—High Court's power to alter—Distinction between the two sections.

Where a charge was of two separate offences laid in an alternative form under Ss. 399 and 402, and was treated not alternatively but as additional, acquittal under the former section does not involve an acquittal under the latter and conviction thereunder is not vitiated by repugnancy, but even if it were, the High Court can alter the finding of acquittal into one of conviction maintaining the sentence. S. 402, Indian Penal Code, applies to mere assembling without further preparation; S. 399 applies to a case where such preparation is proved in addition. But a person may not be guilty of dacoity though guilty of preparation and not guilty of preparation yet guilty of an assembly. 41 Cal 350=18 C.W.N. 498=15 Cr.L.J. 385=23 Ind. Cas. 985.

—S. 400.

#### Synopsis.

1. Conviction and sentence.
2. Evidence and proof.
3. Interpretation—"Belong."

#### 1. Conviction and Sentence.

—S. 400—No actual offence under S. 396—Legality of conviction—Conviction under S. 396 if a bar to conviction under this section.

A conviction can be had under S. 400 even where no actual commission of a dacoity is proved. The



element of the offence is association with the knowledge that it is formed for the purpose of committing dacoities habitually. Hence where sentence is already passed for the offence of committing dacoity there is no bar to the passing of a sentence under S. 400. 89 Ind. Cas. 836=27 O.C. 385=26 Cr.L.J. 1412=A.I.R. 1925 Oudh 374.

## 2. Evidence and Proof.

(See also NOTE 1 UNDER S. 401.)

### (a) General.

#### (b) Previous conviction.

#### 2(a) Evidence and Proof—(General)

#### —S. 400—Evidence—Actual participation in dacoity.

It is not necessary for a conviction under S. 400 that the person convicted must have taken part in any dacoity. Evidence showing the actual participation by an accused in any given dacoity is evidence both of his association with the gang and his object in such association. Evidence which though not believed for the purpose of conviction under S. 395, Indian Penal Code may yet be relied upon for the purpose of a conviction under S. 400. A conviction under S. 400 cannot be considered bad in law merely because the evidence on the record would also have justified a conviction of a specific offence under S. 395. 7 O.W.N. 862=1930 Cr.C. 1079=A.I.R. 1930 Oudh 455.

#### —S. 400—Evidence as to commission of offence and proceedings under S. 110, Criminal Procedure Code—Admissibility.

In a trial for offence punishable under S. 400, Indian Penal Code, namely, of belonging to a gang of dacoits the evidence of commission of an offence and that the accused were bound down under S. 110 of the Criminal Procedure Code is admissible. 87 Ind. Cas. 925=52 Cal. 595=26 Cr.L.J. 1037=42 C.L.J. 501=A.I.R. 1925 Cal. 872.

#### —S. 400—Existence of gang—Crimes committed.

The existence of a gang associated for the purpose of habitually committing dacoity is the first element that the prosecution has to prove in the charge under S. 400. In such a case evidence that members of the same gang committed several burglaries, i.e. crimes other than dacoity would be relevant to the charge (32 Mad. 179, not Foll.) 83 Ind. Cas. 683=11 O.L.J. 632=26 Cr.L.J. 123=A.I.R. 1925 Oudh 144.

#### —S. 400—Proof of existence of gang—Crimes committed.

When examining the general question of the existence of a gang the Court need not look for the complicity of every one of the accused in every one of the dacoities proved to have been committed. It is sufficient to find that out of the accused one or more had taken part in the dacoities so that the presumption is strong that a gang had committed all these dacoities. 89 Ind. Cas. 836=27 O.C. 385=26 Cr.L.J. 1412=A.I.R. 1925 Oudh 374.

#### —S. 400—General criminality if can be attributed to individuals—Gist of offence under section—Acquittal of accused—Adverse inference from—Evidence of approver.

The general criminality of a tribe or caste cannot be imputed to individual members of gangs in a prosecution under S. 400 of the Code.

The mere fact that the persons who were accused under S. 400 were acquitted cannot be relied upon by the prosecution that they were habitual dacoits.

Association is the gist of the offence under S. 400 and the prosecution must prove that the accused belonged to a gang who habitually commit dacoity.

The evidence of the approver in a case under S. 400 must be corroborated to such an extent as to connect the accused with the offence that he belonged to an association or gang bent upon habitually committing dacoity. 16 C.W.N. 69=13 Cr.L.J. 39=13 Ind. Cas. 279.

#### —S. 400—Gang—Liability of members.

If a gang however small is found to have been formed for the purpose of habitually committing dacoity, all persons who thereafter joined that gang in one or more cases, come within the operation of S. 400.

In cases under S. 400 against a gang of desperate men prepared to do anything in carrying out their crimes, the heaviest possible sentences should be passed. In awarding sentences the Court should not consider whether particular offenders were concerned in only one or more of the dacoities committed by the gang but whether it was clearly established that they did in fact join a recognised gang, is an important point. 68 P.L.R. 1911=45 P.W.R. 1911 Cr.=12 Cr.L.J. 260=10 Ind. Cas. 833.

#### —S. 400—Essentials—Evidence establishing conviction under S. 395.

It is not necessary for a conviction under S. 400, Indian Penal Code, that the person convicted must have taken part in any one dacoity. A person cannot be said to belong to a gang of dacoits within the meaning of S. 400 about whom the Court is satisfied that his connection with the gang was limited. A conviction under S. 400 cannot be considered bad in law merely because the evidence on the record would also have justified conviction for a specific offence under S. 395, Indian Penal Code. 13 O.C. 235=11 Cr.L.J. 551=7 Ind. Cas. 1006.

#### —S. 400 (1)—Evidence of habitually committing dacoity.

To sustain a conviction under S. 400 (1) it must be proved that there was an association and that the association was for the purpose of habitually committing dacoity and the habit must be proved by aggregate facts. 18 P.L.R. 1910=11 Cr.L.J. 364=6 Ind. Cas. 492.

#### —S. 400—Scope of—Proof required.

In a case under S. 400, the prosecution is bound to prove that the accused belonged to a gang which was consciously associated for the specific purpose of habitually committing dacoity. Such direct proof will, however, be rarely forthcoming. In the absence of direct evidence, the associating and the purpose thereof may be established by proof of facts from which they may be reasonably inferred. Evidence to show that the accused had committed crimes other than dacoities is really evidence of bad character and is excluded by S. 54 of the Evidence Act. If there be sufficient evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time, it might not improperly be inferred from that evidence alone that they were members of a gang associated for the purpose of habitually committing dacoity. *Per Pinhey, J.*—S. 400 appears to postulate the existence of a definite gang operating for a definite period and the object of the section would seem to provide for



the punishment of those proved to be members of such a gang and against whom evidence is not forthcoming to convict them of specific offences of dacoity. (1908) 32 M. 179=5 M.L.T. 100=9 Cr.L.J. 567=2 Ind. Cas. 307.

## 2 (b) Evidence and Proof—Previous conviction.

### —S. 400—Previous conviction—Value of.

Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded, but where such evidence is admissible *aliunde*, it should not be excluded. Where the accused is charged under S. 400, Indian Penal Code, such evidence is admissible, not as evidence of character but as evidence to prove habit and association. 7 O.W.N. 862=128 Ind. Cas. 739=A.I.R. 1930 Oudh 455.

### —Ss. 400 and 401—Proof—Previous conviction.

In cases where other evidence has established association for the purpose of habitually committing theft, evidence of previous convictions whether for offences against property or for bad livelihood is admissible to prove not the bad character but habit and for such purpose evidence of convictions for bad livelihood is more valuable. 38 Cal. 408=15 C.W.N. 461=12 Cr.L.J. 97=9 Ind. Cas. 555.

### —S. 400—Belonging to a gang of dacoits—Proof—Previous conviction—Relevancy.

Previous convictions of the accused for dacoity along with other dacoits is relevant against him under Explanation 2 of S. 14 of the Evidence Act. But the propriety of the accused's conviction must be judged exclusively by reference to the evidence adduced by the prosecution at the trial. The confessions made by his accomplices at previous trials for dacoity cannot be taken into consideration against the accused under S. 30 of the Evidence Act. Such confessions do not stand on a better footing than the sworn testimony of an accomplice and cannot be treated as good evidence against the accused without being corroborated *aliunde* by independent evidence in material particulars and especially in respect of the identity of the accused. 11 Cr.L.J. 364=18 P.L.R. 1910=6 Ind. Cas. 492.

### 3. Interpretation—"Belong."

(See also NOTE 2 UNDER S. 401).

### —S. 400—"Belong" Meaning.

The term "belong" in S. 400, implies something more than the idea of casual association: it involves the notion of continuity and indicates a more or less intimate connexion with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity. A.I.R. 1930 Oudh 455=7 O.W.N. 862=128 Ind. Cas. 739.

### —S. 400—Interpretation—"Belong"—Meaning.

The word "belong" in S. 400 implies something more than a casual association. It involves the idea of continuity rather than of permanency and also of a connexion extending long enough to warrant the inference that the accused has identified himself with the gang which has for its object the habitual commission of dacoity. The essence of the section is the agreement habitually to commit dacoity not the actual

commission or attempted commission of dacoities. The existence of such an agreement and the participation of any person in that agreement may be inferred from circumstances. 110 Ind. Cas. 449=47 C.L.J. 471=10 A.I.Cr.R. 371=29 Cr.L.J. 705=A.I.R. 1928 Cal. 309.

### —S. 400—"Belong"—Meaning.

The term 'belong' implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with the band, the common purpose of which is the habitual commission of dacoity. 63 Ind. Cas. 455=19 A.L.J. 725=22 Cr.L.J. 663=A.I.R. 1921 All. 32.

### —S. 400—Gang of dacoits, belonging to.

The term 'belong' in S. 400 means something more than casual association; it involves the idea of continuity and shows a more or less intimate connection with a body of persons for a period of time sufficiently long to warrant the inference that the person has identified himself with a band whose common purpose is the habitual commission of dacoity. 13 O.C. 213=11 Cr.L.J. 554=7 Ind. Cas. 1012.

### —S. 401.

#### Synopsis.

1. Evidence and Proof.
2. Interpretation—"Belong".
3. Joint trial.
4. Sentence.
5. Miscellaneous.

#### 1. Evidence and Proof.

(See also NOTE 2 UNDER S. 400)

#### 1. Evidence and Proof.

- (a) General.
- (b) Previous conviction.

#### 1 (a). Evidence and Proof—(General).

### —S. 401—Evidence of association before period of charge—Admissibility to corroborate other evidence of association during that period.

Where several persons are being tried under S. 401 of being members of a large gang, the evidence that a big gang was in existence and was committing acts of depredation on the community all over India, Burma and Ceylon, and that some of the accused who were residents of a particular village were found associated together in crime characteristic of the gang in parts so distant as Calcutta, Midnapore, Karachi, various parts of Ceylon and Rangoon is sufficient to justify a Judge even of very little proof on actual association of particular accused in leaving it to the jury to decide whether the accused was a member of the gang.

In such a case, evidence of association before the period of charge is admissible to corroborate the evidence of association during that period. A.I.R. 1938 Mad. 858=1938 M.W.N. 595=48 L.W. 639=40 Cr.L.J. 355=180 Ind. Cas. 431.

—S. 401—That each member committed theft need not be shown. A.I.R. 1937 Nag. 17=38 Cr.L.J. 251=I.L.R. (1937) Nag. 315=166 Ind. Cas. 587 (F.B.).



**—S. 401—Admissibility of facts showing prevalence of thefts in locality and their nature.**

In the absence of direct evidence, the purpose of association may be established by proof of acts from which this may be reasonably inferred. The prevalence of thefts in a certain area and the rise and fall coinciding with action taken against members of the supposed gang are as much relevant circumstances in a trial under S. 401 as are the convictions obtained against certain members. Of course, the possibility has to be kept in mind that certain of these crimes may have been committed by independent persons. A.I.R. 1937 Nag. 17=38 Cr.L.J. 251=I.L.R. (1937) Nag. 315=166 Ind. Cas. 587 (F.B.).

**—S. 401—In a trial under S. 401, Indian Penal Code in considering whether there was an association of gang, evidence that certain of the persons were seen near the scene of house breakings either before or after the event is a relevant fact.** A.I.R. 1937 Nag. 17=38 Cr.L.J. 251=I.L.R. (1937) Nag. 315=166 Ind. Cas. 587 (F.B.).

**—S. 401—Evidence—Existence of gang of cattle lifters—Names of suspects in reports to Police Officers—Admissibility.**

Although there is no objection to police officers being called to prove the existence of a gang of cattle lifters and the frequency of thefts in the area where that gang operated, the reports made to them from time to time or brought to their notice showing the names of particular suspects are inadmissible as being hearsay and should be excluded. 24 S.L.R. 252=126 Ind. Cas. 468=A.I.R. 1930 Sind 211.

**—S. 401—Essentials—Proof of taking part in particular theft or robbery—If necessary.**

It is not necessary for a conviction under S. 401 that the person convicted must have taken part in any one theft or robbery. Evidence showing the actual participation by an accused in any given theft or robbery is evidence both of his association with the gang and of his object in such association. Evidence which though not believed for the purpose of a conviction under S. 379 or S. 392 may yet be relied upon for the purpose of conviction under S. 401. 118 Ind. Cas. 423=6 O.W.N. 441=30 Cr.L.J. 922=1929 Cr.C. 143=A.I.R. 1929 Oudh 321.

**—S. 401—Enquiry into theft by panchayat and calling a person suspect, or accepting money for search of stolen property—Sufficiency.**

The evidence that a panchayat enquired into a theft and called a person before it as a suspect, or that a person accepted money and agreed to make a search for stolen property and to restore it to the owner does not as against that person prove any of the ingredients of the offence punishable under S. 401. 94 Ind. Cas. 264=27 P.L.R. 276=27 Cr.L.J. 600=A.I.R. 1926 Lah. 439.

**—S. 401—Existence of gang not proved—Stolen property traced through accused's information—Legality of conviction.**

The evidence against accused was that several thefts and several articles which had been stolen from different houses were discovered on the information supplied by him, that he was suspected in one of those theft cases and that he made promises to restore certain stolen cattle.

**Held,** that such evidence did not prove that he was a member of a gang of habitual thieves the very existence of which had not been proved. 87 Ind. Cas. 848=26 Cr.L.J. 1024=A.I.R. 1925 Lah. 604.

**—S. 401—Proof of each member being a habitual thief—If necessary.**

It is not necessary to prove that each individual member of a gang has habitually committed theft or any particular act of theft. Once it is proved that a gang was formed for the purpose of habitually committing theft, all persons who thereafter join the gang in committing one or more thefts come within S. 401 of the Indian Penal Code. 77 Ind. Cas. 984=25 Cr.L.J. 520=A.I.R. 1923 Lah. 666.

**—S. 401—Facts to be proved.**

To sustain a conviction on a charge under Section 401, Indian Penal Code, it is necessary to prove—

- (1) that there existed a gang of persons ;
- (2) that those persons were associated for the purpose of committing theft or robbery ;
- (3) that theft or robbery was to be committed habitually ;
- (4) that the accused was a member of such gang. In the absence of direct evidence the associating and the purpose of the association may be established by proof of acts from which these may be reasonably inferred. 73 Ind. Cas. 815=24 Cr.L.J. 703=A.I.R. 1923 Lah. 327.

**—S. 401—Essentials of—Association for habitually committing theft—Evidence.**

The gist of offence under S. 401 is association for the purpose of habitually committing theft or robbery. Habit is to be proved by the aggregate of acts. An order under S. 110 of the Criminal Procedure Code against the accused and detention in jail for failure to furnish security thereunder, do not bar their subsequent trial under S. 401, Indian Penal Code. Evidence of previous convictions of theft and of being bound down under S. 110, Criminal Procedure Code, is not admissible on a subsequent trial of the accused under S. 401, Indian Penal Code, to prove either the commission of such offence or bad character. Evidence of the commission of several thefts of meeting together at different places before and after the commission of thefts and burglaries in bazaars, boats and houses of being seen on various occasions carrying away stolen articles are found in company under circumstances suggesting complicity in thefts and burglaries, and evidence of systematic thefts of cattle by individual accused are sufficient to support a conviction under S. 401. 47 Cal. 154=31 C.L.J. 192=21 Cr.L.J. 386=55 Ind. Cas. 994.

**—S. 401—Proof of the offence—Offence how established.**

The following proof is necessary for an offence under S. 401: (1) A gang of persons existed. (2) The persons joined together to commit theft or robbery. (3) Robbery or theft was to be habitually committed. (4) The accused belongs to such a gang.

When a gang is once established all persons joining the gang in some theft, generally become members of the gang, but it is not without exception. A person joining the gang knowing its purpose is its member but a person taking part in a theft with some members of the gang is not necessarily its member.

No unfavourable presumption should be drawn against persons associating with the members of a gang at fairs, weddings, and liquor shops. 110 P.L.R. 1916=47 P.W.R. 1916 Cr.=17 Cr.L.J. 443=35 Ind. Cas. 1003.

**—S. 401—Habitual gang of thieves—Facts necessary to sustain conviction—‘Agoo’—Position of.**

The ‘Agoo’, i.e., the receiver of stolen property in the interests of thieves is a principal member of the



gang and is within S. 401 of the Code. To sustain a conviction under S. 401 it is necessary to prove that those persons were associated for the purpose of committing theft, and robbery; that theft or robbery was to be habitually committed, and that the accused was a member of that gang. When once a gang is proved however small it may be, all persons joining it in one or more cases of theft come within S. 401. 13 P.R. 1914 Cr.=16 Cr.L.J. 33=223 P.L.R. 1915=26 Ind. Cas. 625.

**—S. 401—Association for the purpose of habitual theft.**

For a conviction under S. 401, proof of association and that the association was for purposes of habitual theft, are necessary. Where the accused, in company with three others, whose whereabouts were unknown, came to a village and they were regarded with suspicion, and on being challenged ran away, but in the pursuit, the accused was caught, and it was not shown who the others were, or whether they had before been seen together in the neighbourhood, or at some other place under suspicious circumstances, that any one of them had ever been suspected or found guilty of theft or robbery.

**Held**, that the conviction under S. 401 is bad and that the fact that the accused had at one time been bound over under S. 110 of the Criminal Procedure Code, was immaterial. 36 P.W.R. 1912 Cr.=258 P.L.R. 1912=13 Cr.L.J. 799=17 Ind. Cas. 543.

**—S. 401—Habitual offenders.**

For a conviction under this section, it must be clearly established that the members composing of a gang have combined or come together for the purpose of habitually committing theft or robbery. The fact that several members of a gang of a wandering tribe were dishonest and did commit thefts and other crimes is not in itself sufficient to show that they combined for habitually committing thefts. The mere stay of wives and children with the adult members does not enable a Court to infer that they were associates for the thefts. 9 A.L.J. 565=12 Cr.L.J. 204=10 Ind. Cas. 23.

**1. (b) Evidence and Proof—Previous conviction.**

**—S. 401—Previous convictions of accused not properly proved—Prosecution case weakened—Retrial, if should be ordered and when not proper.**

Where, in a trial of several accused under S. 401, Indian Penal Code, the alleged previous convictions of some of them are not properly proved which results in materially weakening of the prosecution case, the ordinary and proper procedure would be to order a retrial of these accused; but where this would necessitate another very elaborate trial at considerable cost and trouble to both the Crown and to the accused and the accused have already served nine months in jail, the interests of justice do not demand that a retrial of these accused should be ordered. A.I.R. 1938 Mad. 858=48 L.W. 639=1938 M.W.N. 595=40 Cr.L.J. 355=180 Ind. Cas. 431.

**—S. 401—Evidence of previous conviction of dacoity and of orders under S. 110, Criminal Procedure Code, is admissible for the purpose of proving habit and association in a subsequent trial under S. 401, Indian Penal Code.** Thus the fact that certain of the accused were previous convicts and bound over is not without significance. A.I.R. 1937 Nag. 17=38 Cr. L. J. 251=I.L.R. (1937) Nag. 315=166 Ind. Cas. 587 (F.B.)

**—S. 401—Previous proceedings under Sec. 110, Criminal Procedure Code—Admissibility.**

Previous convictions and proceedings under S. 110, Criminal Procedure Code, are admissible in a case under S. 401 for the purpose of proving habit though not of general bad character and are not excluded by S. 54, Evidence Act. 24 S.L.R. 252=126 Ind. Cas. 468=A.I.R. 1930 Sind. 211.

**—S. 401—Belonging to gang of thieves—Previous convictions and orders under S. 110 of the Criminal Procedure Code.**

In a trial under S. 401, Indian Penal Code, evidence may be adduced and taken into consideration of previous convictions of some of the accused for offences of theft, house-breaking and receiving or concealing stolen property both prior and subsequent to the year when the nucleus of the gang was found to have been first formed. Evidence of orders passed from time to time against some of the accused under S. 110, Criminal Procedure Code, demanding from them security for good behaviour is also admissible. 3 P.R. 1915 Cr.=191 P.L.R. 1915=16 Cr.L.J. 300 = 28 Ind. Cas. 524.

**—S. 401—Gang—Habitual theft—Previous convictions.**

Under S. 401, Indian Penal Code, in determining whether a party of accused persons, constitutes a gang of persons associated for the purpose of habitual theft, evidence that each individual of the party is a convicted thief, is relevant. The evidence can be tendered whether before or after the prosecution have established the association. 14 Bom. L.R. 373=13 Cr. L.J. 539=15 Ind. Cas. 811.

**2. Interpretation—"Belong."**

(See also NOTE 3 UNDER S. 400)

**—S. 401—Belonging to gang—Meaning—Receiver of stolen property if within the expression.**

It cannot be laid down as a general proposition that a person who receives stolen property from a gang of the character prescribed in S. 401 is a member of the gang. The word "belong" used in S. 401 is no doubt very comprehensive, but the expression "to belong to a gang of persons, etc." conveys the same idea as "to be one of a gang of persons, etc." The object of the section obviously is to punish the persons who organize thieving expeditions and form a party to commit theft. A person who receives stolen property from them cannot be said to belong to their gang. 99 Ind. Cas. 851=28 P.L.R. 19=28 Cr.L.J. 179=A.I.R. 1927 Lah. 524.

**3. Joint trial.**

**—S. 401—Cases, if can be combined.**

Where two Sessions cases are started against persons accused under S. 401 of being members of a gang, it is not only permissible to combine the two trials but when all the accused are members of one gang, this procedure is also convenient and proper. A.I.R. 1938 Mad. 858=1938 M.W.N. 595=48 L.W. 639=40 Cr.L.J. 355=180 Ind. Cas. 431.

**—Ss. 401 and 413—Receiving stolen property from gang—Whether sufficient for conviction under S. 401—Joint trial of different persons under Ss. 401 and 413.**

The fact that the accused had received stolen property from a gang of the character described in S. 401, Indian Penal Code, on a number of occasions is not in itself sufficient for his conviction under S. 401.



The offence of being a member of a gang of the kind described in S. 401 and the offence of receiving stolen property from members of the gang on different occasions cannot be said to be committed in the same transaction and a joint trial of different sets of persons under Ss. 401 and 413, Indian Penal Code is illegal. A.I.R. 1932 Lah. 486=33 Cr.L.J. 584=33 P.L.R. 736=138 Ind. Cas. 424.

#### 4. Sentence.

##### —Ss. 401 and 457—Separate sentences under—Legality of.

Though technically the offence of being member of a gang associated for the purpose of committing burglaries is different from that of actually taking part in them, yet where the main evidence to establish membership consists of the fact that the accused took part or received some of the proceeds of the burglaries, it is not equitable to give separate sentences under Ss. 401 and 457, Indian Penal Code. A.I.R. 1932 Lah. 298=33 Cr.L.J. 251=33 P.L.R. 602=136 Ind. Cas. 27.

##### —S. 401—Sentence—Points to be considered.

In determining to what extent in any particular case the punishment should approach to or recede from the maximum limit prescribed by the section the trying Magistrate has to take into account several factors, *inter alia* the antecedents of the prisoner whether such antecedents speak well or ill of him, such as his character and state of life of whether good or bad including the previous convictions, if any. So while assessing sentence under S. 401 the Magistrate can take into consideration previous convictions and orders under S. 110, Indian Penal Code, even when S. 75, Indian Penal Code, does not apply. 24 S.L.R. 252=126 Ind. Cas. 468=A.I.R. 1930 Sind 211.

#### 5. Miscellaneous.

##### —S. 401 and Criminal Procedure Code, S. 110—Difference between—One punitive while other preventive.

The difference between S. 401 of the Indian Penal Code and S. 110 of Criminal Procedure Code, is that while under the former it is necessary to prove that several persons have associated together forming a gang for the purpose of habitually committing theft or robbery and their activities have in fact materialized into active robberies and thefts to attempts at such offences, the latter being only a preventive section evidence of strong suspicion and evil repute that such person or persons engage in criminal activities is enough to render them liable to be bound down to be of good behaviour. S. 401 of the Indian Penal Code is punitive while S. 110 of the Criminal Procedure Code is preventive. 1946 O.W.N. 316=1946 O.A. (C.C.) 227=227 Ind. Cas. 204=1946 A Cr.C. 126=1946 A.W.R. (C.C.) 227=47 Cr.L.J. 1019=A.I.R. 1947 Oudh 86.

—S. 401—Where it appeared that it was open to the Police to proceed against certain persons either under S. 401, Indian Penal Code, or under S. 110, Criminal Procedure Code and after some discussion it was decided to take proceedings under S. 110 :

**Held**, that the course was a perfectly legitimate one for the prosecution to take and that it could not be objected against on the ground that a substantive charge should have been laid against them. A.I.R. 1933 Oudh 251=10 O.W.N. 325=34 Cr.L.J. 852=144 Ind. Cas. 944.

##### —S. 401—Charge.

In trial under S. 401, Indian Penal Code, there is nothing objectionable if in Sessions Court only one charge has been framed against all accused though a number of independent charge sheets were originally filed. A.I.R. 1938 Mad. 858=48 L.W. 639=(1938) M.W.N. 595 = 40 Cr.L.J. 355=180 Ind. Cas. 431.

##### —S. 401—Prosecution under S. 401, nature of.

A prosecution under S. 401 is of a peculiar nature differing from an ordinary case in respect of the numbers of accused involved, and the extent of time covered by their operations. There can be no definite rule of limitation barring responsibility for stolen property after a certain time. Each case must be judged in view of the circumstances. Important factors are the number of articles recovered and the way in which information led to their recovery. A.I.R. 1937 Nag. 17=38 Cr.L.J. 251=I.L.R. (1937) Nag. 315=166 Ind. Cas. 587.

##### —S. 401—Conviction—Legality—Offence also under Sec. 379 or 392.

A conviction under S. 401 cannot be considered bad in law merely because the evidence on the record would also have justified a conviction of a specific offence under S. 379 or 392. 118 Ind. Cas. 423=6 O.W.N. 441=30 Cr.L.J. 922=1929 Cr.C. 143=A.I.R. 1929 Oudh 321.

##### —S. 402—Proof of purpose of assembly—Inference from the circumstances and the nature of articles recovered from the possession of the accused.

Where persons are accused under Ss. 309/402, Indian Penal Code, it is difficult to give direct evidence of the purpose of the assembly. The purpose of the assembly can be gathered only from the circumstances of the arrest of the accused and the nature of the articles recovered from the possession of the accused. 1949 A.W.R. 471=A.I.R. 1950 A. 93=51 Cr.L.J. 399.

##### —S. 402—What is offence under—Accused assembled together on the night of dacoity—Two of them armed with revolvers and one with spear.

Where the accused, three of whom were residents of another village, assembled on the night of the dacoity under a shisham tree, outside a village and two of them were armed with revolvers and one with a spear :

**Held**, that the accused committed an offence falling within the purview of S. 402, Indian Penal Code : 37 P.W.R. 1916 Cr. Foll. 106 Ind. Cas. 350=9 A.I.Cr.R. 346=29 Cr.L.J. 14=A.I.R. 1928 Lah. 144.

##### —S. 402—Accused found assembled, fully prepared for dacoity.

Where the accused are caught at a lonely well at a long distance from their respective homes in different villages fully armed and equipped for committing a dacoity, their conviction under S. 402 is competent. 6 P.R. 1916=A.I.R. 1925 All. 62 and 23 All. 124, Appl. 94 Ind. Cas. 269=27 Cr.L.J. 605.

##### —S. 402—Evidence—Accused coming from different villages—Arrested on suspicion by villagers—Various circumstances showing their guilty intention—Legality of conviction.

The accused were all residents of different villages and they mostly lived at a great distance from the village where they were caught. They gave a number



of separate reasons, for the most part entirely improbable, to account for their being caught in the particular village. Different portions of the same manual on bayonet training were found in the possession of different accused who came from different villages. A lot of ammunition was recovered from some of the accused and they were all armed. A series of armed dacoities had occurred recently in the district. The accused were arrested by the villagers themselves on suspicion. 84 Ind. Cas. 860=22 A.L.J. 1028=26 Cr.L.J. 380=5 L.R.A. Cr. 156=A.I.R. 1926 All. 62.

—Ss. 402 and 399—Assembling at a rendezvous.

Some members of a gang who had assembled though unarmed at a rendezvous for the common purpose were guilty under S. 402, though not under S. 399. 19 Cr.L.J. 43=42 Ind. Cas. 1003 (All.).

—S. 402—Member of a gang of dacoits.

Prosecution need only prove that the accused are members of a gang which had in fact committed preparation for dacoity and not what exact part was played by each member in such preparation. 6 P.R. 1916 Cr.=17 Cr.L.J. 280=37 P.W.R. 1916 Cr.=34 Ind. Cas. 1000.

—S. 402—Evidence.

Several persons were found at 11 o'clock at night on a road just outside the city of Agra all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none of them could give any reasonable explanation of his presence at the spot under the circumstances.

**Held**, that these persons were rightly convicted under S. 402 of assembling. 1901 A.W.N. 16=23 A. 124.

—Ss. 403 to 409.

Synopsis.

1. Applicability and scope.
2. Bona fides.
3. Cheating.
4. Civil wrong.
5. Conversion.
6. Conviction and sentence.
7. Criminal breach of trust.
8. Criminal misappropriation.
9. Dishonest intention.
10. Entrustment.
11. Evidence and proof.
12. Offence by servant.
13. Owner not known.
14. Partner.
15. Pledge.
16. Procedure.
17. Retention.
18. Revision.
19. Theft.
20. Wrongful gain.
21. Miscellaneous.

(1) Applicability and scope.

—S. 409—Applicability and scope—"Banker"—Person working in bank.

Persons working in a bank are not bankers within the meaning of S. 409, Indian Penal Code. 1950 Comp. C. 220=A.I.R. 1950 Cal. 57=51 Cr.L.J. 388.

—Ss. 406 and 403—Applicability and scope—Ornaments handed over to accused for specific purpose—Refusal to return them—Offence committed.

If the complainant hands over to the accused some ornaments for a specific purpose on the accused promising to return them after using them for that purpose, there is an entrustment within the meaning of S. 405, Indian Penal Code, and if the accused refuses to return the ornaments he commits an offence under S. 406 and not under S. 403, Indian Penal Code. 52 C.W.N. 641=A.I.R. 1949 Cal. 207=3 A.I.Cr.D. 138=50 Cr.L.J. 382.

—Ss. 403 and 409—Applicability—Firm of grain dealers made Government stockist—Shortage in quantity of grain entrusted—Offence.

Where a firm dealing in grains, is made a Government stockist of food grains and entrusted with grains as such, and thereafter it is found that the stock is short owing to the removal of a certain quantity by the partners without the order or consent of the Government, the offence committed is one of criminal misappropriation falling under S. 403, Indian Penal Code, and S. 409, Indian Penal Code, does not apply. Failure to account or failure to render satisfactory account must be regarded as a circumstance pointing to guilt. 26 Pat. 703=A.I.R. 1949 Pat. 69=50 Cr.L.J. 108.

—S. 406—Applicability—Banker and customer—Depositor—Position and rights—Deposit by customer—If entrusted to bank for particular purpose—Charge of criminal breach of trust—Competency of.

The relationship between a depositor and a bank is simply one of creditor and debtor. There is no entrustment by the depositor (creditor) to the bank (debtor) for any particular purpose. The Bank cannot be proceeded against criminally for criminal breach of trust at the instance of the creditor on the ground that the Bank deals with the money deposited as its money and uses it for their own purposes. The money belongs to the bank, though it is liable to refund it to the depositor when he demands it; but no criminal proceedings will lie in the matter. 1949 Comp. C. 49=3 A.I.Cr.D. 124.

—S. 409 and S. 562, Criminal Procedure Code—Applicability and scope.

S. 409—Conviction for offence under—Applicability of S. 562, Criminal Procedure Code. (1945) 2 M.L.J. 575=A.I.R. 1946 Mad. 173.

—Ss. 408 and 409—Applicability and scope—Protection under S. 270, Government of India Act.

Offence under S. 408 or S. 409, is not one in respect of which the protection of S. 270, Government of India Act, can be claimed. A.I.R. 1945 F.C. 24=I.L.R. (1945) Kar. F.C. 19 Sup.=49 C.W.N. (F.R.) 55=11 B.R. 401=(1945) 1 M.L.J. 371=47 Bom. L.R. 395=79 C.L.J. 275=58 L.W. 292 (1)=(1945) F.C.R. 90=219 Ind. Cas. 145 (F.C.).



**—Ss. 403 to 409—Applicability and scope—Owner of property—Contract for sale.**

There were certain dealings between two firms, *A* and *B*. *A* sent goods to *B* which it was alleged *B* had purchased from *A*. Later on *A* sent bill for the goods to *B*. *B* refused to pay on the ground that they had never received the goods. Evidence was given to show that *B* had received the goods and signed receipts. It was alleged that these receipts had disappeared. Evidence was given that *C*, an employee of firm *A*, whose duty it was to enter those things in the books did not enter these deliveries and it was suggested that it was done in collusion with *B*. *C* was charged with criminal breach of trust and *B* with abetting him :

**Held**, that there could be no charge for criminal breach of trust or criminal misappropriation on the facts proved, inasmuch as the goods became the property of *B* as soon as they were appropriated to the contract of sale between *A* and *B*. (1945) 79 Cal. L.J. 126.

**—S. 407—Applicability and scope—Doing of act in anticipation of statute which would make it offence is no offence.**

Appropriation of money with dishonest intention attracts S. 407, Indian Penal Code.

A German Director of a German Company, on the eve of the declaration of war between Britain and Germany, attempted to realise as much money as he could, and so asked his clerk to try to find a purchaser for the enamels that he had in stock. He was brought into touch with *D*, who agreed to pay Rs. 7,643 for the enamels. He came with a cheque for that amount on the morning of September 2, 1939, the day before the war was declared ; but the accused refused to take a cheque and said that he must be paid in cash. The cash was paid in the afternoon of September 2, and the accused handed over the money to his wife :

**Held**, that it was not an offence to do an act in anticipation of a statute or enactment which would make that act an offence. At the time when the accused took this money and handed it over to his wife, intending to withhold it from the Government of India, there was nothing in law prohibiting the accused from screening the money from the Government of India or the custodian of enemy property. If, therefore, the acts of the accused were done merely to screen the money from the Government of India or the custodian of enemy property and he had no intention to cause wrongful loss or wrongful gain to any other person or persons, he did not commit an offence. In the absence of evidence that he intended to profit himself at the expense of his firm of which he was a partner and had appropriated money belonging to a number of persons even though he was entitled to a share of the money or that he intended to defraud the creditors of the firm *i.e.*, he acted with the intention of causing wrongful loss to the creditors of the firm, the accused could not be held guilty under S. 407. A.I.R. 1942 Mad. 182=54 L.W. 521=(1941) 2 M.L.J. 748=1942 M.W.N. 41=43 Cr.L.J. 395=198 Ind. Cas. 543.

**—S. 409—Applicability and scope.**

A person accused of offence under S. 409, Indian Penal Code is not protected by S. 136, Bom. Local Boards Act. A.I.R. 1942 Sind 45=I.L.R. 1941 Kar. 557=43 Cr.L.J. 514=199 Ind. Cas. 198.

**—S. 405—Applicability and scope—Civil proceedings—If bar to prosecution.**

When Government themselves stand in the position of a private person whose property had been stolen or

embezzled, the exercise of the civil right of recovery by Government does not preclude the criminal remedy. A.I.R. 1939 Lah. 340=I.L.R. (1939) Lah. 119=41 P.L.R. 432=40 Cr.L.J. 910=184 Ind. Cas. 318.

**—Ss. 406, 209—Applicability and scope.**

An offence punishable under S. 406 is substantially a different offence from the one punishable under S. 206. A.I.R. 1937 Bom. 46=38 Bom. L.R. 1192=38 Cr.L.J. 272=166 Ind. Cas. 731.

**—Ss. 403 to 409—Applicability and scope.**

*Mouzadar* in Assam is a Government servant and not a lessee. If he converts money realized by him from the tenants, it is an offence. I.L.R. (1937) 1 Cal. 272=40 C.W.N. 1154.

**—S. 406—Applicability and scope—Ornaments given to goldsmith in consideration of giving certain quantities of gold and silver—Promise to return identical gold and silver after melting—Failure—Offence.**

It would be somewhat unusual for an owner of a gold ornament to transfer out and out his right therein to a goldsmith in consideration of the latter's promise to give certain quantities of gold and silver. It is more probable that the owner of an ornament desirous of obtaining its gold would have it melted and the gold given to him ; but a transaction of the first kind is easily conceivable, and if the evidence in the case is consistent with a transaction of that kind the Court should not construe it so as to make it a case of the second kind and make the transferee liable under S. 406, Indian Penal Code for failure to return identical gold and silver. A.I.R. 1936 All. 691=1936 A.L.J. 865=1936 A.W.R. 630=37 Cr.L.J. 1075=165 Ind. Cas. 182.

**—S. 405—Applicability and scope.**

Section 405 covers dishonest misappropriation, dishonest conversion, dishonest user or disposal in violation of a direction of law, or of a legal contract, or dishonestly suffering any other person to do so. Where a charge under the section does not indicate which of these several offences was intended and does not state who made the alleged entrustment or who suffered from the alleged breach of trust, it is indefinite and embarrassing. 63 Cal. 18=161 Ind. Cas. 280=37 Cr. L.J. 439.

**—S. 409—Applicability and scope—Defence—Accused charged with embezzlement of particular sum—Defence that prosecution failed to prove it, though they might have proved other embezzlements.**

It is not open to the accused to put up a defence against the charge framed under S. 409, Indian Penal Code that the prosecution has failed to prove the embezzlement of a particular sum, with which he is charged though they might have succeeded in proving embezzlement of other sums, for the offence amounts to no more than this that the prosecution have failed to prove the embezzlement because it is possible to explain all the circumstances against the appellant by the hypothesis that the appellant embezzled some other sums shortly before or after the alleged occurrence. Such a defence cannot hold good for the simple reason that, if accepted, it would merely involve a conviction, whatever hypothesis was adopted and no prejudice can be urged by the accused for lack of charge because it was his own defence. A.I.R. 1936 Lah. 907=37 Cr.L.J. 581=38 P.L.R. 1157=162 Ind. Cas. 391.

**—S. 405—Applicability and scope.**

The terms of S. 405 are very wide and entrustment may be brought about in any manner. A.I.R. 1936



Mad. 353=1936 M.W.N. 281=43 L.W. 548=70  
M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (2)  
(F.B.)

—Ss. 406, 409—Applicability and scope.

President of co-operative society being not public servant should be prosecuted under S. 406 and not 409. 1935 M.W.N. 1337.

—S. 409—Applicability and scope.

Unless accused is professionally the complainant's agent, the proceedings cannot be started under S. 409. 1935 M.W.N. 649.

—S. 409—Applicability and scope—Property must be actually misapplied—S. 409 does not include intention to misappropriate at a future date.

Section 409 does not include an intention to misappropriate at a future date. Where, therefore, the accused who was a treasurer of a society, satisfied a decree against him by making a deposit entry in favour of his creditors decree-holders.

**Held**, that the fraudulent action of the accused did not earmark the money in his hands at the source for payment in respect of that liability; the fraudulent entry was intended to make it possible at a later date to misappropriate the moneys of the Society; but nothing was then misappropriated and consequently, the accused was not guilty under S. 409.

For an offence under S. 409, the property entrusted or part of it must be actually misapplied. A.I.R. 1934 Lah. 843=36 Cr.L.J. 165=152 Ind. Cas. 615 (2).

—S. 409—Applicability and scope—Defence—Public servant acting in the course of employment—Whether can set up breach of regulation by superior officer.

A servant acting within the scope of his employment cannot, in order to defraud his master, set up breach of his master's regulations in his own favour. A public servant is expected to discharge his duties honestly whether his movements be properly supervised or not, and it would be setting a very bad principle if such reprehensible conduct on the part of the accused is condoned merely on account of the negligence of those who were in duty bound to control his actions. A.I.R. 1934 Lah. 677=36 Cr.L.J. 424=35 P.L.R. 649=16 Lah. 44=153 Ind. Cas. 887.

—S. 408—Applicability and scope—Charge under—Property entrusted to accused—Accused, if should show what has become of it.

In a charge under S. 408, Indian Penal Code, it is not necessary for the accused to show exactly what has become of the missing property. When he was entrusted with it, if he cannot produce it, he must at least give a credible and probable account of its disappearance, but he need do nothing more than that. A.I.R. 1934 Rang. 42=35 Cr.L.J. 849=148 Ind. Cas. 1035 (2).

—S. 405—Applicability and scope.

If the agent lends money to himself without his master's permission, he is guilty of criminal breach of trust. 1933 M.W.N. 256.

—S. 409—Applicability and scope—Public servant responsible for proper spending of money, but having no dominion over it—Owner of money exonerating him from liability—Circumstances—Evidence.

A public servant who was responsible in law for the proper expenditure of a certain sum of money but

respect of which he had no dominion other than passing orders for payment in writing and into whose hands money never actually came, was charged for alleged embezzlement of money in proceedings taken against him after a delay of 3 years. He could not produce all vouchers in respect of the expenditures due to the sudden death of the person who spent the money. The owner of the money was satisfied with the payments made by the accused and had exonerated him from every liability, civil or criminal:

**Held**, that there was no case of criminal misappropriation against the accused nor any reasonable ground for even a suspicion of such an offence against him. A.I.R. 1933 Oudh 387=35 Cr.L.J. 148=10 O.W.N. 807=9 Luck. 61=146 Ind. Cas. 661.

—S. 403—Applicability and scope.

Misappropriation of immovable property—There can be no criminal misappropriation if the subject matter of offence is immovable property. 1932 M.W.N. 1353.

—S. 408—Applicability and scope—Property—Cheque.

Cheque is property within the meaning of S. 488. 52 A. 894=125 Ind. Cas. 589=1930 A.L.J. 849=A.I.R. 1930 All. 449.

—S. 408—Applicability and scope—Misappropriation by liquidator.

A liquidator who misappropriates money which has come into his custody as liquidator, cannot be said to be acting or purporting to act in the discharge of his official duty: 7 B.H.C. (Cr.) 61 and A.I.R. 1929 Bom. 375 Rel. on; A.I.R. 1929 Mad. 659, Diss. from. A.I.R. 1930 Bom. 487=32 Bom. L.R. 1134=129 Ind. Cas. 344.

—S. 403—Applicability and scope—Municipal Committee selling receipt books relating to sale transaction of cattle in fair—Licensee making entry in receipts contrary to rules fixed—If offence under S. 403 or 405.

The municipal Committee of Amritsar issued licenses to a number of persons to write receipts relating to sale transactions of cattle in a certain fair. A receipt book was issued to each licensee who was to pay the price of each receipt book at the rate of eight annas per receipt in advance and when he wrote the receipt in the fair he was to charge eight annas per head of cattle from the seller plus his own writing charges. If an animal sold had a calf with it, two separate and consecutive receipts were to be issued for both respectively. P purchased two receipt books paying full price therefor during the fair, he wrote receipts relating to two transactions of sale of buffaloes, each one of whom had a katti, with it, but instead of issuing four receipts as required by the rule he issued only two and charged one rupee from each purchaser. P was prosecuted under S. 409 and S. 420 but was convicted under S. 406.

**Held**, that the case could not possibly fall under Ss. 403 and 405. P was not entrusted with any property or with any dominion over any property and there was no criminal breach of trust by him. The mere making of wrong entries in the receipt books might have rendered P liable to the forfeiture of his license but could not possibly bring his action within the purview of S. 403 and S. 405. 129 Ind. Cas. 298=A.I.R. 1930 Lah. 408.

—S. 405—Applicability and scope—Applicability to any person in any manner entrusted with any property.

Section 405 does not limit the offence to the case of persons who are entitled to be called trustees in the



technical sense. The section is couched in broad terms and covers any person who is in any manner entrusted with any property. Where a person manages a large property under a definite agreement that he should get 3/5ths for his own use and spend 2/5ths on certain religious and educational objects, if it can be proved that he has converted to his own use some portion of the 2/5ths share of the profits which he should devote to these objects, he may be properly convicted of an offence of breach of trust. 126 Ind. Cas. 395=7 O.W.N. 663=1930 Cr.C. 941=A.I.R. 1930 Oudh 401.

—S. 405—Applicability and scope.

Section 405 refers only to movable property: 23 Cal. 372; 6 Bom. H.C. Cr. 33 and 36 Cal. 758, Foll. 8 Rang. 13=125 Ind. Cas. 271=A.I.R. 1930 Rang. 158.

—S. 408—Applicability and scope—Innocent disobedience—Repayment of loan to Clerk—Clerk enlisting himself as member and getting it as loan—If offence.

A clerk in the employment of a Co-operative Bank affiliated to another Co-operative Bank received some repayments of loans from three members of the Bank with instructions to pay the said sums to the Chief Bank. Previous to these repayments the clerk had sufficient amount in hand to make up Rs. 240 together with repayments. The moneys were duly entered in cash book and receipt given as customary, but disobeying the instructions he retained the money. Subsequently in contravention of rules he got himself enlisted as a member and procured the loan of the amount. Apart from disobedience there was no evidence that the accused appropriated the sums to his own use. The clerk was convicted under S. 408.

**Held**, that the accused was not guilty under S. 408. Disobedience of the clerk was not criminal and the subsequent procuring of loan though *ultra vires* being in contravention of rules would not turn the innocent act into criminal. 117 Ind. Cas. 632=1929 Cr.C. 266=30 Cr.L.J. 812=A.I.R. 1929 Pat. 506.

—S. 409—Applicability and scope—Lessee of Government—Accused a lessee from Government to collect rent and deposit it in treasury—Failure to deposit within agreed time—Offence.

The petitioner had executed a kabuliyat in favour of the Government whereby he agreed to realize the gross rent of a Mouzah payable to the Government lying within his jurisdiction and to deposit the said amount in the Government Treasury on or before the date to be fixed by the Chief Commissioner or any other authorized officer from time to time, and if he failed to deposit the gross rent from his kist within the time fixed, the Government should be competent to realize from him or from his surety or sureties the said sum in arrears according to law prescribed for the realization of arrears of rent. The petitioner failed to deposit the rent as agreed to by him.

**Held**, that the penalty would be that the amount would be recovered from his sureties or himself; the kabuliyat did not contemplate his being criminally prosecuted for failure to deposit the amount realized. The position of the petitioner was not that of a servant but a lessee. 110 Ind. Cas. 97=47 C.L.J. 442=29 Cr.L.J. 641=A.I.R. 1928 Cal. 321.

—S. 409 and S. 562, Criminal Procedure Code—Applicability and scope.

The offence under S. 409, Indian Penal Code, is beyond the scope of S. 562, Criminal Procedure Code,

and so a Magistrate acts without jurisdiction if he releases under S. 562, Criminal Procedure Code an accused convicted under S. 409, Indian Penal Code. 100 Ind. Cas. 225=7 A.I.Cr.R. 360=28 Cr.L.J. 257=A.I.R. 1927 Lah. 735.

—S. 405—Applicability and scope—Wagering contract—Receipt of money—If offence.

A person cannot be convicted under the second part of S. 405 if the contract in respect of which the money is received, is a wagering contract. 100 Ind. Cas. 989=28 Cr.L.J. 381=7 A.I.Cr.R. 474=A.I.R. 1927 Mad. 425=52 M.L.J. 179.

—Ss. 405, 406—Applicability and scope.

The trust contemplated by Ss. 405 and 406 need not be in furtherance of a lawful object: 101 Ind. Cas. 890=10 N.L.J. 79=28 Cr. L. J. 506=8 A.I.Cr.R. 143=23 N.L.R. 106=A.I.R. 1927 Nag. 225.

—S. 403—Applicability and scope—Failure to return—Receiver entrusting property to be returned at auction—Covenant to pay money as security—Failure to return the property if an offence.

When a Receiver attaches property and entrusts it to some person, he does not purport to sell it to him or dispose of it at that time. The Receiver may not even be in a position to know its true value. The intention of the parties is that the articles should be returned in specie or produced at the time when the auction-sale is to take place. The covenant by the person entrusted that he would be liable to pay a certain amount is more by way of security than because the property is transferred to him with liberty to dispose of it or withhold it. In such cases it is the true intention of the parties which must be taken into account. So if the person entrusted fails to produce the property he is guilty under S. 403. 92 Ind. Cas. 585=48 All. 288=7 L.R.A. Cr. 34=24 A.L.J. 270=27 Cr.L.J. 297=A.I.R. 1926 All. 302.

—S. 406—Applicability and scope—Immovable property—If can be subject of criminal breach of trust.

Criminal breach of trust cannot be committed in respect of immovable property: 23 Cal. 372, Foll. 95 Ind. Cas. 280=27 Cr.L.J. 760=A.I.R. 1926 Lah. 478.

—S. 409—Applicability and scope—Accused bound to lodge money into treasury in excess of certain sum—Accused removing the excess to a Government godown—Offence.

Where it is necessary for the accused to lodge in the Treasury any Government money in excess of that shown due to Government by the registers which he might have in his hands under certain rules, he is guilty under S. 409 if he removes the excess from the office cash box and it makes no difference that he removes it to a godown belonging to Government. 94 Ind. Cas. 205=1 Luck. 345=29 O.C. 245=3 O.W.N. 382=27 Cr.L.J. 589=A.I.R. 1926 Oudh 398.

—S. 404—Applicability and scope—Immovable property—If can be subject of criminal misappropriation.

Section 404 is not expressly limited to movable property alone and criminal misappropriation or conversion is easily possible of immovable property where the materials have been severed from the building and removed, 6 B.H.C. Cr. 33, Diss.



Where the property removed by the accused consisted of the rafters used in the house left by the deceased:

**Held**, the rafters were immovable property so long as they were attached to the house, but became movable property when they were severed from the house and as the accused had no title to the house and the house was not in the possession of any person legally entitled to its possession, S. 404 applied, if, after severing the rafters from the house, they dishonestly removed them and misappropriated or converted them to their own use. 91 Ind. Cas. 49=24 A.L.J. 153=27 Cr.L.J. 17=6 L.R.A. Cr. 200=A.I.R. 1925 All. 673.

—S. 409 and Criminal Procedure Code, S. 179—Applicability and scope—Offence of criminal breach of trust—Causing wrongful loss if a necessary consequence—Applicability of Criminal Procedure Code, S. 179.

The word "consequence" in S. 179 does not include all the possible results of an act, but is restricted in its scope to certain specified results; those are the results specified in the provision of the law making the act an offence. The offence of criminal breach of trust is complete with the act of conversion and the intention to cause wrongful gain or wrongful loss. That intention can only be formed or at least can only be proved to have been formed at the place where the conversion takes place. For the purposes of S. 179 it is immaterial where the wrongful loss actually takes place, and indeed whether any such loss actually does take place or not. A.I.R. 1922 Bom 39, Dissent.; 38 Mad 639, Foll. 81 Ind. Cas. 538=20 N.L.R. 72=25 Cr.L.J. 922=A.I.R. 1924 Nag 253.

—Ss. 403, 411—Applicability and scope—Two articles lost found with accused—Nature of offence.

A packet containing a loose diamond and a diamond-ring was lost and was found with accused two years later.

**Held**, only one offence of retaining stolen property was committed under S. 411 and not two offences under S. 403 one in respect of diamond and the other in respect of the ring. 81 Ind. Cas. 443=2 Rang. 80=25 Cr.L.J. 907=A.I.R. 1924 Rang. 256.

—Ss. 403, 405—Applicability and scope—Breach of trust and misappropriation—Temporary.

If Ss. 403 and 405 be read together, it will be seen that criminal breach of trust is a species of criminal misappropriation by a person entrusted with the property misappropriated, and as regards criminal misappropriation it is distinctly laid down that a dishonest misappropriation for a time only is misappropriation. The same principle applies to temporary misappropriation by a person entrusted with the property. 68 Ind. Cas. 157=23 Cr.L.J. 557=A.I.R. 1923 Nag. 146.

—S. 403—Applicability and scope—Criminal Procedure Code, S. 181 (2) and S. 179—Money received at one place to be handed over at another place—Offence where committed.

Under S. 403, Indian Penal Code, the offence is complete the moment the accused receives or retains the money with a dishonest motive of appropriating it or converting it to his own use. Where the accused receives money in respect of which the offence is committed at one place to be handed over at another, the offence is committed at the former place. The failure to hand

over the money is not a necessary ingredient to constitute an offence of criminal misappropriation and is therefore not a consequence which has ensued by reason of anything done by the accused. The words "consequence which has ensued" occurring in S. 179 do not apply to criminal misappropriation or criminal breach of trust. 1 Pat. L.T. 200=56 Ind. Cas. 775=21 Cr.L.J. 519=1921 P.H.C.C. 31=A.I.R. 1921 Pat. 85.

—Ss. 405 and 408—Applicability and scope—Criminal misappropriation—Breach of trust—Clerk authorised to receive moneys.

Where a clerk in the service of an estate is authorized to receive money on its behalf and to pay them into the estate treasury, money so received by him is not his money for which he has merely to account to the estate but is actually the estate money which is entrusted to him and if he misappropriates the same, he commits criminal breach of trust. The offence is not one merely falling under S. 403. 9 C.L.J. 257, Foll. 12 Mad. 49, Expl. 21 Cr.L.J. 824=(1920) M.W.N. 518=12 L.W. 295=58 Ind. Cas. 824.

—S. 406—Applicability and scope—Movable attached in execution of decree—Entrusted to accused—Non-production—Offence.

The accused were entrusted by a Court officer with certain movable property attached in execution of a decree but at the time of sale they did not produce the property and evaded service of notice.

**Held**, that they could not be guilty of criminal breach of trust inasmuch as they did not misappropriate the property or convert it to their own use or dispose of it in any manner contrary to the terms of the trust. The accused were guilty of contempt of Court under S. 172, Indian Penal Code. 16 A.L.J. 600=19 Cr.L.J. 975=47 Ind. Cas. 875.

—S. 408—Applicability—Embezzlement—Breach of trust by clerk or servant.

A person employed by a station master to mark and load goods and paid out of an allowance granted by the company to the station is not guilty of an offence under S. 408, Indian Penal Code, if he recovers an overcharge from a consignor of goods and converts it to his use. 40 All. 565=16 A.L.J. 596=19 Cr.L.J. 967=47 Ind. Cas. 867.

—S. 409—Applicability and scope—Manager of Bank—Deceiving shareholders as to profits.

Where the Manager of a Bank being entrusted with the property of the Bank dishonestly uses and disposes of some of the property contrary to the Articles of Association of the Bank causing the shareholders to declare a dividend larger than the profits warranted, he is guilty of an offence under S. 409, Indian Penal Code. 23 P.W.R. 1915 Cr.=167 P.L.R. 1915=16 Cr.L.J. 473=28 P.R. 1915 Cr.=29 Ind. Cas. 105.

—Ss. 409 and 477-A—Applicability and scope.

A debtor executed certain *Hundi* in favour of a certain Bank payable after 6 months. The Bank being in need of ready money, its Managing Director tried to get the *Hundi* cashed in another Bank which Bank insisted on the Director's clearing his own account with it before he would cash the *Hundi* for his Bank. To pay off his loan, the Director asked his son to put in a loan application to his Bank for the exact amount due by him to the other Bank and sanctioned it as the Managing Director on the security of his moneys in his Bank. After this he got the *Hundi* cashed. He was charged under Ss. 409 and 477-A.



**Held**, that the prosecution failed to establish the charge of criminal misappropriation as the accused in his anxiety to get ready money chose a method which could not be said to have injured his Bank. The prosecution having failed to prove that the loan application by the son and the accused's order of sanction were really ante-dated, the charge of falsification of documents could not be sustained. 164 P.L.R. 1915=16 Cr.L.J. 443=29 Ind. Cas. 75=25 P.W.N. 1915 (Cr.).

**—Ss. 404 and 424—Applicability and scope—Claim of right.**

Ss. 404 and 424 do not apply to the case of persons, who take possession and deal with the estate of the deceased under a claim of right. (1914) M.W.N. 791=15 Cr.L.J. 602=25 Ind. Cas. 514.

**—Ss. 403 and 405—Applicability and scope—Person entrusted with property for sale—Failure to comply with all conditions.**

S. 405 does not cover misappropriation of sale proceeds of property entrusted to a person. A person cannot be said to have disposed of property entrusted to him in violation of his contract dishonestly, unless a dishonest intention is proved. An auctioneer is not liable for criminal breach of trust if he does not carry out every term in the agreement punctually. A person cannot be convicted of criminal misappropriation when the charge is for criminal breach of trust. 41 Cal. 844=15 Cr.L.J. 683=19 C.W.N. 422=26 Ind. Cas. 131.

**—Ss. 406 and 408—Applicability and scope—Criminal breach of trust—Misappropriation of Water-tax.**

Where Municipal Water-Works Inspector misappropriated some water for his own use and for the use of his tenants for which he paid no tax.

**Held**, that the Inspector was guilty under S. 408, Indian Penal Code. Where he received some money from his tenants as water-tax he was guilty under S. 406 of the Code. 35 All 36=11 A.L.J. 369=14 Cr.L.J. 415=20 Ind. Cas. 239.

**—S. 403—Contract Act, S. 108, Excep. 3—Applicability and scope—Jewels entrusted for sale—Price realised but not paid to owner—Misappropriation—Contract Act, S. 108, Excep. 3.**

A entrusted certain jewels to a broker for sale. The jewels were found with B; the appellant, who had received them in pawn from C. It transpired that the broker had sold them to C; who then pawned them to B.

**Held**, that the broker did not misappropriate the jewels, but he misappropriated the money received from C, for them and that B, was protected by Excep. 3 to S. 108, Contract Act, and was entitled to have the jewels returned under S. 517, Criminal Procedure Code. 4 Bur. L.T. 170=12 Cr.L.J. 647=11 Ind. Cas. 1003.

**—Ss. 403, 411 and 75—Applicability and scope—Possession of strayed animals—Applicability of S. 75.**

Where there is no evidence to indicate a theft, a person in possession of strayed animals is guilty of an offence under S. 403 and not of an offence under S. 411. S. 75 of the Code does not apply to the case of a person with previous convictions under Chap. XVII who is found guilty of an offence under S. 403. 36 P.W.R. 1911 Cr.=235 P.L.R. 1911=12 Cr. L. J. 943=11 Ind. Cas. 623.

**—S. 406—Applicability and scope—Deceased property of—Heir not justified in taking forcible possession of such property.**

A person who claims to be an heir to a deceased person is not justified in taking possession of the property left by him by force from the person who is actually in possession of it. 11 Cr.L.J. 364=11 P.L.R. 1910=41 P.W.R. 1910 (Cr.)=6 Ind. Cas. 490 (2).

**—Ss. 403, 405 and 415—Applicability and scope—Provident Fund—Fund in the hands of agent.**

Whereby the terms of the contract of the employment of Manager of Provident Institutions the custody and application of the Provident Funds was in the hands of the Proprietor or Agent, the manager is not criminally liable for any misappropriation by the proprietor of the institution or his agent. 5 M.L.T. 141=11 Cr.L.J. 189=4 Ind. Cas. 1106.

**—S. 408—Applicability and scope—Person remunerated for collecting money.**

If a person receives remuneration for collecting money and accounting for the same and of giving receipt to the payer, he accepts an express trust. 9 C.L.J. 257=10 Cr.L.J. 482=4 Ind. Cas. 48.

**2. Bona fides.**

**—S. 404—Bona fides—Ingredients of offence—Curator taking possession under S. 196 of Succession Act—Whether "legally entitled to possession."**

In order to find a person guilty under S. 404, Indian Penal Code, the prosecution must prove not only misappropriation but dishonest misappropriation or dishonest conversion to his own use of property by the accused. Secondly, the prosecution must prove that the property was in the possession of a deceased person at the time of that person's decease and that it has not since been in the possession of any person legally entitled to such possession.

If there is a *bona fide* claim to the property which is not a pretence, then no offence under the section can be committed because dishonesty is an essential ingredient of the offence. Therefore, a plea by the legitimate or illegitimate sons of the deceased, who are charged under the section, that they acted in good faith, cannot be lightly brushed aside.

A person may not have title to property in the sense of title to the ownership of the property, but yet he may be legally entitled to possession thereof. A curator appointed and authorised by the District Judge under S. 196 of the Succession Act to take possession of the property, is a person legally entitled to possession within the meaning of S. 404, Indian Penal Code. A I.R. 1949 Cal. 171=50 Cr.L.J. 241.

**—S. 406—Bona fides.**

Owner had handed over property years before and had taken no more interest in it. It was handed over for use and the only stipulation was that it was to be returned when required by the owner. Owner fell out with the person entrusted with the property who had pawned it. Owner launched a prosecution under S. 406, Indian Penal Code.

**Held**, in the circumstances it was perfectly reasonable and legitimate for the person entrusted with the property to think that he could purchase the property and no offence of criminal breach of trust was established and that Court should not lend aid to such malicious prosecution. A.I.R. 1935 Rang. 361.

**—S. 409—'Bona fide' claim—Dominion over property—Claim unsustainable—Effect.**

Unless the claim of the accused is merely a pretence and not a *bona fide* claim, no offence under



S. 409 is committed where the accused not only has got dominion over the property but is laying some claim over it even though it turns out that the claim is not in law sustainable. Generally in cases under S. 409 the property is non-existent or at least leaves the dominion of the accused. Where these facts are wanting, ordinarily a Criminal Court should refer the matter for decision by the Civil Court especially where the important witnesses are living far away beyond the jurisdiction of the Court. 81 Ind. Cas. 829=28 C.W.N. 831=25 Cr.L.J. 1053=A.I.R. 1924 Cal. 908.

### 3. Cheating.

#### —S. 409—Cheating.

Accused, agent of money-lenders, dishonestly selling jewels pledged with him by complainant as security for loan contrary to terms of contract and also dishonestly appropriating interest paid by complainant :

**Held**, that the offence did not fall under S. 409. A.I.R. 1941 Mad. 804=1941 M.W.N. 677=54 L.W. 391 (2).

#### —Ss. 406 and 420—Cheating—Subsequent misappropriation.

Where there is an entrustment of the bonds for a special purpose and it is immaterial how the accused became entrusted with property or dominion over property, he would be guilty under S. 420, Indian Penal Code, of obtaining property by cheating as soon as delivery is obtained and subsequent misappropriation will bring him under S. 406, Indian Penal Code, as well. A.I.R. 1936 Mad. 353=(1936) M.W.N. 281=43 L.W. 548=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (2) (F.B.).

#### —S. 405—Cheating.

Per **Lakshmana Rao, J.**—Acts constituting the offence of obtaining property by cheating cannot by themselves constitute the offence of criminal breach of trust. The ingredients of the offences are different and so is the evidence requisite to establish them. There can be a breach of trust independently of cheating and the offences are distinct and separate. The offence under S. 420 is complete as soon as delivery is obtained by cheating and without the further act of misappropriation there can be no breach of trust A.I.R. 1936 Mad. 353=(1936) M.W.N. 281=43 L.W. 548=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (2) (F.B.).

#### —Ss. 405 and 406—Cheating.

Per **Mocket, J.**—There can be no consent by a person who is cheated and so if there was deceit which prevented any true consent arising, there could be no entrusting; the terms are mutually exclusive. A.I.R. 1936 Mad. 359=48 L.W. 548=(1936) M.W.N. 281=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (2) (F.B.).

#### —Ss. 405 and 415—Cheating.

A person who tricks another into delivering property to him bears no resemblance to a trustee in the ordinary acceptance of that term; and S. 405, Indian Penal Code, gives no sanction to regard him as a trustee. The illustrations to the section show that it is intended to cover the case of property honestly obtained by the person entrusted with it, and subsequently, dishonestly misappropriated by him in breach of his trust. The essence of criminal breach of trust is the dishonest conversion of the property entrusted. But the act of cheating itself involves a conversion. Conversion signifies depriving the owner of the use and possession of the property. When the cheat afterwards sells or consumes or otherwise use the fruit of his cheating, he is not committing

an act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he practised to get hold of the property. It is not necessary to strain the language of S. 405 to catch the cheat, for he can be dealt with apart from that section. In fact, there would be little use of S. 415 if cheating is only a form of criminal breach of trust. For these reasons, cheating is a complete offence by itself and cannot be criminal breach of trust. A.I.R. 1936 Mad. 353=43 L.W. 548=(1936) M.W.N. 281=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (2) (F.B.).

#### —Ss. 406 and 420—Cheating—Subsequent misappropriation.

Even though the accused, when he induced the complainant to part with certain properties had the intention of deceiving him, a subsequent misappropriation by him of the property to his own use would amount to criminal breach of trust. The fact that there was a complete offence of cheating when the property was received will not prevent the accused being guilty of criminal breach of trust. A.I.R. 1936 Mad. 1=(1935) M.W.N. 914=69 M.L.J. 681=42 L.W. 923=37 Cr.L.J. 142=159 Ind. Cas. 656.

#### —Ss. 406 and 420—Cheating—Property obtained for one purpose used for another—Offence.

To justify a conviction under S. 420, Indian Penal Code, deception must be proved. Where in the absence of deception a person obtains property for one purpose and uses it for another, he is guilty of an offence under S. 406 and not under S. 420 of the Code. 1 U.P.L.R. (H.C.) 69=20 Cr.L.J. 413=51 Ind. Cas. 173. (All.)

#### —S. 409—Cheating—Directors of loan—And deposit society—Issue of false balance sheet.

The mere fact that the Directors of a Loan and Deposit Society passed and issued an incorrect balance sheet does not justify a charge of cheating. All other circumstances, viz., the nature of the statements, the case or difficulty with which their truth or falsity could be ascertained, the course of business of the Society—the position, experience and attainments of individual Directors, must be considered before a decision is arrived at. Mistakes and omissions in the classification of debts as 'doubtful or bad' does not lead to a presumption of cheating nor does the omission by the Directors to show their debts as a separate item afford any presumption of guilt. These omissions will entail a civil liability only.

An untrained auditor is not criminally liable for failure to detect such mistakes. 9 M.L.T. 20=11 Cr.L.J. 624=8 Ind. Cas. 325.

### 4. Civil wrong.

#### —S. 403—Civil wrong—Wrongful dishonouring of cheque by Bank.

If a cheque is dishonoured by a bank, that does not connote misappropriation. The remedy for a cheque being wrongly dishonoured lies in the Civil Court. This is not a matter which is to be tried by a criminal Court. 1950 Comp. C. 220=A.I.R. 1950 Cal. 57=51 Cr.L.J. 388.

#### —Ss. 403, 406 and 417—Civil wrong.

Commission agent advancing money to potato-grower on mortgage of crop—Mortgage to secure to former sale of crop and his commission—Sale by grower to another agent in breach of contract :

**Held**, that the grower cannot be said to have committed criminal misappropriation, or criminal breach



of trust or cheating. A.I.R. 1939 Sind 48=40 Cr. L.J. 278=179 Ind. Cas. 841.

—Ss. 403, 420—Civil wrong.

Where, in a case, the chief matter in dispute between the complainant and the accused is a dispute between the partners, and the allegations of criminal offences under Ss. 403 and 420, Indian Penal Code, are made in the complaint for the purpose of squeezing money out of the accused, the complaint is not maintainable as the dispute is of a civil nature. A.I.R. 1939 Sind 21=40 Cr.L.J. 246=179 Ind. Cas. 687.

—S. 409—Civil wrong—Lambardar not depositing land revenue collected by him—Whether offence under S. 409—Lambardar, if in a position of trustee.

The failure of a *lambardar* to deposit land revenue collected by him does not constitute an offence under S. 409; a *lambardar* is bound to pay on due date all the land revenue recoverable from an estate irrespective of the fact whether he realizes it from the tax-payers or not. The *lambardar* does not, therefore, stand in the position of a trustee but that of a *quasi-lessee*. The dispute between the Government, and the *lambardar* over the question of recovery of land revenue is consequently one of a civil nature. A.I.R. 1938 Pesh. 25=39 Cr.L.J. 741=176 Ind. Cas. 406.

—S. 403—Civil wrong—Person authorised to take and sell cotton of another—Selling cotton as such—Sale money not handed over to owner.

The act of the accused selling the cotton belonging to another where he is authorised to so take it, cannot amount to misappropriation of the cotton itself within the meaning of S. 403, Indian Penal Code, and where after the sale of the cotton he refused to pay the money due to the owner, the remedy lies only in Civil Court. A.I.R. 1937 Mad. 968=47 L.W. 140=(1937) M.W.N. 733=39 Cr.L.J. 144=172 Ind. Cas. 501.

—S. 408—Civil wrong and criminal offence, distinguished.

Every offence of criminal breach of trust involves a civil wrong in respect of which the complainant may seek his redress for damages in the Civil Court but every breach of trust, in the absence of *mens rea*, cannot legally justify a criminal prosecution. A.I.R. 1937 Oudh 331=38 Cr.L.J. 491=1937 O.W.N. 505=168 Ind. Cas. 58.

—S. 408—Civil wrong—Offence under S. 408—Essentials of—*Mens rea*, necessity of.

The distinction between a civil wrong, which gives rise to a suit for damages for that wrongful act or tort, and a criminal offence punishable under the Indian Penal Code, is very clear. Every breach of trust gives rise to a suit for damages but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust under Ss. 408 and 409, Indian Penal Code. It is this mental act of fraudulent misappropriation that clearly demarcates an act of embezzlement which is a civil wrong or tort, from the offence of criminal breach of trust punishable under S. 408, Indian Penal Code. This malicious intent on the part of a servant to deprive his master of sums of money due to the latter and the fraudulent misappropriation as evidenced by such mental act or intent to deprive the master of his property without any outward or visible trespass is the fundamental distinction between a civil wrong arising out of a breach of trust and the offence of criminal breach of trust. A.I.R. 1937

Oudh 331=38 Cr.L.J. 491=1937 O.W.N. 505=168 Ind. Cas. 58.

—S. 409—Civil wrong—Lambardar obtaining revenue from land owners but not handing it over to Government.

The position of the *lambardar* is not that of a trustee in order to make him liable for criminal breach of trust if he does not hand over to the Government, the money recovered from the land owners. His position is similar to that of a lessee and the dispute relating to the payment of the money is one of a civil nature. He is bound to pay the revenue demand subject to certain conditions and if he does not pay, there are ample provisions in the revenue law to make him do so. A.I.R. 1937 Pesh. 35=38 Cr.L.J. 530=168 Ind. Cas. 369.

—S. 409—Civil wrong—Mere refusal of agent to render accounts and allow partner to have access to account-books.

Intention to defraud cannot be presumed from the mere fact of refusal on the part of an agent of a firm to render accounts and to allow one of the partners to have access to the account-books without further facts being proved. The agent cannot be prosecuted in a Criminal Court. The refusal may be a good ground for a civil action, but does not amount in any case to a criminal offence, much less to an offence under S. 409, Indian Penal Code. A.I.R. 1937 Rang. 505=39 Cr.L.J. 194=72 Ind. Cas. 872.

—S. 406—Civil wrong—Mere non-payment of instalments.

The complainant sold a gramophone to the accused on instalment system but on his not paying the instalments the complainant asked for the machine. Though it was not immediately produced, it had not been sold and was produced in Court. He was convicted under S. 406, Indian Penal Code;

**Held**, that it was a matter of civil dispute and the mere non-payment of the monthly instalment could be considered as a criminal offence. A.I.R. 1936 Cal. 674=38 Cr.L.J. 113=165 Ind. Cas. 827.

—S. 405—Civil wrong—A clear distinction exists.

Between criminal and civil liability. Where moneys have been spent upon the business of the company, in the absence of proof of dishonest intention to cause loss to the company, the managing agents cannot be held liable for criminal breach of trust although there has been a breach of contract indirectly causing loss. (1936) 161 Ind. Cas. 280=63 C. 18=37 Cr.L.J. 439.

—S. 408—Contract of service for particular year—Year expiring, and employment continuing—Presumption.

Where there is a contract of employment under certain terms, for a particular year, and the employment continues even after the expiry of that year, the ordinary presumption is that the same conditions also continue.

**Held**, on facts, that there was no criminal misappropriation and any liability on that account would be a civil liability but would not give rise to a criminal prosecution for misappropriation. 163 Ind. Cas. 657=18 N.L.J. 345=37 Cr.L.J. 856.

—S. 403—Civil wrong.

Taking delivery of goods in pursuance of notice of the trial Magistrate with the knowledge of an order



to the contrary by a Court of Appeal—Notice of the trial Magistrate containing alternative of forfeiture in case of failure to take delivery—Goods disposed of :

**Held**, that no offence under S. 403 was committed. Even though the accused may have been aware of the stay order, there was a notice with the alternative of forfeiture and even if after taking delivery he disposed them of pending consideration in appeal, he cannot be held guilty under S. 403 :

**Held, also**, that proper relief for the complainant was to be obtained in the Civil Court. A.I.R. 1934 Cal. 454 = 45 Cr.L.J. 886 = 149 Ind. Cas. 36 (D.B.).

—S. 405—Civil wrong.

When a mortgagor leaves money with mortgagee to meet the demands and the mortgagee, after making some payments, refuses to pay further, it is a case of current deposit and not of criminal breach of trust. 1934 M.W.N. 738.

—S. 409—Civil wrong—No dishonest intention—Remedy.

Where an agent produces his lists of accounts and admits the withdrawal of money, if he be recalcitrant, even if there is good ground for suspicion that he was not altogether honest, yet so long as there is no intention to misappropriate money belonging to his principal, the agent's prosecution under S. 409 for criminal breach of trust is not the proper remedy; the proper remedy lies in a suit for accounts in a Civil Court. 125 Ind. Cas. 513 = A.I.R. 1930 Pat. 221.

—S. 405—Civil wrong—Return of deposit to brother—Criminal breach of trust or civil liability.

The return of a deposit to the brother of depositor under circumstances indicating the best of intention and an absence of moral turpitude, may render a person civilly liable to the depositor but does not amount to criminal breach of trust as that offence involves moral turpitude. 117 Ind. Cas. 157 = 1929 Cr.C. 104 = 30 Cr.L.J. 735 = A.I.R. 1929 Sind 119.

—S. 406—Civil wrong—Suit—Money advanced in respect of a contract—Breach of contract—Remedy.

Where money is advanced in respect of a contract, and there is no entrustment in a fiduciary form, any dispute arising out of the breach of contract is one of civil nature and capable of settlement not in the criminal but in the civil Courts. 96 Ind. Cas. 501 = 7 A.I. Cr.R. 24 = 27 Cr. L.J. 949.

—Ss. 403, 406, 411 and 379—Civil wrong—False denial of loan—Criminal breach of trust—Loan of a chattel—Borrower denying the loan—Offence—Civil liability.

*Per Batty, J.*—The loan of a chattel does not constitute the borrower a person entrusted with the chattel or with dominion over it within the meaning of S. 406 for the borrower is not a trustee but has a beneficial interest given him in the thing lent. A false denial of a loan is not in itself a misappropriation at all, and may amount to no more than an attempt to evade civil liability for the money or the chattel lent. Attempt to evade civil liability does not necessarily imply that the property has been misappropriated. The false denial of a loan is compatible with the absence of criminal misappropriation and no more constitutes that offence than possession of stolen property constitutes theft or dishonest receipt. The false denial may be evidence of an offence under S. 403 as possession of stolen pro-

perty may be evidence of offences under S. 379, or 411.

*Per Aston, J.*—Where the property dishonestly misappropriated had come into the accused's possession through his being entrusted with it or with any dominion over it which includes a loan of a chattel, the offence committed is criminal breach of trust. (1904) 6 Bom. L.R. 1093.

5. Conversion.

—Ss. 405 and 406—Conversion—Essentials of conversion.

An offence of conversion punishable under S. 406, Indian Penal Code, is only committed when a man does an unauthorised act which deprives another of his property permanently or for an indefinite time. 3. A. I. Cr. D. 277 = A.I.R. 1949 Pat. 326 = 50 Cr. L.J. 682.

—S. 403—Conversion—Actual conversion or appropriation is necessary.

In order to frame a charge of criminal misappropriation, it must be proved that actual conversion or appropriation of the property by the accused for his own use had taken place. A.I.R. 1938 Mad. 172 = (1937) 2 M.L.J. 734 = 46 L.W. 812 = (1937) M.W.N. 1321 = 39 Cr.L.J. 312 = 173 Ind. Cas. 317.

—S. 409—Conversion—False paper entries—Entries in cash book—Conversion effected as no cash passed—Offence.

A loan of Rs. three lacs was made to one of the accused who was a director of a Bank. The professed object of the accused was to bolster up the affairs of the closely allied concern known as the Hindustan Assurance and Mutual Benefit Society, which would otherwise have been obliged, under Cl. 179 of its Articles of Association to go into liquidation. What he did in effect was that with one of the three lacs of rupees he converted a debt owed by the Society into a credit balance; with another lac he created a fixed deposit for the Society with the Bank; with the third lac he converted his own debt into a credit balance and also created a fixed deposit of Rs. 30,000 in his wife's favour. He sent intimation to the Society regarding their credits. At the time when he made these changes in the Bank's financial position, he had no authority except his own and his subsequent transactions do not show that he had an honest intention.

**Held**, that although the changes made were mere paper entries, the conversions were no less conversions because no cash passed and that an offence under S. 409 had been committed. 118 Ind. Cas. 650 = 30 Cr.L.J. 954 = 1930 Cr.C. 25 = A.I.R. 1930 Lah. 57.

—S. 409—Conversion—Non-payment for a long time.

It was proved by as good evidence as could have been produced that accused received the three sums in question and, as up to the time of his prosecution more than a year later, he had not paid them over to the persons authorised to receive them, he must be presumed to have converted them to his own use. A.I.R. 1923 Lah. 566.

—S. 403—Conversion—Offence.

A person obtaining goods of another innocently and disposing of them fraudulently for the benefit of himself or a third person is guilty of conversion. The assuming to oneself the right of disposing another man's property, is itself conversion. 12 Bom. L.R. 316 = 5 Ind. Cas. 457 [On Appeal See 37 Bom. 122 = 17 Ind. Cas. 663 (P.C.)].



**6. Conviction and sentence.****—S. 406—Conviction and sentence.**

Accused man of position and Secretary of Co-operative Society committing breach of trust.

**Held**, that the sentence of fine of Rs. 175 and imprisonment till rising of Court inadequate and should be increased. A.I.R. 1943 Sind 164=44 Cr.L.J. 798=208 Ind. Cas. 540.

**—S. 409—Conviction and sentence—Trial for embezzlement of deposits—Offences alleged of conspiracy to commit breach of trust and also specific charges with regard to definite sums of money—Splitting of case at trial into four separate trials—Passing of separate sentences in two cases—Propriety.**

The offences alleged against the accused (Secretary and Assistant Secretary of Bank) were conspiracy to commit criminal breach of trust and also specific charges with regard to definite sums of money and one charge-sheet was submitted. When the case came on for trial, the prosecution, in spite of the protest of the defence, split up the case to be tried into four separate trials. In the first trial, the Secretary was given three years under S. 409, Indian Penal Code. He was also convicted of conspiracy. No separate sentence was passed upon him. In the second trial, he had been given two years under S. 409, Indian Penal Code. No separate sentence for conspiracy was passed upon him. The Assistant Secretary was given three years under S. 409, in the first trial and four years in the second trial. No separate sentence was passed upon him on the conspiracy charge. The prosecution in the first trial alleged a separate conspiracy to embezzle a particular sum of money. In the second trial, they went a little further and alleged a separate conspiracy to embezzle money coming from a certain bank.

**Held**, that in framing these charges, the prosecution entirely lost sight of the real nature of the case, but on a technical ground, it must be said that the two conspiracies of which the accused had been found guilty were not the same; but it was so impossible to distinguish them that if different sentences had been imposed, the High Court should most certainly have made them concurrent:

**Held**, also that the method of proceeding with the prosecution adopted in the case was the most harassing one. Three items might have been selected as the subject-matter of separate charges. Then it would have been possible upon a verdict of guilty to impose a sentence that would be sufficient. There would then have been no necessity for proceeding with the trial of any more charge.

[The method of proceeding with an indefinite number of trials and imposing sentences to take effect one after the other was disapproved.] A.I.R. 1938 Cal. 697=40 Cr.L.J. 90=43 C.W.N. 23=178 Ind. Cas. 576.

**—S. 408—Sentence—Accused a man of 18 years and of good character—Offence due to laxity of manager and his own miserable pay—Sentence reduced to one already undergone.** A.I.R. 1937 Sind 242=39 Cr.L.J. 6=171 Ind. Cas. 708.

**—S. 406—Conviction and sentence.**

Pawn and loan—Loan returned—Pawnee denying existence of pawn—Court finding against accused on all points—Conviction under S. 406 is legal. A.I.R. 1936 Cal. 673=62 C.L.J. 487=38 Cr.L.J. 118=165 Ind. Cas. 905.

**—S. 408—Conviction and sentence—Embezzlement of various items—Sessions Judge examining evidence in respect of each item which went to make up total amount of sums embezzled as entered in charge sheet—Sentence.**

Where, in a charge under S. 408 the Sessions Judge examines the evidence in respect of each item of money embezzled which went to make up the total amount of the sums embezzled as entered in the charge-sheet in each case, this way of examining the facts being most favourable to the accused, he cannot complain that he has been in any way prejudiced by the manner in which the evidence against him has been scrutinised by the lower Appellate Court:

**Held**, that as from one point of view the accused was as much sinned against as sinning and in view of the circumstances of the case, the ends of justice would be met by reducing the sentence of imprisonment to that already undergone. A.I.R. 1936 Oudh 376=1936 O.W.N. 607=37 Cr.L.J. 941=164 Ind. Cas. 302.

**—Ss. 408, 467 and 477-A—Conviction and sentence—Supervisor of society misappropriating money—Getting affixed to debit entry false thumb-impression—Forgery—Making false debit-entry—Offences.**

The accused, the supervisor of a society connected with the co-operative movement, misappropriated and converted to his own use Rs. 2, which represented the pay of a woman who swept and cleaned his office, and he thereby committed an offence under S. 408, Indian Penal Code. At the same time and date, he forged or caused to be affixed to the receipt of the said sweeper woman, a thumb-impression, which was not of that person and thereby committed a forgery punishable under S. 467, Indian Penal Code, and finally he defrauded the Union by making a false debit entry to the effect that the woman had been paid Rs. 2 when no such payment had been made and thereby committed an offence under S. 477-A, Indian Penal Code.

**Held**, that the necessary element of fraud implying wrongful gain to himself and wrongful loss to the society was proved and the accused was properly convicted. A.I.R. 1935 Bom. 30=36 Bom. L.R. 1120=36 Cr.L.J. 522=154 Ind. Cas. 559.

**—S. 409—Conviction and sentence.**

Sentence of imprisonment and not of fine only is necessary in a conviction under S. 409. 1935 M.W.N. 474.

**—S. 406—Senior member of bar committing criminal breach of trust—Consideration in sentencing him.**

The fact that the amount involved is large and the offence has been committed by a member of a legal profession in which the litigating public must repose entire trust and confidence, and the fact that the accused has been a doyen of the Bar aggravates rather than mitigates the offence. In view of these circumstances, the sentence of 18 months' rigorous imprisonment passed by the trial Court would certainly have erred on the side of leniency if it were not on account of the grave consequences that will befall the accused both professionally and socially in consequence of the conviction. These consequences, however, are not the only materials on which a plea for leniency to be shown to the accused can be founded. His great age (60 years), together with his state of health brought on by the great mental strain to which he has been subjected—albeit by his own faults—urges very strongly that further leniency can justly be shown to him without any risk to the ends of justice.



In the above circumstances, it was held that the ends of justice will be amply met by a sentence of nine months, rigorous imprisonment. A.I.R. 1935 Rang. 453=37 Cr.L.J. 190=159 Ind. Cas. 952.

—S. 408—Conviction and sentence.

Clerk of many years service and in position of trust embezzling large sums of money—Sentence of five years' rigorous imprisonment is not too severe. A.I.R. 1934 All. 173=1933 A.L.J. 1628=35 Cr.L.J. 617=148 Ind. Cas. 218.

—Ss. 403 and 392—Conviction and sentence—Offence of robbery only technical—Attempt to criminally misappropriate currency notes—Sentence.

D who wanted to send by registered insurance post a letter with five currency notes each of Rs. 100 asked the accused to write the address on the envelope but the accused tried to substitute another envelope in place of the original one and wrote the address on it. D's suspicious having been aroused, he demanded of the accused the original envelope. An alteration ensued and the original envelope containing the currency notes and D's coat were torn. The accused was charged under S. 392, Indian Penal Code, and sentenced to 15 months' rigorous imprisonment :

**Held**, that the offence of robbery for which the accused could be held guilty was more or less technical and that the accused should really have been charged with attempt to criminally misappropriate the notes and that in the circumstances, the sentence should be reduced to one of six months' rigorous imprisonment. A.I.R. 1933 Sind 139=34 Cr.L.J. 802=144 Ind. Cas. 427.

—S. 409—Conviction and sentence—Series of embezzlements—Single charge but separate sentences to run concurrently—Legality.

Where the accused was prosecuted for an offence under S. 409, Indian Penal Code, and only one charge was framed in which four sums of money said to have been embezzled were specified and the Magistrate convicted the accused but passed sentence for each embezzlement and directed that the sentences should run concurrently.

**Held**, that there was no misjoinder of charges and that the separate sentences though invalid did not prejudice the accused so as to render the conviction liable to be set aside. 1930 A.L.J. 1130=128 Ind. Cas. 595=32 Cr.L.J. 155=52 A. 941=A.I.R. 1931 A. 267.

—S. 408—Conviction and sentence—Charge specifying gross sums as also items misappropriated in one year—Legality of conviction.

Where an accused person is charged under S. 408, Indian Penal Code, with having committed criminal breach of trust in respect of a gross sum of money misappropriated by him within the period of one year and the charge not only specifies the gross sum taken and the dates between which it was taken, but also sets out the items composing such gross sum giving the dates and the amounts alleged to have been misappropriated, the charge comes within the provision of Cl. (2), S. 222, Criminal Procedure Code, and that if by specifying the items composing the gross sums the charge went beyond what was necessary instead of prejudicially affecting the accused it is to that extent favourable to the accused ; 31 Cal. 928, Foll. 34 C.W. N. 901=1930 Cr.C. 1117=A.I.R. 1930 Cal. 717.

—S. 409—Conviction and sentence—Wrong accounts—Wrong account and wrong entry do

not by themselves prove criminal breach of trust.

The fact that the accounts have been wrongly kept will not of itself prove that the person keeping the account committed criminal breach of trust unless it can be shown that the person misappropriated proceeds of cheque or remittance transfer receipt or any cash proved to have been received by him ; and the wrong entries may rise strong suspicion which may serve as a ground for scrutiny but cannot justify the conviction of the person for criminal breach of trust. 126 Ind. Cas. 684=7 O.W.N. 564=A.I.R. 1930 Oudh 324.

—S. 409—Conviction and sentence.

A sentence of imprisonment is obligatory under the law for an offence either under S. 409 or under S. 420, 94 Ind. Cas. 130=27 Cr.L.J. 562=A.I.R. 1926 Lah. 350.

—S. 409—Conviction and sentence.

The law always regards the offence of criminal breach of trust by persons in charge of public moneys as one of a specially serious nature warranting a severe sentence. 106 Ind. Cas. 337=29 Cr.L.J. 1 (Lah.).

—S. 408—Conviction and sentence—Imprisonment—Benefit of Criminal Procedure Code, S. 562.

Where a person was convicted under S. 408, Indian Penal Code, and was given the benefit of S. 562, Criminal Procedure Code, by the trial Court and by the time the case went to the High Court in revision, considerable time had passed.

**Held**, that though usually imprisonment should be given in cases of embezzlement, it was not proper to interfere with the Magistrate's discretion after such a length of time. A.I.R. 1925 Oudh 673 ; 19 P.W.R. 1910 ; A.I.R. 1925 Bom. 192 and A.I.R. 1926 Sind 101, Rel. on. 107 Ind. Cas. 775=10 A.I. Cr. R. 27=29 Cr.L.J. 291=A.I.R. 1928 Lah. 926.

—S. 409—Conviction and sentence—Postmaster taking V.P.P. without payment—Manipulation of accounts—Effect.

Where a Sub-Postmaster of 13 years' service taking possession of the V.P.P. cover addressed to him and also of the railway receipt, obtained delivery of the goods, but in order to put off payment manipulated the register maintained in the post office, sentence of one year's rigorous imprisonment and a fine of Rs. 100 was adequate punishment. 118 Ind. Cas. 496=52 Mad. 534=29 M.L.W. 522=1929 M.W.N. 275=2 M.Cr.C. 90=30 Cr.L.J. 929=A.I.R. 1929 Mad. 447=56 M.L.J. 551.

—S. 408—Conviction and sentence—Misappropriation by general agent of net balance—Conviction for indefinite portion—Sustainability.

Where a charge of criminal breach of trust is made against a general agent of a trader with general authority to expend the moneys, the cases must be rare in which it is sufficient to charge a net balance as having been misappropriated. It is not permissible to allege a net balance and convict on proof of an offence in regard to some more or less indefinite portion of the amount. The use of criminal courts to litigate a civil claim must be condemned. 59 Ind. Cas. 372=42 All. 522=2 U.P.L.R. (A) 360=22 Cr.L.J. 84=18 A.L.J. 633.

—S. 408—Conviction and sentence—Definite finding as to definite sum.

Though under S. 222 (2) of the Criminal Procedure Code the accused may be charged in respect of the



gross sum received by him still the prosecution must decide what amount they are prepared to prove the accused lawfully received and lawfully expended and what sum was not. To convict there must be a definite finding of a definite sum traced to the accused. 59 Ind. Cas. 372=42 All. 522=18 A.L.J. 633=22 Cr. L.J. 84=2 U.P.L.R. (A) 360.

—S. 406—Conviction and sentence—Money paid to broker for making payment—Appropriation by him as his brokerage.

A broker who received a certain sum from the complainant for paying a certain firm as the price of grain purchased for the complainant and appropriated the same for his brokerage dues owing to him at the time, is entitled to the benefit of doubt in a conviction under S. 406, Indian Penal Code, if it is not clearly proved on which account the money was paid to him. 18 Cr.L.J. 437=38 Ind. Cas. 997 (Cal.).

—S. 405—Conviction and sentence—Criminal breach of trust—'Property'—Cancelled cheques.

A cancelled cheque falls within the meaning of the term 'property' as used in S. 405, even if it is worth no more than the value of the paper upon which it is written. In the matter of a conviction for a criminal breach of trust the question of the value of the property in respect of which the breach of trust is committed is, except so far as S. 95 is concerned, quite immaterial. (1903) 1904 A.W.N. 153=27 A. 28.

## 7. Criminal breach of trust.

—S. 406—Criminal breach of trust—Transaction of loan and failure to repay—Charge of criminal breach of trust—Sustainability.

When a transaction appears to be merely one of a loan and failure to repay the loan, the offence of criminal breach of trust cannot be held to be made out. A charge of criminal breach of trust cannot be sustained on such facts. 230 Ind. Cas. 154=48 Cr.L.J. 552= A.I.R. 1948 Cal. 1.

—S. 406—Criminal breach of trust—Cloth entrusted to tailor to be made into shirts—Refusal by tailor to deliver them claiming lien for his charges.

A tailor to whom cloth has been handed over to be made into shirts does not commit an offence of criminal breach of trust by refusing to deliver the cloth or the shirt claiming a lien upon them for his charges. If however tender is made of the amount due for making the shirts and they are not delivered, a case of criminal breach of trust may well arise. A.I.R. 1950 Cal. 35=51 Cr.L.J. 336.

—S. 406—Criminal breach of trust—Withdrawal of security deposit by clerk on leaving service without master's consent.

Security deposit is given on terms that it will be refunded when the accounts are submitted and accepted. Clerks or officers who give security deposits cannot determine their own liability in the matter while leaving service, and take what they consider is the balance due to them reckoning their deposits as credits with their master. If they do so without the consent of their master, they may be liable for criminal breach of trust. I.L.R. (1938) 2 Cal. 257, approved. I.L.R. (1946) 1 Cal. 17.

—S. 409—Criminal breach of trust.

Failure of police constable to return the uniform after he was dismissed from the service—Will be criminal breach of trust if he converts it to his use. 4 A.I.Cr.D. 590.

—Ss. 406 and 408—Criminal breach of trust—Offence under—Essentials of —B manager of A's shop misappropriating money of shop and ornaments pledged with him by faking up dacoity —Money subsequently recovered from places pointed out by B—B held guilty of criminal breach of trust.

A the proprietor of a liquor shop appointed B as the manager of his shop. The iron safe in the shop contained cash of the shop and certain ornaments pledged with B by C. B faked up a dacoity and gave false information to the police that the cash and ornaments in the safe of the shop had been removed by dacoits. The fact was that the cash and ornaments were appropriated by B and hidden at various places from which they were recovered, subsequently on information given by B :

**Held**, (1) (Per *Das* and *Manohar Lall, JJ.*)—B was guilty of criminal breach of trust with regard to the cash and was rightly convicted under S. 408 as his intention was to dishonestly misappropriate the same by staging a faked dacoity. It was the dishonest intention which was essential for the commission of the offence of criminal breach of trust. Whether wrongful gain or loss actually resulted was immaterial. It was a consequence but not essential part of the offence. There might be appropriation be a mental act without any actual expenditure of the money appropriated though the mental appropriation must be established by some overt and visible act but the actual expenditure of the money was not the only proof of it.

(2) (Per *Das, J.*)—As B wanted to appropriate the ornaments by setting up a false dacoity he was guilty under S. 406 in respect of the ornaments.

Per *Manohar Lall, J.*—It was doubtful whether B could be convicted under S. 406 in respect of the ornaments in the absence of evidence, as to the person on whom the damage or loss would fall if the pawned articles were stolen by some thieves or dacoits. A.I.R. 1946 Pat. 210=24 Pat. 671 (D.B.).

—S. 405—Criminal breach of trust.

A was a manager of a bank. B was approved as a customer of the bank by A and was allowed to open an overdraft account with the bank on a contract of pledge executed by B which contemplated an overdraft of a certain amount against Government securities. Under the contract, B deposited certain G.P. Notes as security for his overdrafts. These G.P. Notes were caused to be entered in account books of the bank by A but were shortly after handed over by A to B before the amount of overdraft was satisfied *pro tanto* or completely to enable B to have the benefit of the same in some way or the other (by pledging the same with other banks). A did not cause any entries to be made in the books of the bank to show that the G.P. Notes had been handed back to B and thus allowed a false statement of affairs and deprived the bank of its security against the amount overdrawn by B :

**Held**, (i) that A committed breach of trust within the meaning of S. 405 ;

(ii) that the fact that A himself was not proved to have made a wrongful gain was immaterial ;

(iii) and that B was guilty of abetting the offence. A.I.R. 1944 Cal. 92=I.L.R. (1943) 1 Cal. 493=45 Cr.L.J. 431=211 Ind. Cas. 574.

—S. 405—Criminal breach of trust.

Person having reasonable claim against another for more than amount belonging to other in his hands—User of this amount for his own purpose does not



amount to criminal breach of trust. A.I.R. 1940 Mad. 329=1939 M.W.N. 1213=41 Cr.L.J. 824=190 Ind. Cas. 123.

—S. 405—Criminal breach of trust—Jury should bear in mind difference between civil and criminal liability.

In dealing with a case of criminal breach of trust the jury should bear in mind the difference between civil and criminal liability. A.I.R. 1940 Mad. 329=(1939) M.W.N. 1213=41 Cr.L.J. 824=190 Ind. Cas. 123.

—S. 405—Criminal breach of trust—Essentials.

To constitute an offence of criminal breach of trust, there must be an entrustment; there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract, and thirdly, the misappropriation or conversion or disposal must be with a dishonest intention. Every payment of money by one person to another is not entrustment unless there are circumstances attending it from which it can be gathered that it was an entrustment and not a mere payment. Whether in a particular set of circumstances a delivery or passing of property from one to another amounts to an entrustment or not is not a point of law on which the Judge can give a binding direction to the jury. A.I.R. 1940 Mad. 329=1939 M.W.N. 1213=41 Cr.L.J. 824=190 Ind. Cas. 123.

—S. 409—Criminal breach of trust.

Land-owner paying money to *lambardar* in discharge of his liability for land revenue—Instead of depositing it in Government treasury, *lambardar* converting it to his own use :

**Held**, that offence committed was one under S. 409. A.I.R. 1939 Lah. 340=I.L.R. (1939) Lah. 119=41 P.L.R. 432=40 Cr.L.J. 910=184 Ind. Cas. 319.

—S. 406—Criminal breach of trust—Case not falling under S. 84—Evidence relating to state of mind at time of commission of crime showing that accused must have been unable to form criminal intention necessary.

Where a court trying a person for an offence of criminal breach of trust finds that the case is not covered by S. 84, Indian Penal Code, it should consider another aspect of the case, namely whether even if S. 84 did not cover the case, the state of mind in which the accused was did not exclude the existence of a dishonest intention which is an essential ingredient of the offence of criminal breach of trust. Evidence is certainly relevant for the purpose of ascertaining whether the petitioner's state of mind rendered it possible and likely for him to have entertained a dishonest intention when he dealt with the moneys entrusted to him. Any other mental state can also be put forward with equal relevancy for the purpose of negating the existence of the criminal intention which is an essential ingredient of the crime under S. 406, Indian Penal Code. A.I.R. 1939 Mad. 407=49 L.W. 160=1939 M.W.N. 726=(1939)-1 M.L.J. 255=40 Cr.L.J. 642=I.L.R. (1939) Mad. 353=182 Ind. Cas. 228.

—Ss. 409, 420, 427—Criminal breach of trust—Cheating.

A case of breach of trust is inconsistent with a case of cheating.

Where the accused deceived the complainant into believing that gold jewels had been pledged in order to get money dishonestly while in fact there had been no

pledge and false entries had been made in accounts to support the false representation, the offence is not one under S. 409 but under Ss. 420, 467, Indian Penal Code. 1937 M.W.N. 729.

—S. 405—Criminal breach of trust—Ingredients.

The offence of criminal breach of trust consists in a person dishonestly misappropriating or converting entrusted property to his own use or dishonestly using or disposing of that property in violation of any direction of law or of any legal contract, and it is the dishonest misappropriation or conversion or user or disposal as the case may be, that is the essence of the offence. A.I.R. 1937 Sind 68=38 Cr.L.J. 512=31 S.L.R. 123=168 Ind. Cas. 89 (F.B.).

—S. 405—Criminal breach of trust—Held, on facts that offence was committed.

Where the accused charged with an offence under S. 405, gave an explanation which was found to be entirely false and it appeared that the keys of the record room were in a stranger's possession with the connivance and complicity of the accused for the purpose for which they were used, that is to say, for giving access corruptly to records and dishonesty was clearly established :

**Held**, that the fact that the accused himself did not misappropriate or use or dispose of any record in violation of his trust was immaterial and the second part of the definition in S. 405, brought home the offence to the accused. A.I.R. 1936 Pat. 108=2 B.R. 153=37 Cr.L.J. 219=160 Ind. Cas. 12.

—S. 408—Criminal breach of trust—Held, on evidence that offence was committed and verdict of 'not guilty' of jury was perverse.

It was proved that the accused who was a clerk in a College did handle moneys paid by students as tuition fee and it was his duty to receive the money and to enter up such receipts in the Income Register and in the Cash Book and to pay the moneys shown in the Cash Book into the account of the College at the Imperial Bank. It was also proved that on the days in question, he had received sums of money as tuition fees and had correctly entered such sums in the Income Register. It was further proved that he had made false entries in the Cash Book and had paid lesser sums into the Bank. His subsequent conduct in absconding and using another name was entirely consistent with his guilt :

**Held**, that the verdict of not guilty given by the jury in these circumstances and in the face of the above facts placed before them was clearly perverse and that the accused stood guilty of an offence under S. 408, Indian Penal Code. A.I.R. 1935 All. 970=1935 A.W.R. 988=1935 A.L.J. 1019=37 Cr.L.J. 135=159 Ind. Cas. 621.

—S. 406—Criminal breach of trust.

Where a person is entrusted with property attached by an order of a Civil Court and he deliberately refuses to produce the property when called upon to do so, his conduct amounts to a repudiation of his trust and he is guilty of criminal breach of trust punishable under S. 406, Indian Penal Code. A.I.R. 1935 Lah. 31=36 Cr.L.J. 119=152 Ind. Cas. 513.

—S. 405—Criminal breach of trust—Ingredients.

It is incumbent upon the prosecution in a case under S. 405, Indian Penal Code, in order to establish the charge against the accused to prove that he was en-



trusted with the sum and that he dishonestly misappropriated or converted to his own use this sum or thereabouts. A.I.R. 1935 Rang. 453=37 Cr.L.J. 190=159 Ind. Cas. 953.

**—S. 405—Criminal breach of trust—Dishonest user of cattle—Supurdnama—Accused willing to produce cattle.**

Where a person was convicted under S. 405, Indian Penal Code, for dishonestly using certain cattle in violation of the *supurdnama* entered into by him and it appeared that he had brought the cattle in question to the *Tahsil* and was willing to produce them :

**Held**, that under the circumstances he could not be held to have dishonestly used them in violation of the terms of the *supurdnama* and his conviction should be set aside. A.I.R. 1933 Lah. 235 (1)=34 P.L.R. 883=34 Cr.L.J. 1163 (1)=145 Ind. Cas. 936.

**—S. 409—Criminal breach of trust—Lambardar—Failure to pay amounts collected to treasury, whether amounts to criminal breach of trust.**

A *lambardar* who was responsible for the collection of land revenue amounting to Rs. 118-14-9 and who should have paid this amount into the treasury by the 6th June, 1930, paid nothing till the 7th August. When he was approached by a Police Officer sent by the *Tahsildar*, he paid only Rs. 33 though he had collected Rs. 49. The amounts collected were, however, deposited in a safe place. The *lambardar* was prosecuted for criminal breach of trusts:

**Held**, that the slackness of the *lambardar* in remitting the amounts collected to the treasury did not amount to criminal breach of trust and he could not be convicted under S. 409, Indian Penal Code. A.I.R. 1931 Lah. 468=22 Cr.L.J. 811=131 Ind. Cas. 910.

**—S. 408—Criminal breach of trust—Delay in remitting—If breach of trust.**

Where the accused did not convert the money to his own use, there was no falsification of accounts and the delay in making the remittances was explainable by an assignment of goods:

**Held**, that in these circumstances mere delay in making the remittance did not amount to criminal breach of trust. 106 Ind. Cas. 682=29 Cr.L.J. 90=9 A.I.Cr.R. 350 (Pat.).

**—S. 408—Criminal breach of trust—Legality of finding—Absence of definiteness of sum misappropriated—Effect of Criminal Procedure Code, S. 222 (2).**

The case was one of criminal misappropriation. As to the amount embezzled, the jury were not unanimous and they said they were not able to ascertain it definitely, but the majority of them were of opinion that it might be a thousand rupees or so out of the amount mentioned in the charge. The Judge agreed in the verdict. He, however, was of opinion that the amount embezzled was not a thousand rupees or so but nearly rupees five thousand. He accepted the verdict and convicted the accused.

**Held**, that the object of the amendment made by the introduction of sub-section (2) to Section 222, Criminal Procedure Code was "not to amend the Indian Penal Code, but merely to get rid of a technical difficulty in framing a formal document, viz., the charge." By this amendment the procedural law was altered to meet two difficulties. Under the law as it stood before, there was very great difficulty in convicting where there was a running account and where the

prosecution was unable to put their hands on a specific item of which the particular sum was embezzled or to which it was attributable. The other difficulty was that under section 234, Criminal Procedure Code, it was not allowed to have more than three offences of the same kind, and so the charge could not legally stand. The law on these two points was altered and altered for the better. It was not intended either to throw the onus on the accused by bringing a charge against him of a deficiency in his accounts or to do away with the necessity of proving the elements of the offence as laid down in the Indian Penal Code.

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what the property is. There must therefore be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction. 85 Ind. Cas. 372=40 C.L.J. 555=29 C.W.N. 54=26 Cr.L.J. 532=A.I.R. 1925 Cal. 260.

**—S. 405—Criminal breach of trust—Transfer of money from another's account to one's own—No actual taking—Nature of offence.**

In order to establish a charge of dishonest misappropriation of criminal breach of trust it is not necessary that the accused should have actually taken tangible property such as cash from the possession of another and transferred it to his own possession. The transfer of certain amount from the account of another to one's own account is sufficient to constitute the offence. 98 Ind. Cas. 599=27 Cr.L.J. 1383=A.I.R. 1926 Lah. 38.

**—S. 409—Breach of trust, what is—War bond entrusted to Bank for sale—Endorsement by owner in favour of Bank—Bank dealing with bond contrary to instructions of endorser—Offence.**

A Municipal Committee handed over a war bond to a Bank with instructions to sell it at its market value and to remit the sale proceeds to the Committee. The bond was endorsed in favour of the Bank in order to facilitate its sale. Instead of selling the war bond, according to instructions received by the Bank, the directors of the Bank pledged it with another Bank against cash payment and that amount was utilized by the directors to meet some urgent demands made on their Bank as the Bank was short of cash at that time and the customers were pressing for payment.

**Held**, that the property in the bond as between the Municipal Committee and the Bank was still retained by the Municipal Committee and did not vest in the Bank. By making use of the bond in a manner which was contrary to the conditions under which it was entrusted to the Bank the directors, who knew of the fact, caused unlawful loss to the Municipal Committee and unlawful gain to the Bank and were guilty under S. 409. 98 Ind. Cas. 599=27 Cr.L.J. 1383=A.I.R. 1926 Lah. 385.

**—S. 409—Criminal breach of trust—Accepting brokerage—President purchasing articles for Municipality and taking brokerage from vendor—If offence.**

A President of Municipality purchased some articles for the Municipality and after its price was paid, got a certain amount from the vendor as brokerage for which he gave the vendor a receipt.

**Held**, that the President was not guilty of criminal breach of trust as this brokerage, commission of



discount was paid for his own personal use and no for the benefit of the Municipal Committee. 97 Ind. Cas. 64=4 Rang. 128=27 Cr.L.J. 1088=A.I.R. 1926 Rang. 171.

**—S. 406—Criminal breach of trust—What is—Unpaid vendor—Sale by vendee—When offence.**

Disposal, prior to payment to vendor, by vendee of goods given him under an arrangement that property in them should pass to him on payment is an offence. 82 Ind. Cas. 163=51 Cal. 796=25 Cr.L.J. 1235=A.I.R. 1924 Cal. 816.

**—S. 405—Criminal breach of trust.**

Loss to the principal or anybody else is by no means a necessary ingredient of the offence. 32 Bom. L.R. 1195=129 Ind. Cas. 385=A.I.R. 1930 Bom. 490. (F.B.).

**—Ss. 403, 405 and 408—Criminal breach of trust—Clerk with power to receive and deposit money in treasury.**

A misappropriation of a sum by a clerk of an estate service with a power to receive and deposit the same in the treasury gives rise to an offence of the criminal breach of trust falling under S. 405 and calls for a conviction under S. 408 of the Penal Code. (1920) M.W.N. 518=12 L.W. 295=58 Ind. Cas. 324.

**—S. 409—Criminal breach of trust—Cash certificates—Payment of less than due.**

A Sub-Postmaster was asked to make payments for some cash certificates. The value of each certificate was Rs. 8-2-6 and this amount was paid by the Government but the accused paid Rs. 7-2-6 each and himself appropriated the balance.

**Held,** that the accused was guilty of criminal breach of trust within S. 409, Indian Penal Code, 10 Bom. 256, not Foll. 42 All. 204=18 A.L.J. 93=24 Cr.L.J. 316=2 U.P.L.R. (All.) 51=55 Ind. Cas. 476.

**—S. 406—Criminal breach of trust—Necessary elements.**

Complainant paid off a debt due to accused on condition that he should return the bond, but he refused to do so and denied payment.

**Held,** there was no trust which would bring the case within the terms of S. 406. 22 C.W.N. 1005=20 Cr.L.J. 151=49 Ind. Cas. 343.

**—Ss. 403 and 406—Criminal breach of trust—Agent's refusal to return money received on behalf of principal.**

Where an agent received money on behalf of his principal, the money so received is the property of, and is owned by, the principal. If the agent refuses at the request of the person paying the money to refund it he is not criminally liable, and, consequently cannot be prosecuted for the offence of a criminal breach of trust. The gist of that offence is the dishonest misappropriation or the conversion by one to his own use of the property of another which has been entrusted to him. 20 Cr.L.J. 654=52 Ind. Cas. 430 (Pat.).

**—Ss. 406 and 206—Criminal breach of trust—Hire purchase agreement—Sale of property hired.**

A sale of property by a hirer under a hire purchase agreement, under which title to property rests in the complainant till payment of full purchase-money and which prohibited any disposition of it, if made after a decree of Civil Court for unpaid purchase-

money, is not a criminal breach of trust, the decree operating as a merger of the original agreement. It seems that proceedings under S. 206, Indian Penal Code could be taken with the sanction of Court which passed the decree against the accused. 18 Cr.L.J. 728=40 Ind. Cas. 728 (Cal.).

**—S. 406—Criminal breach of trust.**

Whilst a hire-purchase agreement was in force the accused pledged the car to different persons on three different occasions.

**Held:** that the pledging of the car by the accused was a violation of the legal contract made by him in regard to the hire of the car and violation was dishonest. The accused was guilty of the criminal breach of trust as he obtained moneys on the security of the motor car. 17 Bom. L.R. 670=16 Cr.L.J. 665=30 Ind. Cas. 649.

**—S. 406—Criminal breach of trust—Hire purchase agreement—Installments—Sale of articles hired.**

Where a hirer under a hire purchase agreement sells the article hired, he is guilty of criminal breach of trust. (1894) 2 Q.B. 262; 63 L.J.Q. B. 577, Foll. 7 Bur. L.T. 222=7 L.B.R. 298=15 Cr.L.J. 425=24 Ind. Cas. 161.

**—S. 406—Applying money entrusted for other purposes—Whether criminal breach of trust.**

The accused receiving money from the complainant on condition that he would purchase a motor car, sell it and return her the money with half the profits, but applying the money for other purposes, is not guilty of criminal breach of trust. 12 A.L.J. 730=15 Cr.L.J. 284=23 Ind. Cas. 492.

**—S. 405—Criminal breach of trust—Essentials of offence.**

The offence of criminal breach of trust is completed by the misappropriation or conversion of the property with the intention of causing wrongful gain or wrongful loss. It is the intention which is essential and not whether wrongful loss or wrongful gain is actually caused. 38 Mad. 639=16 M.L.T. 505=(1914) M.W.N. 894=15 Cr.L.J. 688=29 M.L.J. 175=26 Ind. Cas. 136.

**—S. 406—Criminal breach of trust—Essentials—Proof of offence—Procedure.**

Special provisions are made in S. 222 (2), Criminal Procedure Code for a charge of criminal breach of trust. They must be strictly observed and proof must be given that the offence was completed between the dates given. Default in it cannot be cured by S. 537. Any completed act is necessary to constitute the offence of criminal breach of trust. 17 C.W.N. 479=14 Cr.L.J. 219=19 Ind. Cas. 315.

**—S. 408—Servant of a firm making false representation to the manager—Criminal breach of trust.**

A servant of a firm who gets money from the manager on the pretence that it was required for paying the coolies and misappropriates it, is guilty of the offence under S. 408 as the accused was entrusted with the money for the master's benefit. 22 M.L.J. 112=10 M.L.T. 917=13 Cr.L.J. 15=13 Ind. Cas. 108.

**—S. 406—Criminal breach of trust—Advance taken on pro-note promising to buy paddy for firm making advance.**

The accused took an advance from a trading firm on pro-note promising in writing to use the money



solely in buying paddy and to deliver it to the firm, within a certain period at the market rate, the value to be credited to loan.

**Held**, that such dealing is a loan pure and simple with undertaking to buy and sell paddy; that the advance was made and taken as for the benefit of both the person as well as the firm and that as the accused was owner of the money, there was no criminal breach of trust. 5 Bur. L.T. 11=6 L.B.R. 46=13 Cr.L.J. 269=14 Ind. Cas. 653.

— **S. 405—Criminal breach of trust—Money advanced for purchase of paddy—Whether trust is created.**

*A* a paddy dealer, agreed with *B*, to supply *B* with certain baskets of paddys; the same day, *B* advanced *A* Rs. 10,000 to obtain this paddy. *A* promised to use this sum to the purchase of paddy for *B*. Simultaneously, *A* executed five promissory notes for Rs. 2,000 each in favour of *B* bearing no interest.

**Held**, that the transaction created the relationship of debtor and creditor between *A* and *B* and no trust was created within S. 405. Per *Fox, C.J.*—The property for which criminal breach of trust is committed must be either the property of some person other than the person accused, and the offender should hold the property on trust for such other person. Mere breach of contract is not criminal breach of trust. Per *Ormond, J.*—In a prosecution for criminal breach of trust, trust must be established beyond all doubt. 5 Bur. L.T. 143=6 L.B.R. 62=13 Cr.L.J. 888=17 Ind. Cas. 824 (F.B.).

— **S. 406—Criminal breach of trust.**

The fact that the complainant had agreed to give the accused time to repay money misappropriated is no ground for the acquittal of the accused who is charged under S. 406, Indian Penal Code. 6 A.L.J. 758=10 Cr.L.J. 417=3 Ind. Cas. 908.

— **S. 406—Criminal breach of trust—Money entrusted for particular purpose—Failure to account.**

If a person fails to account for money entrusted to him for a particular purpose, he is guilty of criminal breach of trust. Dishonest misappropriation may sometimes be inferred from the circumstances without direct evidence. 4 Ind. Cas. 762 (U.B.).

— **S. 405—Criminal breach of trust—Dishonestly misappropriates—Essentials.**

**Held**, that the bare refusal by the accused to allow the removal of a box deposited in his house by the complainant unless the debt due to him by the complainant is paid, did not amount to a criminal breach of trust. (1907) 17 M.L.J. 413.

— **S. 405—Criminal breach of trust—Using printing blocks unauthorisedly. —‘User’—‘Dishonestly’.**

Where a person entrusted with blocks for printing a catalogue used them for printing a catalogue for a person other than the giver.

**Held**, that a contract not to use the blocks for purposes other than those of the giver must be implied, and that the use in the case was, therefore, unauthorised, and that as it produced wrongful gain to a substantial extent to the other person for whom they were used, the user was dishonest and that an offence of criminal breach of trust had been committed by the person so entrusted. (1901) 6 C.W.N. 203.

— **S. 406—Criminal breach of trust—Property claimed by a third party—Finding claim false—Dishonest intention.**

Where *A* and others employed the accused to sell paddy for them and paddy was sold and one *A* and *N* claimed a portion of the sale proceeds exclusively, and *N* during the trial had brought a suit for it, the High Court:

**Held**, there was no criminal breach of trust, even though the two lower courts had found that *N*'s claim was false. (1900) 28 C. 362.

— **S. 409—Criminal breach of trust—Form of Charge.** See C. P. C, S. 234. 1904 A.W.N. 165=27 A. 69.

— **S. 406—Criminal breach of trust—Charge.** See C. P. C, Ss. 234. 1902 A.W.N. 44=24 A. 254.

## 8. Criminal misappropriation.

— **S. 403—Criminal misappropriation.**

If the person who takes cattle scattered on account of *cheeta* scare subsequently retains it intending to treat it at his own, then he will be guilty of criminal misappropriation. 1944 Mad. 26=(1943) 2 M.L.J. 334=56 L.W. 547=1943 M.W.N. 580=45 Cr.L.J. 220=210 Ind. Cas. 315.

— **S. 403—Criminal misappropriation—What is.**

Misappropriation is the wrongful setting apart or assigning of a sum of money to a purpose or use to which it should not be lawfully assigned or set apart.

[Duty of prosecution explained.] A.I.R. 1940 Mad. 329=1939 M.W.N. 1213=41 Cr.L.J. 824=190 Ind. Cas. 123.

— **S. 403—Criminal misappropriation.**

Employee withdrawing security amount deposited by him without employer's permission and before adjustment of accounts :

**Held**, that the withdrawal amounts to criminal misappropriation. A.I.R. 1938 Cal. 451=42 C.W.N. 618=39 Cr.L.J. 691=1 L.R. (1933) 2 Cal. 257=176 Ind. Cas. 126.

— **S. 409—Criminal misappropriation—Mere non-production of money, whether amounts to criminal misappropriation.**

Except in exceptional circumstances, which themselves indicate the dishonest intention of the accused, mere non-production of money which is rightfully in the hands of the accused will not amount to the crime of misappropriation. There must be something to prove dishonesty. Such dishonesty, of course, may be inferred from the surrounding circumstances, and the terms upon which the accused had the money on his possession. 164 Ind. Cas. 270=40 C.W.N. 128=37 Cr.L.J. 904.

— **S. 403—Criminal misappropriation.**

In order to constitute the offence of criminal misappropriation, the property must have come into the possession of the accused innocently in the first instance. A.I.R. 1936 Rang. 471=38 Cr.L.J. 48=165 Ind. Cas. 596.

— **S. 409—Criminal misappropriation—Violation of account rules—Appropriation of money drawn for payment of one bill towards another of same firm—If misappropriation.**

Appropriation of money drawn from the Bank for payment of particular bill, towards payment of another



bill due to the same firm or person does not amount to embezzlement of Government money; it may at the most amount to deliberate violation of the account rules making the person liable for departmental punishment. 7 O.W.N. 564=126 Ind. Cas. 684=A.I.R. 1930 Oudh 324.

**—S. 403—Criminal misappropriation—Trying to sell missing bullock found by accused.**

A's bullock which was missing was found in the possession of B. B had tried to sell it to C who later on refused to purchase it thinking that it was acquired by B by theft.

**Held**, that offence under S. 403 was committed by B. B knew that the bullock did not belong to him. He did not make any inquiry as to real owner but set up a title to the bullock himself and tried to dispose of it with a view to make a wrongful gain to himself and a wrongful loss to the original owner. His act therefore amounted to dishonest misappropriation or conversion to his own use within the meaning of S. 403: 36 P.W.R. 1911, Cr. Rel. on. 119 Ind. Cas. 863=10 L.R.A. Cr. 156=30 Cr.L.J. 1133=1930 A.L.J. 220=13 A.I. Cr. R. 30=1929 Cr.C. 645=A.I.R. 1929 All. 917.

**—S. 403—Criminal misappropriation—Railway Claims Inspector realising sale-proceeds of certain bags of goat-skins but not paying to railway—Nature of offence.**

The duty of a Claims Inspector of a Railway Company was to investigate claims and to report what arrangements he could make with persons making claims against the railway. He arranged, with the representative of a firm which had submitted a claim against the railway for loss of certain bags of goat skins, to sell certain other bags of skins in addition to the bags sold to him by the A. T. S. and received from him a certain sum in payment, for the bags of skins. He never credited the money to the railway.

**Held**, that he was guilty of the offence of criminal misappropriation under S. 403 and not under S. 408. 99 Ind. Cas. 593=8 L.L.J. 515=28 Cr.L.J. 161.

**—S. 403—Criminal misappropriation—Postmaster opening a V. P. article addressed to himself and extracting a railway receipt from it without paying for it for six days and making false entries in the P. O. books—Nature of offence.**

A branch postmaster who was also a shop keeper ordered a consignment of flour in order to meet the requirements of his shop and a value-payable envelope containing the railway receipt for the flour arrived at the branch post office. The postmaster opened it extracted the railway receipt, went down the station where the goods had by that time arrived, and took delivery. After six days he paid the price of the goods into the post office. In the meantime he made in the books of the post office entries and repeated daily "on account of the absence of the addressee."

**Held**, that, although the offence was a technical one in the sense that no loss was incurred by the post office and the money involved was voluntarily returned, it amounted to criminal misappropriation within the meaning of S. 403, Indian Penal Code, and the postmaster was guilty under S. 52. Post Office Act: 109 Ind. Cas. 236=8 Lah. 662=29 P.L.R. 151=29 Cr.L.J. 508=A.I.R. 1928 Lah. 92.

**—S. 406—Misappropriation and breach of trust—Re-payment on demand—Inference as to guilt.**

It is a possible view that an accused is guilty of criminal breach of trust between the misappropriation

and the re-payment, but Court, should be slow when re-payment is at once made on demand to assume guilt in accused person. Criminal liability is not the same as civil liability: (1914) A.C. 221, Rel. on. 97 Ind. Cas. 1041=27 Cr.L.J. 1217=21 S.L.R. 55=A.I.R. 1927 Sind 28.

**—S. 403 — Criminal misappropriation—Essentials—Setting apart for use of another—If misappropriation.**

If a person sets apart an article for the use of another person, of which article he is a trustee, he misappropriates it, even though he has not put it to his own use. S. 403 is in no way restricted to appropriating property to one's own use. If a trustee repudiates the trust and asserts that he now holds the property on behalf of a person other than the one who entrusted him with it, he misappropriated the property just as much as he would have been said to misappropriate it if he had been putting forward his own claim to it. 92 Ind. Cas. 585=48 All. 288=7 L.R.A. Cr. 34=24 A.L.J. 270=27 Cr.L.J. 297=A.I.R. 1926 All. 302.

**—S. 409—Criminal misappropriation—Misappropriation—Non-payment for a long time.**

Where a Court Amin collects a large sum of money and does not pay it into Court until five months have elapsed, it is a fair presumption that he has misappropriated the amount, unless he can explain his action. 95 Ind. Cas. 943=23 M.L.W. 718=27 Cr.L.J. 863=A.I.R. 1926 Mad. 727.

**—S. 403—Criminal misappropriation—Dishonest detention of property—Letter thrown away by owner.**

A letter was addressed to complainant who received and read it and then throw it on a table at which he and the accused were seated. The accused picked up the letter and produced it in Court in a proceeding between the complainant and his wife for judicial separation. The court refused to receive it and returned it to the accused.

**Held**, that the essential ingredient for the offence of criminal misappropriation being proof of disappropriation or conversion to the use of the accused, the offence was not made out in respect of the letter. *Quære*: Whether the letter, the subject of the charge, was, under the circumstances 'property' at all. 40 All. 119=16 A.L.J. 12=19 Cr.L.J. 174=43 Ind. Cas. 590.

**—S. 403—Criminal misappropriation—Essentials of the offence—Dishonest motive—Overt acts, if necessary.**

The chief elements for a conviction under S. 403 is the dishonest misappropriation or conversion to one's own use. In the absence of any overt act on the part of the accused no dishonest motive can be imputed to him simply because he has detained certain documents in his custody. 19 Cr.L.J. 943=47 Ind. Cas. 667 (Pat.).

**—Ss. 403, 379 and 411—Criminal misappropriation—Proof of offence.**

When a man is found in possession of a camel about seven months after it strayed away and there is no other evidence, he ought not to be called to account for it, particularly when he gives, reasonable explanation of getting hold of it. 41 P.W.R. 1915 Cr.=17 Cr.L.J. 68=62 P.L.R. 1916=32 Ind. Cas. 660.



—S. 403—Criminal misappropriation—Husband and wife—Husband's liability.

A husband is not liable for misappropriation by his wife, during the course of service by his consent. 13 A.L.J. 55=27 Ind. Cas. 622.

—Ss. 403 and 414—Money won at gambling—Loser not the true owner—Misappropriation.

Winner at gambling who asked the loser to give in writing that the money paid was won at gambling, misappropriated the money where the money does not belong to the loser but the loser's master. The demand of writing indicates knowledge on the part of the winner that he was causing wrongful loss to the true owner. This misappropriation takes place at the time the money passes from the loser to the winner. 4 S.L.R. 159=11 Cr. L.J. 730=8 Ind. Cas. 929.

—Ss. 403 and 415—Criminal misappropriation—Cheating—Definition—Exchange of Railway ticket.

A person travelling by train with a ticket for the Benares Cantonment under pretence of doing a fellow passenger a kindness by seeing if she had got a proper ticket for Ajudhia, got her to hand over to him the ticket she had for Ajudhia and then, pretending to return it, substituted his own for her ticket :

**Held**, that he was guilty of criminal misappropriation under S. 403 and not of cheating under S. 420. (1904) 1905 A.W.N. 9=2 A.L.J. 16=27 All. 378.

—S. 406—Criminal misappropriation of thing lent—Denial of title. See S. 403. 6 Bom. L. R. 1093.

### 9. Dishonest intention.

—S. 409—Dishonest intention—Essentials.

Dishonesty is a pre-requisite for a prosecution. under S. 409. A.I.R. 1946 All. 227=1945 A.W.R. (H.C.). 298 (2).

—S. 405—Dishonest intention.

Where, in the case of an accused tried for criminal breach of trust the evidence relating to his state of mind at the time of the commission of the crime clearly shows that due to particular kind of unsoundness of mind, he must have been unable to form the criminal intention of causing wrongful loss or gain, he cannot be held guilty of the offence with which he is charged. A.I.R. 1939 Mad. 407=49 L.W. 160=1939 M.W.N. 126=(1939)-1 M.L.J. 255=40 Cr.L.J. 642=I.L.R. (1939) Mad. 353=132 Ind. Cas. 228.

—S. 405—Dishonest intention—Trust—Trust receipt—Passing of property to purchaser—Decisive test in cases of breach of trust—Criminal intent, how to be ascertained—Purchaser under trust receipt, when guilty of breach of trust—Purchaser, held had no criminal intent under S. 405—Trust receipt, nature of.

The question whether the property in the goods has or has not passed to the purchaser is relevant to the decision of cases under S. 406 or S. 409, Indian Penal Code, but it is not necessarily decisive. The decisive test is whether there was an entrustment within the meaning of S. 405, Indian Penal Code, and the necessary criminal intent. The property in the goods may have passed to the purchaser; he is, therefore, the legal owner but he may nevertheless constitute himself a trustee of these goods for another, including the seller, who thereby becomes the beneficial owner. The phrase,

however, 'that a man cannot commit criminal breach of trust of his own property,' requires some qualification. It is true, provided the person is the legal and beneficial owner, and the whole aggregate of rights of ownership are vested in him. It is not, of course, true if the legal ownership only is vested in him. Therefore, if the property in the goods does and is intended to pass under the documents called trust receipts, it is still possible that the purchaser may constitute himself a trustee of goods that are now his, for the seller. However, it cannot well be said that a person has the requisite criminal intent when it is doubtful whether the property has or has not passed, whether he is entrusted with the goods under the terms of a trust agency, or whether there is an out and out sale, whether by cash or credit, with the property in the goods passing. But, if it is clear that the trust receipt is, what it is really intended to be, a trust agency, whereby the buyer binds himself to sell the goods on behalf of the seller and is entrusted with the goods under certain clear terms and conditions, there is an entrustment within the meaning of S. 405, Indian Penal Code, and if there be a violation of the terms and conditions of the entrustment with the necessary intent, there can be a conviction for criminal breach of trust.

Where, in a case, the seller had never seriously directed his mind to the words of the trust receipt at all, that he never contemplated that its terms would be complied with and all he thought that it secured was due payment of the purchase price at due date and the purchaser took delivery of goods but did not pay the purchase price either on the date mentioned in the trust receipt or afterwards :

**Held**, that the purchaser could not be said to have criminal intent required by S. 405, Indian Penal Code, as, whatever be the legal relation established by the trust receipt, the purchaser had good reason to believe that he was the purchaser of the goods in the ordinary sense of the term, that the property or the goods had passed to him on delivery, and that all he had to do was to pay the draft on due date.

**Obiters.**—The trust receipts are not intended to pass the property in the goods purchased, but to give the purchaser limited right of disposal pending the payment of the full purchase price. A.I.R. 1939 Sind 1=40 Cr.L.J. 173=I.L.R. (1939) Kar. 248=179 Ind. Cas. 135.

—S. 408—Dishonest intention—Employee furnishing security—At time of leaving service, withdrawing the amount.

**Held**, there was no dishonest intention. A.I.R. 1936 Cal. 520=38 Cr.L.J. 56=165 Ind. Cas. 720.

—S. 408—Dishonest intention—Failure to credit money in treasury.

In cases under S. 148, Courts should be slow to presume dishonesty. Dishonesty cannot always be implied from the occasional failure of a servant immediately to credit into the treasury amounts recovered by him in the discharge of his official duties. A.I.R. 1936 Nag. 160=I.L.R. (1937) Nag. 38=39 Cr.L.J. 349=173 Ind. Cas. 639.

—S. 405—Dishonest intention—Dishonesty, established.

To establish dishonesty, it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for a time and to secure the use of the property for his own benefit for a time may be sufficient.



A.I.R. 1936 Pat. 350=15 Pat. 108=17 P.L.T. 302=2 B.R. 696=37 Cr.L.J. 877=164 Ind. Cas. 74.

—S. 405—Dishonest intention—The definition of criminal breach of trust in S. 405, Indian Penal Code, penalises a dishonest misappropriation or conversion or dishonest use or disposal of property in an improper manner, that is to say, dishonesty is an essential ingredient in the offence and must be proved. A.I.R. 1936 Pat. 350=15 Pat. 108=17 P.L.T. 302=2 B.R. 696=37 Cr.L.J. 877=164 Ind. Cas. 74.

—S. 409—Dishonest intention—Precise manner of misappropriation, if to be proved—Charge under—Whether can be framed with reference to date of overt act by which intention is manifested.

It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest; but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intentions or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had *mens rea* for the crime. So, in cases of criminal breach of trust, the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. The mental act or intent to deprive the master of his property is the gist of the offence.

Section 409, Indian Penal Code, does not require that he should be still an agent at the time of committing the breach of trust. The gist of the offence being the mental act of the accused, it is beyond the power of any other person to give direct proof of the act or of its; the prosecutor, in asking the Court to frame a charge, is entitled to refer to the date of the overt act by which that intention is manifested and put into effect, and on which he relies as proof of the misappropriation. A.I.R. 1936 Pat. 350=15 Pat. 108=17 P.L.T. 302=2 B.R. 696=37 Cr.L.J. 877=164 Ind. Cas. 74.

—S. 408—Dishonest intention—Agent collecting rent—Complainant refusing to accept rents collected unless whole sum was paid—Salary due to accused—Right of accused to retain collections until payment of salary—Absence of proof of dishonest intention:

Held, offence under S. 408 not committed. A.I.R. 1935 All. 922=37 Cr.L.J. 308=160 Ind. Cas. 382.

—Ss. 405 and 24—Dishonest intention—Another's money used contrary to purpose for which it was given.

Where a person makes use of money belonging to another without the latter's consent, and contrary to the purpose for which possession thereof has been given by the latter to the former, the intention of the person so making use of that money must *prima facie* be dishonest within the meaning of S. 24, Indian Penal Code. A.I.R. 1935 Rang. 453=37 Cr.L.J. 190=159 Ind. Cas. 952.

—Ss. 403 and 405—Dishonest intention—All that is necessary for an offence under S. 403 is that there should be misappropriation or conversion with the intention of causing wrongful gain or wrongful loss. It is not necessary that loss or gain should have actually accrued before the offence is completed. All that

is required is that there should be an intention of causing such gain or loss which would amount to dishonesty. A.I.R. 1934 All. 499=1934 A.L.J. 308=35 Cr.L.J. 982=3 A.W.R. 506=56 All. 1047=149 Ind. Cas. 420(F.B.).

—S. 405—Dishonest intention—Intention is the crux of the cases of criminal breach of trust. 1933 M.W.N. 246.

—S. 406—Dishonest intention—Too narrow an interpretation not to be placed on the word 'dishonest.'

Where, in payment for certain cloth valued at Rs. 43-12-0 purchased from the accused, the complainant sent him a hundred rupee note but the accused did not send back any change alleging that money was due to him and refusing to give the change until the account was settled:

Held, that no offence under S. 406, Indian Penal Code, was committed, inasmuch as the conduct of the accused was not dishonest.

Too narrow an interpretation should not be placed on the word dishonest so as to lead to substantial injustice. A.I.R. 1933 Pat. 554=34 Cr.L.J. 915=144 Ind. Cas. 918.

—S. 409—Dishonest intention—Elements of the offence—Meter installed by Electric Company—Failure to produce meter on a particular date.

In order to establish an offence under S. 406, Penal Code, it must be proved that the accused dishonestly misappropriated or converted to his own use the property entrusted to him or dishonestly used or disposed of that property in the manner provided in the section.

A person on whose premises an Electric Company has installed a meter is responsible for the price of the meter which the Company may realise from the deposit which they hold in his name. But the mere failure of that person to produce the meter does not itself constitute an offence of criminal breach of trust under S. 406, Penal Code. The words of the section do not embrace the case of a man who has taken an article on hire and fails to produce it. Evidence that he acted dishonestly is essential to make him criminally liable. A.I.R. 1932 All. 324=1932 A.L.J. 213=33 Cr.L.J. 866=140 Ind. Cas. 78.

—S. 408—Dishonest intention—Gist of offence—Dishonest misappropriation—Mere delay in payment—Effect.

Mere retention of money or mere failure to return it does not necessarily raise a presumption of dishonest misappropriation. The mere fact that the payment was delayed is no ground for imputing a criminal intention. Though the ingredients of the offence of criminal breach of trust are somewhat broadly stated, there is no doubt as to their meaning. The sections dealing with the offence of criminal breach of trust were intended to punish an offence of which dishonesty is the essence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so. In such cases the Magistrate should be slow to move. This caution is all the more necessary since there is a natural desire to secure speedy justice by having recourse to criminal law: 7 O.W.N. 556=A.I.R. 1930 Oudh 321=126 Ind. Cas. 679.

—S. 409—Dishonest intention—Delay in remitting—Head of office negligent in seeing to the observance of rules about remitting money to



**treasury—Intention of wrongfully keeping Government out of the money—Offence.**

Section 409 cannot properly be construed as involving that any head of an office, who is negligent in seeing that the rules about remitting money to the treasury are observed, is *ipso facto* guilty of the offence of criminal breach of trust, but something more than that is required to bring home the dishonest intention, which is one of the essentials of a conviction under S. 409. There should be some indication which justifies a finding that the accused definitely had the intention of wrongfully keeping Government out of the money; and ordinarily that would be shown by some overt act, which went beyond mere retention of money that should have been remitted to the treasury. He is guilty of gross dereliction of duty in not seeing that the rules are observed: 11 P.R. 1908, Rel. on. 111 Ind. Cas. 730=30 Bom. L.R. 624=29 Cr.L.J. 922=11 A.I.Cr.R. 82=A.I.R. 1928 Bom. 205.

**—S. 405—Dishonest intention—Legality of conviction.**

Where a President of a Taluk Board drew out certain money from Taluk Board funds on contingent bills in respect of certain works but before they were completed with the object of preventing the moneys from lapsing at the end of the financial year although it was against the Fund Rules to do so.

**Held**, that the facts were not sufficient to import any dishonest intention and the President could not be convicted of criminal breach of trust. 100 Ind. Cas. 365=28 Cr.L.J. 285=A.I.R. 1927 Mad. 533.

**—S. 408—Dishonest intention—Intention to deprive master of property.**

The mental act or intent to deprive the master of his property is the gist of the offence under S. 408. The accused was engaged as a tonga driver, to drive his tonga on hire within the limits of Ludhiana Municipality. The accused had to bring back the tonga each evening and pay over his earnings while he was to receive a salary of Rs. 15 a month. He did not return one evening, and on the following day was pursued and arrested some 36 or 37 miles from Ludhiana. The accused in his defence at first denied the title of complainant.

**Held**, that the accused was guilty under S. 408. 88 Ind. Cas. 461=6 Lah. 257=26 Cr.L.J. 1149=26 P.L.R. 401=A.I.R. 1925 Lah. 411.

**—S. 409—Dishonest intention.**

The criminal intention in a charge under Indian Penal Code, S. 409, is a matter of inference from proved facts. 87 Ind. Cas. 962=26 Cr.L.J. 1042=A.I.R. 1925 Oudh 676.

**—S. 406—Dishonest intention—Loss if necessary—Intention to cause loss—Sufficiency.**

Loss is not an ingredient of the offence under S. 406 as the intention to cause wrongful loss by itself amounts to dishonesty. 69 Ind. Cas. 631=A.I.R. 1924 Lah. 353.

**—S. 403—Dishonest intention—Marriage presents retained by accused when marriage was broken off—If offence.**

Under an agreement to give the complainant's son to the accused's daughter in marriage, the complainant had presented some jewels and clothes for her betrothal ceremony. The negotiations fell through subsequently and the accused refused to give back the

presents on the ground that the complainant had wrongfully broken the engagement and that he, the accused was entitled to retain the jewels.

**Held**, that no dishonest intention was proved and that therefore no offence under S. 403 was made out. 72 Ind. Cas. 348=24 Cr.L.J. 348=A.I.R. 1922 Cal. 57.

**—S. 403—Dishonest intention—Accused losing buffalo and a month later tying complainant's buffalo—Intention.**

Where the accused kept the buffalo tied up in the verandah of his house which was open to the gaze of the public going about in the street, and the buffalo itself apparently strayed into his house and it is not denied that he himself had a month previously lost a buffalo, and where in appearance this buffalo was very much like that buffalo, and where the accused claimed it as his own as against complainant's assertions.

**Held**, in these circumstances that finding of the Magistrate that there was dishonest intention cannot be accepted. 17 M.L.W. 157=A.I.R. 1923 Mad. 364=44 M.L.J. 128.

**—S. 403—Dishonest intention—Constable keeping strayed sheep in possession—Dishonesty.**

A police constable caught a strayed sheep intended for sacrifice and on his transfer from the *thana* to which he was attached, to another *thana* he took it with him there;

**Held**, that it was sufficient evidence of dishonesty and that he was guilty of an offence under S. 403. 17 A.L.J. 145=20 Cr.L.J. 218=1 U.P.L.R. (H.C.) 88=49 Ind. Cas. 778.

**—S. 405—Dishonest intention—Essential.**

Unless dishonest intention is shown the accused cannot be found guilty under S. 405, Indian Penal Code. 10 Cr.L.J. 255=3 Ind. Cas. 285 (Bom.).

**—Ss. 403 and 426—Dishonest intention—No deterioration of property—Effect of Civil case.**

Where the reversioner of a mortgagor sold some of the bricks of the mortgaged house which had tumbled down and appropriated the amount and the Magistrate convicted him of criminal misappropriation of property and mischief.

**Held**, that as no dishonest intention or substantial deterioration of the mortgaged property was shown, the conviction was bad. (1901) 6 C.W.N. 34.

**10. Entrustment.**

**—S. 405—Entrustment—Implied entrustment—Sufficiency.**

For the purposes of S. 405, Penal Code, it is not necessary that entrustment should be express. An implied entrustment will suffice. A.I.R. 1950 Ajmer 76.

**—S. 409—Entrustment—Money deposited in current account by constituent of bank.**

When a person opens a current account in a bank, there is no question of entrustment. The relationship between the bank and the customer is one of creditor and debtor. The bank is free to use the money deposited by the customer or constituent in any way it likes and is not bound to keep the money apart. There can, therefore, be no case against the Bank or any of its officers for committing an offence under S. 409, Indian Penal Code, which presupposes an entrust-



ment. 45 C.W.N. 1071 and 51 C.W.N. 427 (P.C.) Rel. on. 1950 Comp. C. 220=A.I.R. 1950 Cal. 57=51 Cr.L.J. 388.

**—S. 406—Entrustment—Employee of firm depositing money entrusted to him in his own account.**

If an employee of a firm who is entrusted with a specific sum of money for the purpose of crediting the same in the account of the firm, deposits it in his own private account, he is guilty of the offence under S. 406, Indian Penal Code. A.I.R. 1950 Cal. 523=4 A.I.R. Cr. D. 587.

**—S. 406—Entrustment—Jeweller instructed to make gold jewel and paid cost of gold, neither delivering jewel nor returning money.**

The complainant instructed a jeweller to make a gold chain and paid him the cost of the gold. The jeweller neither delivered the jewel nor returned the money paid to him.

**Held**, that the money could not be said to have been entrusted to the jeweller and he was therefore not guilty of the offence of criminal breach of trust. It was in fact a payment in advance for the jewel which was to be made. That being so, the money became the money of the jeweller the moment it was paid to him and he could not therefore be said to have misappropriated it. 4 A.I.Cr. D. 775.

**—Ss. 405 and 406—Entrustment—Ingredients of offence—Entrustment of property or dominion over it—Absence of—Effect—Person supervising auction and advising auctioneer as to course to be followed but not entrusted with property—Liability of.**

Before a person can commit the offence of criminal breach of trust under S. 405, Indian Penal Code, he must be entrusted with the property or with dominion over the property. Where a person is sent to an auction merely as a supervising officer, his duties being to see that the auctioneer did his duty properly and that the interests of the Government (where the auction is of Government property) are properly looked after and to point out to the auctioneer his duty in case earnest money was not paid by a bidder and to see that the auctioneer follows the best course in the interest of the Government, and is not entrusted with the goods to be auctioned or has had no dominion over them, such person cannot be held guilty of an offence under S. 405. The goods being entrusted to the auctioneer the person supervising the auction and merely advising the auctioneer cannot be held guilty of criminal breach of trust and convicted under S. 406 of a criminal conspiracy to commit such offence under S. 406 read with S. 120-B, when the auctioneer himself is not an accused charged or prosecuted. 3 A.I.Cr.D. 672.

**—Ss. 406 and 409—Entrustment—Complainant handing over bearer cheque to accused as agent of firm—Accused crediting only portion of amount in firm's account—"Entrustment"—Meaning of.**

The complainant who owed money to a firm handed over a bearer cheque drawn in favour of the firm to the accused who was the agent of the firm. The accused cashed the cheque and credited only a portion of the amount in the firm's account. The accused was convicted under S. 409, Indian Penal Code.

**Held**, (i) that the case could not under any circumstances fall under S. 409, Indian Penal Code, which applied only where an entrustment was made to a

public servant or, in the way of business, to a banker, merchant, factor, broker, attorney or agent. The accused did not come within any of the categories referred to above. No doubt he was the servant and agent of the firm, but he was not the agent of the complainant. By merely handing over the cheque to him the complainant did not constitute him as his agent, as he in fact handed over the cheque to him in his capacity as servant and agent of the firm. Therefore, the offence, if any, would fall under S. 405, Indian Penal Code, and be punishable under S. 406, Indian Penal Code;

(ii) that in every offence of criminal breach of trust what must be established initially was the fact of entrustment of money or property. The word "entrusted" in S. 405, Indian Penal Code, was not necessarily a term of law and had different implications in different contexts. Even so, when money was entrusted to an accused person, it should be transferred to him under such circumstances which showed that, notwithstanding its delivery, the property in it continued to vest in the prosecutor and the money remained in the possession or control of the accused as a bailee, and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with his instructions. Under S. 46 of the Negotiable Instruments Act the making of a cheque was complete as soon as it was delivered by the drawer to the payee. The delivery might be actual or constructive. So long as the delivery was made by the person drawing the cheque with the intention of making payment, the property of the drawer in the cheque passed to the payee. The property in the cheque in the present case passed from the complainant to the firm as soon as the cheque was handed over to the accused. There was, therefore, no entrustment of any money by the complainant to the accused, and no offence under S. 406, Indian Penal Code, was therefore committed by the accused;

(iii) that there was civil liability upon the firm to account for the moneys received on their behalf by their agent. So in respect of the loss which the complainant had sustained, he could have a remedy in a Civil Court even though that which caused the loss did not amount to an offence. 1936 Mad. 1 and 1919 Pat. 570, Foll. I.L.R. (1949) Nag. 620=1949 N.L.J. 382.

**—S. 405—Entrustment—Offence under—Need for entrustment—Article purchased on permit diverted for another purpose.**

Where a permit to purchase an article was granted to the accused on condition that it was to be used in a specified work and the accused diverted and disposed of that article for another purpose, he cannot be convicted of the offence of criminal breach of trust as there was no entrustment of the article in question within the meaning of the term as used in S. 405, Indian Penal Code. The transaction, so far as the accused is concerned, was one of purchase and the property is the article clearly passed to him. The use of the words "in any manner" in S. 405, Indian Penal Code, do not enlarge the term "entrustment" itself and unless there is entrustment, the transaction in question cannot be affected by the terms of the section. I L R. (1947) 1 Cal. 97.

**—S. 406—Entrustment—Money paid in discharge of debt and not in trust—Conviction in respect of—Sustainability.** 227 Ind. Cas. 443=48 Cr.L.J. 107=13 B.R. 66=I.L.R. 24 Pat. 128=26 P.L.T. 357=A.I.R. 1946 Pat. 125.



**—S. 406—Entrustment—Compensation money paid for compromise of case—Case not compromised—Money so paid, if money paid “in trust”.**

Where money is paid to a complainant as compensation for the compromise of a criminal case filed by him on condition that it must be returned if the case is not actually compromised, and the case is not subsequently compromised as the Court refused permission, the complainant does not commit any offence under S. 406, Indian Penal Code, by denying that he ever received any compensation, as by no stretch of reasoning can it be said that the compensation money paid to him comes within the definition of money paid in trust. 1 D.R. 79.

**—S. 405—Entrustment.**

A person cannot be said to be entrusted with property within the meaning of S. 405, when he obtains possession by means of a trick. A.I.R. 1942 Sind 167=I.L.R. (1942) Kar. 284=44 Cr.L.J. 123=203 Ind. Cas. 609.

**—S. 406—Entrustment.**

A trust implies confidence placed by one man in another. It implies necessarily that the confidence was freely given and that there is a true consent. There is no true consent if confidence is obtained as a result of a trick. If there was a trick or deceit, a true consent cannot arise; there can be no entrustment, and no offence under S. 406, Indian Penal Code, because an essential element of the offence is an entrustment. A.I.R. 1942 Sind 167=I.L.R. (1942) Kar. 284=44 Cr.L.J. 123=203 Ind. Cas. 609.

**—Ss. 405 and 409—Entrustment—Customer depositing money in Bank in current account—Cheque dishonoured—Officers of Bank, if guilty.**

Where customer pays a sum into the current account at a particular bank, the sum becomes, to all intents and purposes, the money of the banker, subject to the liability of the bank to return to the customer an equal sum of money. Having regard to the legal relationship of banker and customer on a current account, the money cannot be said to have been entrusted with the banker in the sense in which the word ‘entrust’ is used in Ss. 405 and 409, Indian Penal Code. If a cheque is dishonoured due to the inability of the bank to pay, the officers of the bank cannot be convicted under S. 409; the only remedy which the customer has is to sue the bank for the balance of his account in the bank, and an action for dishonouring the cheque. A.I.R. 1941 Cal. 713=45 C.W.N. 1071=43 Cr.L.J. 451=199 Ind. Cas. 47.

**—S. 405—Entrustment—Payment by debtor to creditor.**

If the person paying intends to repose trust in the other expecting him to dispose of the money in a particular way, then only there is entrustment. The mere payment by a debtor to a creditor is not entrustment. A.I.R. 1940 Mad. 329=41 Cr.L.J. 824=1939 M.W.N. 1213=190 Ind. Cas. 123.

**—S. 405—Entrustment—Criminal breach of trust, if can be committed in respect of one's own property.**

Entrustment within the meaning of S. 405, Indian Penal Code, does not necessarily imply actual delivery by the owner of the property to the accused and it cannot be held that a person cannot commit criminal breach of trust of his own property.

A person hypothecated goods in his shop as a collateral security and agreed to hold them and proceeds

therefrom in trust and to pay the proceeds receive by him.

**Held**, that the test in such a case was whether the owner created an equitable charge over the goods in his possession when he executed the trust receipt. If he did so, he held the goods as trustee. It could not be said that by this trust receipt, the owner did not give a beneficial interest in the goods to the other and did not hold the goods, with which he was entrusted a legal owner, in trust. A.I.R. 1938 Sind 73=39 Cr.L.J. 500=174 Ind. Cas. 560.

**—S. 409—Entrustment—Existence of trust.**

The question whether *A* entrusted property to *B* is one which depends upon the actual facts of the case and not merely upon the legal terms employed by the parties. If the real nature of the transaction is a loan, the facts that the parties in writing call it a trust, or agree that for the purposes of the Indian Penal Code, the property in the money shall be deemed to remain in the original owner or agree that the party receiving the money shall be liable for criminal breach of trust if he applies the money to a purpose other than that agreed upon, would not bring that transaction within the scope of S. 405, Indian Penal Code.

The complainant's firm merely financed the accused and his partner in carrying on their business of purchase and sale of gunny bags. As security, the goods were stored in the godown of the complainant for which they had to pay rent and the accused and his partner were required to pay into the complainant's firm, the sale proceeds of the goods. The goods were to be purchased by the accused and his partner in their own names. On moneys advanced by the complainant's firm the accused and his partner had to pay interest. Complainant's firm was to receive commission at the rate of eight annas per 100 bags on sales effected by the accused and his partner. Goods were to be sold by the accused and his partner in their own names. The accused and his partner were solely responsible for the sale proceeds of goods sold ‘if any merchant fails, runs away, dies or the amount of *bardan* be not recoverable in any other circumstances.’ The accused sold some goods but did not pay the sale proceeds to the firm. He was convicted under S. 409.

**Held**, that neither the money with which the goods were purchased nor the goods after they had been purchased were the property of the complainant's firm entrusted to the accused and his partner as their agents. There being no trust, the accused could not be convicted under S. 409, Indian Penal Code. A.I.R. 1938 Sind 57=39 Cr.L.J. 399=174 Ind. Cas. 145.

**—S. 405—Entrustment.**

Per *Laxmanarao, J.*—The terms of S. 405, Penal Code, are very wide and entrustment may be brought about in any manner.

Per *Mockett, J.*—There can be no consent by a person who is cheated, and so if there was deceit which prevented any true consent arising, there could be no entrusting; the terms are mutually exclusive. A.I.R. 1936 Mad. 353=1936 M.W.N. 281=43 L.W. 548=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (2) (F.B.).

**—S. 405—Entrustment.**

There must be ‘entrustment’ in law within the meaning of S. 405 when the property was obtained by cheating. A.I.R. 1936 Mad. 353=43 L.W. 548=1936 M.W.N. 281=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (2) (F.B.).



## — S. 405—Entrustment.

Per *Cornish, J.*—The word “entrusted” should be construed as it occurs in a section of the Penal Code, headed “of criminal breach of trust”. The notion of a trust in the ordinary sense of that word is that there is a person, the trustee or the entrusted in whom confidence is reposed by another who commits property to him; and this again supposes that the confidence is freely given. A.I.R. 1936 Mad. 353=43 L.W. 548=1936 M.W.N. 281=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (2) (F.B.).

## — S. 405—Entrustment—Meaning of—Endorsement and delivery of bonds for specific purpose, whether entrustment.

The word ‘entrusted’ is not necessarily a term of law. It may have different implications in different contexts. In its most general significance, all it imports is a handing over of possession for some purpose which may not imply the conferring of any proprietary right at all.

The accused falsely represented to the complainant that they had sent some bonds for rectification to Bombay and as they had not arrived and the last day for completion of contract with a Bank had arrived, requested the complainant to oblige them by giving the complainant's bonds temporarily for a few days, assuring him that his bonds would be returned to him as soon as the bonds sent for rectification were received and the complainant endorsed and delivered to the accused his bonds for this purpose.

**Held**, that the bonds were not handed over absolutely to the accused but were entrusted to them. A.I.R. 1936 Mad. 1=1935 M.W.N. 914=69 M.L.J. 681=42 L.W. 923=37 Cr.L.J. 142=159 Ind. Cas. 656.

## — S. 405—Entrustment—Constable ordered to investigate offence—Property suspected of having been stolen, seized—Constable, if has dominion over property.

Where a head constable is ordered to investigate an offence, in the course of his duty under the provisions of S. 550, Criminal Procedure Code, and the Police Act, it is his duty to seize all property which is suspected of having been stolen. Having seized the property, he is entrusted with dominion over it on behalf of the Crown and if he then misappropriates the property, he clearly commits breach of trust with regard to it and is guilty under S. 409, Penal Code. A.I.R. 1935 Nag. 139=36 Cr.L.J. 867=31 N.L.R. 312=156 Ind. Cas. 184.

## — S. 405—Entrustment—Meaning of.

The term “entrustment” is not necessarily a term of law. It may have different implications in different contexts. In its most general signification, all it imports is the handing over the possession for some purpose which may not imply the conferring of any proprietary right at all. A.I.R. 1935 Rang. 453=37 Cr.L.J. 190=159 Ind. Cas. 952.

## — S. 408—Entrustment—Supply of waterproof coat to Railway servant—Condition of renewal on damage or loss—Contract of bailment—Attempt to pawn the garment.

Where a Railway servant is supplied a waterproof coat on condition that if it is damaged or lost, it will be renewed at the cost of the Railway servant, the contract is one of bailment. Delivery of the waterproof coat is an entrustment within the meaning of the Penal Code and when he attempts to pawn

the garment, he is liable to conviction under S. 408 read with S. 511, Penal Code. A.I.R. 1934 Rang. 41=35 Cr.L.J. 783 (2)=148 Ind. Cas. 814.

## — S. 409—Entrustment.

Where property is delivered under a trust, the sale proceeds of the property entrusted are also subject to the trust. A.I.R. 1932 Sind 169=34 Cr.L.J. 51=140 Ind. Cas. 647.

## — Ss. 406 and 477—Entrustment—Executor de son tort—Conversion of moneys to his own use, whether amounts to criminal breach of trust—Entrustment, necessity of—‘Secreting, a document, what amounts to.

A person who intermeddles with the estate of a deceased or does any other act which belongs to the office of executor where there is no rightful executor or administrator in existence is made accountable by the civil law to the extent of all assets which may have come to his hands. This, however, is not upon the basis of entrustment but upon the basis that not being entrusted, he had no business to intermeddle and he cannot be convicted for criminal breach of trust even if he did not *bona fide* believe that he was the real owner of the property.

Where such a person said to one of the legatees ‘you will have your share, wait, do not be anxious’ :

**Held**, that he did not become a person with whom the legatee had entrusted her share within the meaning of S. 406, Penal Code.

A person may secrete a document not only when the existence of the document is unknown to other persons and for the purpose of preventing the existence of the document coming to the knowledge of any body, but also when the existence of the document is known to others. In the later case, he may secrete it for the purpose, for example, of preventing it being produced in evidence or for the purpose of raising difficulties in the way of its being produced in evidence. But it is not necessarily enough to show that upon an occasion upon which it became his duty to produce the document, he failed to discharge that duty, though this may be a cogent piece of evidence in certain circumstances. The fact that a man perjures himself by denying the existence of a document which, to his knowledge is in his custody would be a still more cogent piece of evidence. But whether the offence of secreting the document is committed or not, must depend in each case upon the fact. A.I.R. 1931 Cal. 184=35 C.W.N. 425=32 Cr.L.J. 836=58 Cal. 1051=132 Ind. Cas. 145 (F.B.).

## — S. 409—Entrustment, necessity of.

Where the accused, in the capacity of an accountant of a municipality, put up cheques drawn to self for the Chairman's endorsement persuading the Chairman who was ignorant of English that they were for contractors and drew the money from the treasury and misappropriated it.

**Held**, that he could not be convicted of an offence under S. 409, Penal Code, as he was not entrusted with any funds. A.I.R. 1931 Mad. 439=1931 M.W.N. 399=32 Cr.L.J. 756=131 Ind. Cas. 461.

## — S. 406—Entrustment—Pro-note taken in accused's name—Agreement to use amount in particular way—Breach of agreement, whether amounts to criminal breach of trust—Entrustment, necessity of.

Where A offered to indemnify B against C's demands and in order to secure himself against personal



loss, took a promissory note from C's relatives, the intention being that in case C proceeded against B, A could proceed against the makers of the note and recover the amount, and with it indemnify B or re-pay himself :

**Held**, that as A was the legal owner of the note, though the proceeds of the note were to be used by him in a particular way, there was no entrustment and A could not be convicted for criminal breach of trust merely because he denied the existence of the note or stated that he had returned it to the maker or repudiated his liabilities under the contract of indemnity. A.I.R. 1931 Mad. 235=1930 M.W.N. 790=32 Cr.L.J. 743=131 Ind. Cas. 449.

—S. 405—Entrustment.

The property in respect of which Criminal breach of trust can be committed must be the property of some person other than the accused, or the beneficial interest or ownership of it must be in some other person and the offender must hold such property on trust for such other person or in some other way for his benefit. There can be entrustment and therefore no breach of trust merely because the owner of the property repudiates his obligations or commits other breach of contract in respect of them. 1930 M.W.N. 790=32 Cr.L.J. 743=131 Ind. Cas. 449=A.I.R. 1931 Mad. 235.

—S. 405—Entrustment—Goods entrusted to firm and not to its manager personally—Liability of manager.

A person who is the manager of the firm cannot be held criminally liable for breach of trust where there is no personal entrustment of goods to him but to the firm in respect of which the offence was alleged to have been committed. 1930 Cr. C. 1168=A.I.R. Rang. 332.

—S. 405—Entrustment—Goods entrusted for sale and sale proceeds to be held for the person delivering the goods—If realisation operates as trust.

Where certain goods were entrusted to the accused, and under the contract between him and the complainant he had to sell those goods and obtain money for them, which he would hold on account of the complainant, subject to deduction of certain charges :

**Held**, that when he received that money, although he did not receive it actually from the complainant, he was "entrusted with" it within the meaning of S. 405. Expl. 41 Cal. 844, Expl. 114 Ind. Cas. 399=30 Cr.L.J. 329=30 Bom. L.R. 1270=A.I.R. 1928 Bom. 521.

—S. 405—Entrustment—Transfer of possession—Retention of property.

The expression "entrusted" in S. 405 is used in its legal and not in its figurative or popular use. The section makes no distinction between different kinds of moveable property. If the expression "entrusted"

is applied to a thing which is not money it would indubitably indicate that such thing continues to remain the property of the prosecutor during the period in which the accused is permitted to retain its possession or is permitted to have any domain over it. When money is "entrusted" within S. 405 to the accused it should be transferred to him under such circumstances which show that, notwithstanding its delivery, the property in it continues to vest in the prosecutor, and the money remains in the possession or control of the accused as a bailee, and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with his instructions : Case law discussed. 108 Ind. Cas. 663=23 S.L.R. 13=29 Cr.L.J. 431=A.I.R. 1928 Sind 106.

—S. 403—Entrustment—Denial of receipt—Goods delivered in pursuance of contract—Denial of their receipt if an offence.

If goods are delivered to the purchase in pursuance of a contract for purchase, there is no entrustment so as to give rise to a trust and the mere fact that the person denies receipt of goods does not render him guilty either under S. 406, the matter being one purely in the nature of a civil dispute. 72 Ind. Cas. 172=24 Cr.L.J. 332=A.I.R. 1924 Mad. 516.

—S. 405—Entrustment—Booking clerk recovering excess charge illegally—Railway Co. not credited—If breach of any trust.

The accused as booking clerk recovered in excess of the legal charge but did not credit it to the Railway.

**Held**, he could not be convicted of the offence under S. 405. A trustee is a person in whom the legal interest in property is vested, the beneficial interest vesting in some other person. In the present case both interests vested in the accused who cannot therefore be a trustee and as said could not commit Criminal Breach of trust. 75 Ind. Cas. 79=6 L.L.J. 125=24 Cr.L.J. 879=A.I.R. 1923 Lah. 295.

—S. 405—Entrustment—Money entrusted to Broker—Broker to bear all loss.

When a company advanced money to a broker with a condition that it shall be used in a particular way, that the broker shall be responsible for the payment of the money and that he shall indemnify the company against all loss,

**Held**, by the Full Bench, that the money was not "entrusted" to the broker within S. 405 of the Penal Code. (*Hartnoll, Offg. C.J.*, dissenting.)

Per *Ormond, J.*—The Penal Code cannot be altered by agreement of parties so as to make S. 405 applicable to a transaction, which is in its real nature, a loan.

Per *Twomey, J.*—A man cannot commit criminal misappropriation of his own property. 7 L.B.R. 278=15 Cr.L.J. 452=7 Bur.L.T. 209=24 Ind. Cas. 332 (F.B.).



**—S. 405—Entrustment—Breach of trust—Advance for purchase of paddy—Sale to advancing firm—Loan or trust.**

Where money was advanced to the accused for the purchase of paddy for sale to the person advancing the money at the market rate, on the day of delivery, the property in the money passed to the accused and his contract to use the money in a particular way would not operate to create a constructive trust. The presence or absence of pro-notes does not affect the character of the transaction. 6 Bur. L.T. 13=14 Cr.L.J. 145=7 L.B.R. 16=19 Ind. Cas. 145 (F.B.).

**11. Evidence and proof.**

**—S. 409—Evidence and proof—Burden of proof—Proof of entrustment—Accused to prove his defence.**

In a case where the accused is charged with an offence under S. 409, Indian Penal Code, though the burden of proving entrustment of the money rests on the prosecution, if it is proved that the accused was in possession of the amount entrusted to him, it is for the accused to prove satisfactorily that he had not embezzled or misappropriated the amount but that the amount had been stolen or that he had been robbed of it. If the prosecution proves its case, the accused must prove such a defence as would carry a reasonable belief that the amount has been either stolen or that the accused has been robbed. 3 Sau. L.R. 74=4 A.I.Cr.D. 674=A.I.R. 1950 Sau. 13.

**—S. 409—Evidence and proof.**

Facts to be established by the prosecution. 47 Cr.L.J. 1041=227 Ind. Cas. 269=A.I.R. 1946 All. 227.

**—S. 403—Evidence and proof.**

No prosecution can be founded on the suspicion of the complainant that the accused has misappropriated the money. A.I.R. 1939 All. 602=1939 A.L.J. 574=1939 A.W.R. 570=40 Cr.L.J. 917=I.L.R. (1939) All. 851=184 Ind. Cas. 313.

**—S. 406—Evidence and proof.**

In a case under S. 406, question of trust must be fully inquired into and whole of prosecution evidence should be recorded before discharging accused on ground that case is of civil nature. A.I.R. 1939 Rang. 377=41 Cr.L.J. 25=184 Ind. Cas. 471 (2).

**—S. 403—Evidence and proof.**

Not only has the prosecution in a case of criminal misappropriation to prove that the accused received the money and has not accounted for it, but also to prove that he converted it to his own use. Proof of receipt and failure to account is naturally a long way towards proof of misappropriation, but it is not the whole way. A.I.R. 1938 Lah. 634=39 Cr.L.J. 851=40 P.L.R. 870=177 Ind. Cas. 278.

**—S. 403—Evidence and proof—Burden of proof—Patwari receiving excess amount on account of land revenue—Amount neither credited nor returned but kept with himself—Presumption—Allegation of return of amount—Burden of proof.**

Dishonest misappropriation for a time is a misappropriation within the meaning of S. 403, Penal Code. If, from proved facts and circumstances, it appears that the accused retained the amount with the intention of causing wrongful loss to the rightful owner and wrongful gain to himself, the dishonest misappropriation must be regarded as proved.

Where, notwithstanding the clear rule (Para 23 of Berar Patels and Patwari's Law) he neither credits the amounts received by him in excess on account of land revenue to Government nor makes it over to the *Patel* when he retains the money with himself, the presumption under S. 114, Evidence Act, would be that it continued to remain with him with intent to make a wrongful gain for himself and cause wrongful loss to the rightful owner. The prosecution has only to prove that the accused has received the money, has acknowledged the receipt and has failed to show it in his master's accounts. The inference is inevitable that the accused dishonestly retained the money for his own use. The onus, therefore, shifts on to his shoulders to prove (1) that he received the amount in excess by mistake, and (2) that he paid it back to the owner or his agent. The burden is not on the prosecution to show, that the amount was not returned. A.I.R. 1938 Nag. 445=1938 N.L.J. 259=39 Cr.L.J. 895=I.L.R. (1939) Nag. 180=177 Ind. Cas. 396.

**—S. 409—Evidence and proof—Necessary proof—Burden—Weakness of defence.**

In a case under S. 409, Penal Code, the burden of proving the guilt of the accused rests throughout upon the prosecution, and the deficiencies of the prosecution cannot be supplemented by any finding that the accused has not proved his innocence.

Proof that the accused attempted to suppress all traces of his embezzlement by any manipulation of accounts or evidence of the financial circumstances of the accused which would render probable a case of misappropriation is necessary to prove that money has been misappropriated. Proving mere false entries is not enough. 1937 M.W.N. 566.

**—S. 403—Evidence and proof.**

In a case of criminal misappropriation accused has not to account for moneys—It is for the prosecution to disprove alleged expenditure. 1936 M.W.N. 1019.

**—S. 403—Evidence and proof.**

Burden is on prosecution to prove dishonest misappropriation either by direct evidence or by evidence of circumstances which lead to reasonable inference. 1936 M.W.N. 828.



—S. 403—Evidence and proof.

Mere failure to account for money is not by itself sufficient for conviction under S. 409. 1936 M.W.N. 825.

—S. 403—Evidence and proof.

Prosecution is not bound to show precisely how the accused used the sums which were not accounted for—It proves entrustment and the failure on the part of the accused to account and leaves the Court to infer misappropriation. But whether misappropriation can be properly inferred is a question of fact and not of law.

Where the accused who was a Secretary of a Co-operative Society and himself a rich man received small sums but failed to credit those in the accounts for some time and paid the same with interest before the irregularities were discovered and there was nothing to show that he was in difficulty by want of money and gained something by retention of money.

**Held**, that the facts did not warrant the inference of criminal misappropriation of the amount. 1936 M.W.N. 491.

—S. 409—Evidence and proof.

Evidence as to history of dealings between accused and his officers in a charge under S. 409, Indian Penal Code, is relevant under S. 14, Evidence Act. A.I.R. 1936 Pat. 350=15 Pat. 108=17 P.L.T. 302=2 B.R. 696=37 Cr.L.J. 877=164 Ind. Cas. 74.

—S. 405—Evidence and proof.

The ingredients of an offence under S. 405 may be proved either by direct evidence or by circumstantial evidence. A.I.R. 1935 Rang. 453=37 Cr.L.J. 190=159 Ind. Cas. 952.

—S. 405—Evidence and proof.

A criminal prosecution for criminal breach of trust and falsification of accounts was filed by one of the partners against the other partner and a clerk. The entry in accounts showed a sum of money as having been given to persons employed in the Audit Department. The partner accused was vested with very wide powers in carrying on the partnership business.

**Held**, even assuming that the complainant examines every person employed in the Audit Department to depose that he never received a bribe, and assuming also that every person who gives that evidence speak the truth, the complainant will not prove much thereby, and the evidence would not be sufficient to establish that the accused dishonestly converted to his own use the amount, to convict him under S. 405 or under S. 477-A, Indian Penal Code. The complainant will have to establish that the clerk who was the co-accused falsified the account book wilfully and with intent to defraud the complainant and that the partner accused abetted that offence. 157 Ind. Cas. 208=36 Cr.L.J. 1112.

—S. 409—Evidence and proof.

Prosecution proving receipt of money and entrustment—Prosecution need not prove mode of misappropriation—Accused must prove his defence. A.I.R. 1934 Cal. 532=59 C.L.J. 306=38 C.W.N. 467=35 Cr.L.J. 1279=151 Ind. Cas. 22.

—S. 408—Evidence and proof—Amounts collected as complainant's *gumashta*—Nature of proof to be adduced—Accused setting up definite case—Whether bound to establish case by evidence.

Where the accused was charged with criminal breach of trust in respect of certain sums which he had collected as the *gumashta* in the complainant's estate.

**Held**, that the prosecution had to give evidence as regards the actual procedure that used to be adopted by the accused for the purpose of paying in such realizations as he used to make and for that purpose, it was necessary for the prosecution to go into details to produce and prove not merely the *pucca* books of the estate and *challans* which had been proved for the purpose of showing that a sum of money was deposited by the accused, but the entire book of *challans* in order to prove that no other amounts were neither in fact paid nor could possibly have been paid by the accused :

**Held**, also that when the accused set up a definite case of having made the payments, it was not, for him to establish that case by oral or documentary evidence. A.I.R. 1934 Cal. 425=35 Cr.L.J. 715=38 C.W.N. 474=148 Ind. Cas. 559.

—S. 406—Evidence and proof—Accused admitting receipt of money but defending by saying that he returned it.

Where the accused, in a trial under S. 406 against him admits having received the money alleged to have been misappropriated, by him but defended himself by saying that he had made it over to the proper person, the onus to prove the payment is not upon him, but it is on the prosecution to prove non-payment ; for it is only when the latter is proved that the presumption will arise of misappropriation or breach of trust. A.I.R. 1934 Sind 22=28 S.L.R. 84=36 Cr.L.J. 818=155 Ind. Cas. 439.

—S. 409—Evidence and proof—Criminal breach of trust—Defalcation and falsification of accounts—Onus of proof.

When a public servant is in charge of goods and it has been proved or admitted that there is a large shortage in those goods, and it is also proved or admitted that the accused, in order to hide the loss, has falsified the books, there is only one inference possible, that of guilt ; in a case like this the onus would be on the accused—the facts being admitted or proved—to give some reasonable explanation for the facts. A.I.R. 1933 All. 356=1933 A.L.J. 479=34 Cr.L.J. 574=55 A. 426=143 Ind. Cas. 318.



**—S. 409—Evidence and proof—Burden of proof, shifting of—Good character of accused, whether relevant.**

In a case of criminal misappropriation, the prosecution has to prove dishonest misappropriation by the accused and unless and until they prove a state of facts which leads inevitably to the conclusion that that accused is guilty, they fail to discharge the onus which lies upon them. The view that once the prosecution has proved that the accused had received the money the onus of proof is shifted to the accused, is erroneous.

In such cases, the prosecution need not prove the actual mode of misappropriation but they must prove dishonest misappropriation. The onus is always upon the Crown. It never shifts to the accused. A.I.R. 1933 Cal. 800=35 Cr.L.J. 156=38 C.W.N. 187=58 C.L.J. 405=61 C. 168=146 Ind. Cas. 767.

**—S. 405—Evidence and proof.**

The burden of proving dishonest intention under S. 405, Penal Code, on the part of the accused is on the prosecution. In other words, the prosecution must prove facts from which the only possible inference which can reasonably be drawn is that there was a dishonest intent. A.I.R. 1932 Bom. 57=33 Bom. L.R. 1518=33 Cr.L.J. 317=136 Ind. Cas. 493.

**—S. 403—Evidence and proof—No obligation to pay at a certain date—If offence.**

It does not follow, merely because an instalment of an agricultural loan is not paid the very next day into the treasury, that thereupon and therefrom an inference begins to be drawn against the village Munsif that he has misappropriated the amount so omitted to be paid. Mere delay in payment of money entrusted to a person, when there is no particular obligation to pay it at a certain date, does not amount to and does not furnish by itself a sufficient proof of misappropriation. A.I.R. 1925 Cal. 613, Rel. on. A.I.R. 1930 Mad. 507=58 M.L.J. 649=31 M.L.W. 837=1930 M.W.N. 530=127 Ind. Cas. 238.

**—S. 406—Evidence and proof—Giving accounts—Failure to give account or giving false account—If conclusive.**

In case of criminal breach of trust failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. But accused must not be convicted on it alone. It is only an indication or piece of evidence pointing to dishonest intention and must be considered along with other facts of the case. A.I.R. 1927 Cal. 409, Diss. from. 121 Ind. Cas. 321=32 Cr.L.J. 249=11 P.L.T. 319=A.I.R. 1930 Pat. 209.

**—S. 406—Evidence and proof—No evidence of manner of misappropriation—Proof of dishonest intention.**

It is neither necessary nor possible in every case of criminal breach of trust to prove in what precise

manner the money was spent or appropriated by the accused, since by law even temporary retention provided it is dishonest is an offence. But where there is no direct evidence of misappropriation and one is left to surmise as to what use was made by the accused of money, one ought to require clear evidence of dishonest intention than in a case where there is direct evidence to prove that the money was appropriated by the accused for a particular use which is inconsistent with his position as a trustee of the money. 121 Ind. Cas. 321=31 Cr.L.J. 249=11 P.L.T. 319=A.I.R. 1930 Pat. 209.

**—S. 403—Evidence and proof—Misappropriation proved to some of the amount—Sufficiency.**

In a case of criminal misappropriation it is sufficient if the prosecution establishes that some of the money mentioned in the charge has been misappropriation by the accused, even though it may be uncertain what is the exact amount so misappropriated: (1893) Rat. Unrep. Cr. Case 659, Foll. 42 All. 522 Diss. from: A.I.R. 1925 Cal. 260, Expl. 108 Ind. Cas. 505=52 Bom. 280=30 Bom. L.R. 325=29 Cr.L.J. 407=10 A.I.Cr.R. 71=A.I.R. 1928 Bom. 148.

**—S. 409—Evidence and proof—Trust—Misapplication.**

In cases of criminal misappropriation the onus lies on the prosecution to prove not only that money was paid to the accused in trust but also that he did not apply it for the purpose for which it was given: *Ratan Lal U.R. Cr.C.* 872 and 860, Rel. on. 112 Ind. Cas. 850=30 Cr.L.J. 18=11 A.I.Cr.R. 405=A.I.R. 1928 Lah. 382.

**—Ss. 403 and 409—Evidence and proof—Receipt—No misappropriation.**

When the prosecution has proved the receipt by the accused of the several amounts, it is for the accused to show that he had not converted them to his own uses. 101 Ind. Cas. 597=45 C.L.J. 207=28 Cr.L.J. 469=A.I.R. 1927 Cal. 409.

**—S. 405—Evidence and proof.**

Something more than breach of trust is necessary to bring the case within the purview of a criminal Court. 92 Ind. Cas. 747=24 M.L.W. 603=27 Cr. L.J. 331=50 M.L.J. 94.

**—S. 406—Evidence and proof—Accused not proving his case—Onus if shifted from prosecution of proving entrustment.**

The accused may not have been able to prove satisfactorily that he got the cows from complainant on a letter from his own son for and on his behalf or that he purchased one cow from the son but this does not relieve the prosecution from proving that a trust had been created in respect of these cows and that the accused had violated that trust. 85 Ind. Cas. 839=26 Cr.L.J. 615=A.I.R. 1923 Lah. 321.



—Ss. 403 to 409—Evidence and proof—How accused got the money.

If the prosecution cannot prove how the accused came by the money, they will be failing to establish one of the first essentials of the offence. 65 Ind. Cas. 1004=25 C.W.N. 838=A.I.R. 1921 Cal. 531.

—S. 409—Evidence and proof—Transfer of personal liability by a Manager of a Bank into entry as liability by Bank—Offence.

Where the Managing Director of a Bank borrowed moneys by executing *Hundis* and cashing it from another Bank and credited in his floating account in his own Bank and some months before the *Hundis* were payable the caused an entry to be made in his Bank's accounts by which the liability for repayment was transferred from himself to the Bank,

**Held**, that the prosecution had failed to prove an offence of criminal breach of trust, that the motive was inadequate and that the evidence led to the inference that the loan was contracted *ab initio* for the Bank for meeting immediate or prospective demands. 16 Cr. L.J. 454=24 P.W.R. 1915 Cr.=162 P.L.R. 1915=29 Ind. Cas. 86.

—Ss. 403 and 405—Evidence and proof—Embezzlement—Civil and criminal liability—Distinction between.

The mixture of the funds of another with one's own may be in any cases natural and proper and in another case convenient but irregular and in the third both irregular and criminal. The distinctions between these cases is to be treated with the greatest judicial care, so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. Apart from constructive criminal responsibility, which may be imposed by Statute, a Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him, was moved by the guilty mind. 18 C.W.N. 98=26 M.L.J. 1=15 Cr.L.J. 305=23 Ind. Cas. 657 (P.C.).

—S. 409—Evidence and proof—Mode of misappropriation need not be proved.

A peon was charged with misappropriation. The prosecution only proved that he had not returned the money though he was bound to return it.

**Held**, that it lay on the accused to prove his defence. The prosecution need not prove the actual mode of misappropriation. 33 All. 249=8 A.L.J. 88=11 Cr. L.J. 699=8 Ind. Cas. 687.

—S. 407—Evidence and proof—Property given to a carrier could not have been accounted for.

Where property is entrusted to a person as carrier it is necessary to show at least, in order to convict him of criminal breach of trust, that some of the property could not be accounted for by him. (1907) 9 Bom. L.R. 229.

12. Offence by servant.

—S. 408—Offence by servant.

Where the accused who was a clerk admittedly received money belonging to the estate and he was asked to account and to give satisfactory explanation which he failed to do, he was criminally as well as civilly liable to his master. A.I.R. 1942 Oudh 89=1941 C.W.N. 1208=43 Cr. L.J. 153=1941 A.W.R. 343=17 Luck. 353=197 Ind. Cas. 255.

—S. 408—Offence by servant—Broker working under or for firm, whether servant of firm.

To work as broker under or for a firm is not necessarily to become their servant. A broker is well understood to be nothing but a middleman, a person who brings together a buyer and a seller. But a broker can be an actual seller as well.

The accused being a broker and having bought a certain quantity of paddy which was lying at certain places, received as advance against the said paddy a certain sum of money from the complainant firm and agreed to deliver that paddy to the firm at a certain place by a certain date. The accused merely represented that he had entered into contracts for the purchase of paddy in order to be able in turn to supply paddy to the firm, undertook to use the advance paid to him to complete those purchases and so be in a position to deliver the paddy to the firm.

**Held**, that the accused was an independent vendor to the firm, and as the ownership in the money advanced passed to him, any condition attached to its use did not amount to a trust and the undertaking given by him to use that advance payment for the express purpose of payment for paddy bought by him, as represented by him, and for no other purpose, did not make him a trustee of the money. To fail to carry out a promise or an undertaking to do something with it upon being paid a sum of money might possibly lay the defaulter open to some other charge dependent upon what were the representations, but as the money had become his and was no longer the property of the payer of the money, there could be no trust in respect of how it should be used for the benefit of the payer of the money. The accused could not, therefore, be convicted under S. 408, Penal Code. A.I.R. 1941 Rang. 189=1941 Rang. L.R. 193=42 Cr.L.J. 776=195 Ind. Cas. 703.

—Ss. 408, 409 and 477-A—Offence by servant—Public exposure of malpractices in connection with banking concerns and punishment of delinquents should be first concern of State.

Otherwise the condonation of the acts of all those concerned in speculation and malversation of money invested and deposited in banks must have a very disastrous effect on the community in general. A.I.R. 1939 Bom. 129=40 Cr.L.J. 579=41 Bom. L.R. 98=181 Ind. Cas. 870.



**—S. 408—Offence by servant—Agreement between employer and servant—Arbitration—Criminal prosecution.**

Where, by the agreement between the accused and his employer, the former was to furnish a surety in Rs. 500 and any sum embezzled by the applicant or the value of any property removed by him would be recovered from the surety, in case such money could not be realised from him, the clause shows, that he understood that if, by any chance, he was suspected by his master of having embezzled any money or his accounts were held to be wrongly prepared, then the matter would be referred to the arbitration or arbitrators selected in the manner laid down in the agreement and the amount of money found to have been misappropriated recovered from his surety, and the agreement did not contemplate his being criminally prosecuted for failure to show in the account books any sum realised by him. A.I.R. 1937 Oudh 331=38 Cr.L.J. 491=1937 O.W.N. 505=168 Ind. Cas. 58.

**—S. 408—Offence by servant—Working partner not contributing anything to partnership—Whether a clerk or servant.**

A working partner who has not contributed anything towards partnership business, is a 'servant' or 'clerk' within S. 408, Penal Code, and can be held guilty of criminal misappropriation or breach of trust. A.I.R. 1934 Sind 22=28 S.L.R. 84=36 Cr.L.J. 818=155 Ind. Cas. 439.

**—S. 408—Offence by servant—Specific sum misappropriated during a certain time—Effect of Criminal Procedure Code, S. 222 (2).**

Accused was employed as a pay clerk in complainant's office and his duties were to receive from his master cheques in respect of certain amounts which had become due and payable on certain bills. He had to cash the cheques keep the proceeds with him and from time to time make payments thereout as and when those bills were presented to him. He was charged with criminal breach of trust in respect of a specific sum misappropriated during a certain period.

**Held**, that the provisions of S. 222, sub-S. (2) were satisfied : A.I.R. 1928 Bom. 148, Rel. on.

**Held**, further, that the misappropriation amounted to a criminal breach of trust. 113 Ind. Cas. 612=30 Bom. L.R. 1530=12 A.I.Cr.R. 73=30 Cr.L.J. 185=53 Bom. 119=A.I.R. 1928 Bom. 557.

**—S. 403—Offence by servant—Money order not paid to payee—Receipt bearing thumb-impression of the postman himself—Offence.**

Where a postman did not pay money to the payee of the money order, and put his own thumb-impression on the receipt, but after two months when enquiries were made, he paid the money and took receipt of the payee,

**Held**, that the postman was guilty of a deliberate misappropriation of the money entrusted to him. 98 Ind. Cas. 99=50 Mad. 462=27 Cr.L.J. 1261=27 M.L.W. 184=A.I.R. 1927 Mad. 696=53 M.L.J. 597.

**—Ss. 409 and 477-A—Offence by servant—Delivery of V.P. by Postmaster without payment—Alteration of date of delivery in account—Offence.**

Where the accused, a Sub-Postmaster, handed over a V.P. letter to the addressee without getting payment, on or before 20-10-25 and then altered his accounts so as to make it appear that he only handed over the letter on 24-10-25.

**Held**, that the accused was guilty of the offence of criminal breach of trust and falsification of accounts under Ss. 409 and 477-A of the Penal Code, 102 Ind. Cas. 488=38 M.L.T. 318=25 M.L.W. 656=28 Cr.L.J. 552 A.I.R. 1927 Mad. 626=52 M.L.J. 703.

**—S. 403—Offence by servant—Public servant receiving money and not handing it over to his successor—Offence.**

Where a public servant receives money in his capacity as such, the fact that he does not include it in his cash balance entered in the remarks column of the register maintained by him on the day it was received, is very strong *prima facie* evidence of its having been misappropriated on that date and he is guilty of embezzlement if he does not hand over to his successor the money in his hands due to Government. 94 Ind. Cas. 205=1 Luck. 345=29 O.C. 245=3 O.W.N. 382=27 Cr.L.J. 589=A.I.R. 1926 Oudh 398.

**—S. 409—Offence by servant—Post office clerk delivering V.P.P. to party and receiving money—Entry not made in register nor money credited—Offence.**

A post office clerk delivered some value payable parcels on 30th May 1925. 27th May 1925 and 23rd May 1925 and kept moneys which were entrusted to him as a public servant up to 9th June 1925 in violation of the rules by which he was bound, and gave a false explanation that the money had not been received until the 9th of June. He also made entries in his register showing that the articles were still undelivered in the post office long after they had been delivered and the money for them had been received,

**Held**, this amounts to a denial of the receipt of the money and is conclusive evidence of criminal breach of trust *R. v. Jackson*, (1. C. & K. 384), Appl.

**Held**, further that the negligence of the postmaster in charge whose duty was to check the delivery register, in not properly checking the register, cannot take the place or proof that the money received on account of these articles was entrusted to his care, and he cannot therefore be charged of a criminal breach of



trust. 94 Ind. Cas. 355=5 Pat. 578=7 P.L.T. 807=1926 P.H.C.C. 190=27 Cr.L.J. 611=A.I.R. 1926 Pat. 299.

**—S. 405—Offence by public servant—Disappearance of property under control of public servant—Proof of breach of trust.**

Without the slightest evidence of any money having been received by public servants they could be convicted of criminal breach of trust when property under their control has disappeared and their connection with the conspiracy is brought home to them. 88 Ind. Cas. 833=2 O.W.N. 469=28 O.C. 230=26 Cr.L.J. 1217=A.I.R. 1925 Oudh 469.

**—S. 409—Offence by servant—Public servant entrusted with money to buy building materials—Obtaining them free and appropriating money—Offence.**

A public servant who being entrusted with Government funds for the purpose of constructing a building obtains the materials free of costs from somebody and appropriates a certain amount to himself as their price, is guilty of Criminal breach of trust. 86 Ind. Cas. 459=4 Pat. 488=6 P.L.T. 154=3 Pat. L.R. Cr. 110=26 Cr.L.J. 811=1925 P.H.C.C. 112=A.I.R. 1925 Pat. 414.

**—S. 408—Offence by servant—Failure to account—Presumption as to misappropriation.**

It is settled law that where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him. If such a servant fails to return the property or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use. In such cases the Courts are entitled to draw hostile inferences and presumptions from the action and statement of the servant. 84 Ind. Cas. 331=26 Cr.L.J. 267=2 Rang. 476=A.I.R. 1925 Rang. 47.

**—S. 405—Offence by servant—Unauthorised sale of municipal property and misappropriation of money—Offence.**

Where a Sanitary Inspector, well knowing the proper place for deposit, and taking advantage of the fact that there was a War between the sweepers and the Municipality used his authority with the sweepers to deposit the stuff at an unauthorised place and proceeded to sell it.

**Held**, a servant acting within the scope of his employment cannot in order to defraud his master set up breach of his master's regulations in his own favour, and it must be taken that in any case, when this night soil was deposited at an unauthorised place, the Sanitary Inspector still held it there at the disposition

of his employers, and to appropriate it to his own use would be a breach of trust. 76 Ind. Cas. 971=45 All. 281=21 A.L.J. 149=4 L.R.A. Cr. 62=25 Cr.L.J. 299=A.I.R. 1923 All. 480.

**—S. 408—Offence by servant—Criminal breach of trust—Buyer paid by commission on purchases.**

A person working under a trading firm on commission to make purchase under instructions is a servant and may be convicted of criminal breach of trust under S. 408, Indian Penal Code. To constitute the relation of master and servant it is not necessary that the person employed should be engaged for full time, or on a fixed full monthly salary. A person hired for a specified work remunerated by commission on work done, may be a servant. 12 Bur. L.T. 58=10 L.B.R. 31=20 Cr.L.J. 513=51 Ind. Cas. 673.

**—S. 405—Offence by servant—Criminal breach of trust by public servant—Definition.**

A clerk in a record-room made another document, forming part of a record in his custody, to a person who was entitled to the document, but who would otherwise have had to present an application on stamped paper in order to secure its return in a legal manner.

**Held**, that the clerk was under the above circumstances rightly convicted for criminal breach of trust by a public servant. (1904) A.W.N. 228=27 A. 260. See also S. 408.

**—S. 408—Offence by servant—Servant ordered to burn waste paper—Sale in shop—Breach of trust.**

A servant who has been directed to burn waste papers is not guilty of criminal breach of trust in taking them to a shop for sale. 2 C.W.N. 216 foll. (1902) 29 C. 489.

**—S. 406—Offence by servant—Breach of trust—Servant—Court of Wards—Ward a major.**

The owner of an estate on assuming management thereof is competent to prosecute a servant of the Court of Wards for criminal breach of trust committed during the management of the estate by the Court. (1900) 5 C.W.N. 248.

**13. Owner not known.**

**—S. 403—Owner not known—Accused picking up spanner on road not knowing owner—If guilty.**

A was convicted on his plea of guilty under S. 403 (he having tried to sell a spanner which he found lying on a public road).

**Held**, that it was not a case where the accused had reasonable means of discovering and giving notice to owner of the spanner, of having found it. The spanner was not of any appreciable value. The



accused's plea of guilty was merely his admission of the facts alleged against him. The case therefore fell under illustration of S. 403 and the accused therefore was not guilty. 32 Bom. L.R. 356 = 125 Ind. Cas. 712 = A.I.R. 1930 Bom. 176.

**—S. 403—Owner not known—Sub-Inspector catching bullock—Owner not known for 20 days—Sale thereafter—If offence.**

Accused, a Sub-Inspector of Police, caught a lawaris bullock, kept it for 20 days and ultimately not being able to trace out the owner sold it thereafter.

**Held**, that the accused was not guilty of any offence. 91 Ind. Cas. 37 = 24 A.L.J. 128 = 27 Cr.L.J. 5 = 7 L.R.A.Cr. 147 = A.I.R. 1926 All. 251.

**—S. 403—Owner not known—Wandering cow—Taking possession—If an Offence.**

A person finding a property of which, from nature of it, there must be an owner, must take reasonable care of it and endeavour to find out the owner; but he is not bound to adopt extraordinary means for the discovery nor is he bound to be out of pocket in discovering the owner by means of advertisement. Where the accused person took possession of a wandering cow of which no owner could be discovered he is not guilty of an offence under S. 403, Indian Penal Code. 67 Ind. Cas. 497 = 23 Cr.L.J. 401.

**14. Partner.**

**—S. 406—Partners—Prosecution by one against another—Sustainability—Contract Act, S. 253.**

A prosecution for criminal breach of trust under S. 406, Indian Penal Code, by one partner against another is not sustainable. A partner who receives money belonging to the partnership on account of himself and his co-partners, does not do so in a fiduciary capacity. Partners are joint owners or co-owners of the partnership property, that is to say, of the common stock. It is difficult, therefore, to conceive how he can be entrusted with, or with dominion over his own property, or how he can dishonestly misappropriate it or convert it to his own use. 60 C. 1316 and A.I.R. 1948 Cal. 292, rel. on 4 A.I.Cr.D. 78 = 1950 N.L.J. 56 = A.I.R. 1950 Nag. 99 = 51 Cr.L.J. 607 = I.L.R. 1950 N. 379.

**—S. 403—Partner—Applicability—Partnership—Refusal by one to pay profits to another—Accounting not effected—Offence—Prosecution—Maintainability of.**

Where the gist of the petition of complaint in a case was that the complainant had provided funds for joint venture with which timber had been bought and sold by the accused, the other partner, and that the complainant who made demands for payment was put off by the accused on some pretext, and that later on the accused made himself scarce:

**Held**, That *prima facie* the question between the parties was one of accounting, and that no accounting

having taken place to show whether the accused owed any and what amount to the complainant, it was impossible to say in the circumstances that there was any *prima facie* case of criminal misappropriation of funds by the accused of such a character as would justify a criminal prosecution under S. 403, Indian Penal Code, criminal proceedings instituted in such circumstances cannot be allowed to proceed and must be quashed. A.I.R. 1949 Cal. 89 = 50 Cr.L.J. 154.

**—Ss. 405 and 406—Partner—Offence under—Partner receiving partnership money—If can be guilty of.**

The word "entrustment" in S. 405, Indian Penal Code, connotes that the accused holds the property in a fiduciary capacity. A partner who receives money belonging to the partnership on account of himself and his copartners does not do so in a fiduciary capacity and therefore, there can be no question of any breach of trust by him in respect of such money. It is extremely difficult to conceive of circumstances under which it could be held that there is an entrustment of partnership property by one partner to another. 60 C. 1316 and I.L.R. (1948) 2 Cal. 452, foll. I.L.R. (1949) 1 Cal. 454.

**—S. 406—Partner—Some partners withholding share of profits due to another—Offence—Prosecution for criminal misappropriation—Maintainability.**

One or more partners receiving money or assets belonging to the partnership on account of themselves and other co-partners cannot be held to do so in a fiduciary capacity. Each partner is a co-owner of the whole of the common stock. Where some partners withhold the share of profits due to another partner, the latter's remedy is to sue for dissolution and accounts. The parties withholding are not criminally liable and cannot be prosecuted under S. 406, Indian Penal Code. I.L.R. (1948) 2 Cal. 452 = 52 C.W.N. 441 = A.I.R. 1948 Cal. 292 = 49 Cr.L.J. 543.

**—Ss. 403 and 405—Partner.**

In India, a partner is liable to be tried for criminal misappropriation or for criminal breach of trust of partnership property under the law as laid down in Ss. 403 and 405. A.I.R. 1941 Rang. 342 = 1941 Rang. L.R. 547 = 43 Cr.L.J. 263 = 197 Ind. Cas. 797.

**—S. 405—Applicability to partners.**

The words of S. 405, Penal Code are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property or with dominion over it and has dishonestly misappropriated it, or converted it to his own use. A.I.R. 1940 Cal. 371 = 44 C.W.N. 650 = 41 Cr.L.J. 796 = 189 Ind. Cas. 769.

**—S. 405—Partners.**

Section 405, Penal Code, applies to partners and a partner can be convicted of criminal breach of trust.



A.I.R. 1940 Mad. 265=1939 M.W.N. 1252=41 Cr.L.J. 398=187 Ind. Cas. 126.

—S. 409—Partner.

Per *Din Mohammad, J.*—A partner can be held guilty of criminal breach of trust if the circumstances brought on the record favour that conclusion. A.I.R. 1939 Lah. 406 =41 P.L.R. 1 and 37=40 Cr.L.J. 942=184 Ind. Cas. 358.

—S. 405—Partners.

A partner can be convicted of criminal breach of trust in respect of the partnership property. The partnership may be for one purpose, and one partner may, for his own quite different purpose, dishonestly and fraudulently abstract money from the partnership assets and criminally misappropriate it, and it cannot in such a case, be said that there is no room for the criminal law at all. It is not then a matter merely of dispute between partners. A.I.R. 1939 Sind 21=40 Cr.L.J. 246=179 Ind. Cas. 687.

—Ss. 403 to 409—Partner—Criminal breach of trust in case of partnership—Gist of the offence.

Sections 403 to 409 are not intended to apply to partners. Partners being joint owners or co-owners of the partnership property, it is difficult to conceive how a partner can be entrusted with, or with dominion over, his own property or how he can dishonestly misappropriate it to his own use.

In a case of partnership, the gist of the offence of criminal breach of trust, *viz.*, dishonest misappropriation is wholly wanting, the accused being a part owner of the property. A.I.R. 1933 Cal. 582=34 Cr.L.J. 958=37 C.W.N. 982=60 Cal. 1316=145 Ind. Cas. 416 (2).

—S. 405—Partner.

The words of S. 405, Penal Code, are quite enough to cover the case of a partner and if one partner is given authority by the other partners to collect money or property of the firm, he is entrusted with dominion over that property and if he dishonestly misappropriates it then he comes within the section.

In case of charges of criminal breach of trust against partners, the Court ought to be very careful. In many cases it is impossible to say what the share of the accused may be, whether he is indebted to the firm or whether the firm is indebted to him and if the firm is indebted to him, there may be no dishonest intent in his withdrawing money from the firm. If there is any doubt upon the matter, the accused must always have the benefit of the doubt. A.I.R. 1932 Bom. 57=33 Bom. L.R. 1518=33 Cr.L.J. 317=136 Ind. Cas. 493.

—S. 408—Partner—Prosecution outcome of dispute regarding liabilities of partners.

In a case under S. 408, if it appears to the Court that the relationship between the parties is one of partnership and that the criminal case is an outcome

of a dispute as regards their respective liabilities, a conviction for embezzlement under S. 408 cannot be sustained. A.I.R. 1931 Pat. 159=12 P.L.T. 355=32 Cr.L.J. 620=130 Ind. Cas. 833.

—S. 403—Partners—Taking joint property—If offence.

Taking of joint property by partner is not criminal misappropriation unless the partner appropriates the joint property to his sole use. 25 Cr.L.J. 669= A.I.R. 1925 Cal. 154=81 Ind. Cas. 157.

—Ss. 403 and 406—Partner—Complaint by one partner against another.

A criminal action against a co-partner by a partner under S. 403 or S. 406, Indian Penal Code, is maintainable if the other ingredients justifying the prosecution are present. 1 Pat. L.T. 127=21 Cr L J. 338=55 Ind. Cas. 674.

—S. 406—Partner—Criminal breach of trust—Partnership.

No conviction under S. 406 can be sustained against a partner in the absence of proof of demand for an account. (1908) 35 C. 1108.

—S. 405—Partner—Criminal breach of trust by partner.

A partner who dishonestly misappropriates or converts to his own use any of the partnership property with which he is entrusted or which he has dominion over, is guilty of an offence under S. 405. (1904) 6 Bom. L.R. 553.

### 15. Pledge.

—Ss. 406 and 420—Pledge—Complainant A owing money to accused B on handnote and pledge of ornaments—Panchas brought by A settling dues of B at Rs. 155—A paying that amount to B—B accepting money but failing to return handnote and ornaments—B held guilty neither of criminal breach of trust nor cheating.

The complainant executed a handnote in favour of the accused for Rs. 106 and on the same day pawned certain silver ornaments with the accused for Rs. 18. The accused evaded settlement of the account and return of the handnote and the ornaments, so the complainant took panchas to his place. The panchas settled the dues at Rs. 155 and the complainant paid this amount to the accused in the presence of the panchas. The accused on the pretext of bringing the handnote went inside the house and went off from the back door and never returned. There was no evidence that the accused accepted Rs. 155 in full satisfaction of his dues. The accused was charged for misappropriation of Rs. 155 given to him and not for misappropriation of handnote and ornaments. There was no unqualified denial of the receipt of money by the accused :

**Held**, that (1) there was no breach of trust with regard to Rs. 155 simply because there was no entrust



ment. The money was not given to the accused in trust but in payment of a debt and therefore it became his property as soon as he received it ;

(2) nor could the accused be said to have misappropriated and converted the ornaments to his own use because he did not deny that the ornaments were pledged with him but alleged that he still held them in trust until the further amount claimed by him was paid off ;

(3) nor could a charge of cheating be sustained against the accused as he could not be said to have had a dishonest intention at the time when he received the money. It may be that he took the money with a dishonest intention, saying he would return the ornaments but not intending to ; but the inference was equally possible that he took the money and subsequently repented and decided to hold out for more. There would then be no dishonest intention in the taking of the money. Or, it may be that the accused took the amount under protest, in part payment, because he had nothing to do with the calling of the panchas, and it was not very clear whether he ever agreed to accept Rs. 155 in full satisfaction. A.I.R. 1946 Pat. 125 = 24 Pat. 128.

#### —S. 406—Pledge.

Sub-pledge by pledgee of goods pawned is not criminal breach of trust. A.I.R. 1942 Rang. 62 = 1941 Rang. L.R. 784.

#### —S. 406—Pledge—Contract of pledge.

Accused entitled to sell articles if interest on loan remained in arrears for three months—Accused exercising right of sale.

The accused, under a contract of pledge with the complainant, advanced a loan to the complainant. The accused was given the right to sell the articles if the interest payable on the loan remained in arrears for three months. In default of payment of interest, the accused sold the articles and credited the balance of the sale proceeds after deducting the amount of the principal and interest due to him to the account of the complainant in his account books :

**Held**, that the accused was not guilty of any offence. He had merely acted on his contract with the complainant and whatever his rights, he must have believed in good faith that he was entitled to sell the property. A.I.R. 1942 Rang. 62 = 1941 Rang. L.R. 784.

#### —S. 405—Pledge—Buyer dealing dishonestly with goods in violation of terms and with guilty intent—Trust receipt containing term that buyer should pay interest on price of goods until payment—Default in payment—Trust receipt, if valid declaration of trust.

The trust receipts can be looked at in two ways. Either they are documents containing a declaration of trust whereby the buyer constitute himself trustee for the seller when the property must have passed, for

a person cannot constitute himself trustee of goods unless he is the legal owner, or they are documents evidencing a previous pledge when they are merely evidence of the terms and conditions on which the seller permits the buyer to deal with the goods on his behalf. If a buyer or an importer who obtains from a seller or a bank documents of title which enable him to deal with the goods covered by the documents of title on certain terms and conditions, deals dishonestly with those goods in violation of those terms and conditions, it may be said that the buyer or importer is entrusted with dominion over the documents of title and of the goods within the meaning of S. 405, Indian Penal Code, and the plea that the documents are only pledged will not avail him, because though as a pledger he may be the legal owner, the pledgee has clearly a beneficial interest. It is true when a buyer or importer under such circumstances obtains possession of the documents, he obtains merely the custody ; the juridical possession remains with the pledgee, but so much the more is he entrusted with dominion over them within the meaning of S. 405, Indian Penal Code, and there is no reason why a buyer or importer cannot, under such circumstances, be guilty of criminal breach of trust provided he has the necessary guilty intent and violates the terms and conditions of his contract.

One of the terms of a trust receipt was that the buyer should pay interest on the price of the goods until payment was made. The buyer made a default :

**Held**, that the trust receipt could not be deemed a valid declaration of trust, for although the word "trustee" was used, the term in the trust receipt was inconsistent with the position of a seller's agent or the existence of trust agency or the creation of a trust and the case, therefore, was only a civil dispute and not a criminal offence. A.I.R. 1939 Sind. 27 = 40 Cr. L.J. 235 = I.L.R. (1939) Kar. 283 = 179 Ind. Cas. 554.

#### —S. 405—Pledge—Pledgee of goods, sub-pledging the goods to the extent of his interest therein.

Where a pawnee or pledgee makes a sub-pledge of the goods pawned to him for the same amount, i.e., to the extent of his interest in it, this raises a pure question of civil law i.e., whether such sub-pledging to the same extent that is to say, for the same amount as the debt for which the original pledge, was made is a wrongful act, for if such sub-pledging was within the rights of the pledgee, any sub-pledging by him cannot be regarded as amounting to a criminal offence, as it is obvious that what a man does within the limits of the right given to him by the law, cannot amount to a criminal offence. As pledgee, the person has a right to sub-pledge to the extent of his interest in the pledged properties. Even if the view is not correct, still the pledgee must be deemed to have acted honestly under the mistaken belief as to the extent of his rights as pledgee, and the sub-pledges of the pledged goods cannot be regarded as amounting to criminal breach of trust. A.I.R. 1938 Mad. 551. = 47 L.W. 359 = 1938



M.W.N. 255=(1938) 2 M.L.J. 161=I.L.R. (1938) Mad. 639=39 Cr.L.J. 716=176 Ind. Cas. 391.

—S. 409—Pledge of article entrusted—Entrustment for sale—Pledge by trustee—Direction to return pledged article—Legality.

The accused entrusted with certain jewellery for sale, having pledged them to a money lender, the Magistrate convicted the accused for criminal breach of trust and ordered the return of jewellery to the complainant.

**Held**, the accused, not having obtained possession of the jewellery wrongfully, the Magistrate was not justified in ordering the return of the jewellery to the complainant in the absence of bad faith on the part of the pawnee. 65 Ind. Cas. 1000=23 Cr.L.J. 216=11 L.B.R. 217=A.I.R. 1922 L.B. 17.

—S. 406—Pledge—No dishonest intention—Sub-pledge by pledgee.

Where it was found that the pledgee never received money and had not denied the pledge.

**Held**: There was no criminal breach of trust. The finding of dishonest intention as against the pledgee cannot rest on the denial of the pledge contained in his statement in answer to the charge. For a finding as to the intention of a person, his statement or conduct after the charge is only a matter for presumption. The offence as against him must rest on events which happened on or about the time alleged in the charge. In the absence of any express condition to the contrary it was quite open to the pledgee to make a sub-pledge of the jewellery. Mere sub-pledge, therefore, prove no intention of dishonesty at all. 71 Ind. Cas. 58=9 O.L.J. 421=24 Cr.L.J. 10=26 O.C. 4 A.I.R. 1922 Oudh. 280.

16. Procedure.

—Ss. 408 and 409—Procedure—Charge of committing criminal breach of trust by accused as “a clerk or as an agent of the company”—Trial by a Second Class Magistrate—Legality.

If a charge had merely been that an alleged breach of trust was committed by the accused in the capacity of a clerk of the company, there could be no objection to the charge being framed under S. 408 of the Penal Code and to such a charge being tried by a Second Class Magistrate. But where the charge is on the alternative footing that the breach of trust was committed either as “a clerk or as an agent of the company” a Second Class Magistrate has no jurisdiction to try such an offence. The insertion in the charge of the alternative expression “or the agent of the company” has the effect of making the alleged offence one under S. 409 of the Penal Code, which is triable only by a Court of Session, Presidency Magistrate or a Magistrate of the First Class. The trial of such an offence by a Second Class Magistrate is an illegality affecting the jurisdiction of the trying Magistrate and vitiating all proceedings which must therefore be quashed. 60

L.W. 487=1948 M.W.N. 63=A.I.R. 1948 Mad. 32=(1947) 2 M.L.J. 163.

—S. 408—Procedure.

A charge under S. 408, Indian Penal Code, framed in accordance with S. 222(2) Criminal Procedure Code, can be combined with charge under S. 477-A, Indian Penal Code if the latter offence is committed in course of same transaction. A.I.R. 1944 Oudh 122=1944 O.W.N. 1=1944 A.W.R. 3=45 Cr.L.J. 538=19 Luck. 493=212 Ind. Cas. 125.

—S. 409—Procedure.

The charge under S. 408, Indian Penal Code, is not compoundable. A.I.R. 1943 Cal. 41=43 Cr.L.J. 926=I.L.R. (1943) 1 Cal. 154=203 Ind. Cas. 180.

—S. 405—Procedure—Jurisdiction of Court.

Trust at M—Complaint by trustee at M that his co-trustee residing at B misappropriated trust money by depositing it in his own firm at B and failing to send same at M for purposes of trust:

**Held**, that offence fell under first part of S. 405 and that the Court at M had no jurisdiction. A.I.R. 1942 All. 439=1942 A.L.J. 559=1942 A.W.R. 313=44 Cr.L.J. 102=203 Ind. Cas. 530.

—S. 409—Procedure—Fine, if recovered to be ordered to be paid to liquidator and not to creditor of bank at whose instance the case was launched.

Where the secretary of bank in liquidation was charged and convicted of offences committed before it went into liquidation, of misappropriation of moneys belonging to the bank by falsely alleging that they were advanced as loans to fictitious persons and he was ordered to pay fine:

**Held**, that the fine should not have been ordered to be paid to the fixed-deposit holder whose deposit had matured at the time the misappropriation took place and at whose instance the case was launched but the fine, if recovered, should have been ordered to be paid to the Liquidator for the benefit of all the creditor. A.I.R. 1941 Mad. 853=1942 M.W.N. 34=43 Cr.L.J. 425=198 Ind. Cas. 765.

—S. 406—Procedure—Jurisdiction.

The accused was arrested without a warrant, and was released on bail. The charge sheet was filed and a summons was issued for the appearance of the accused. The accused appeared of his own accord and the case was adjourned for inquiry. The case was then again adjourned and objection was taken on that day to the competency of the Magistrate to try the case on the ground that the arrest of the accused was illegal:

**Held**, that the propriety of the arrest had no bearing on the subsequent proceedings. Even otherwise, it could not affect the jurisdiction of the Magistrate to inquire into the offence under S. 406, Indian Penal Code committed by the accused within his jurisdiction. A.I.R. 1941 Mad. 181=1940 M.W.N. 1271=52 L.W.



892=(1940) 2 M.L.J. 1016=42 Cr.L.J. 320 (1)=192 Ind. Cas. 684.

—**Ss. 409, 471 and 467—Procedure.**—Postman charged under Ss. 409, 467 and 471 for misappropriating amount of money order and forging thumb impression and using such forged document—Offences committed on April 10, 1939—Sanction of Governor-General, held necessary for prosecution under S. 471, but the trial could proceed for other offences. A.I.R. 1941 Mad. 38=52 L.W. 516=(1940) 2 M.L.J. 564=1940 M.W.N. 1116=42 Cr.L.J. 263 (1)=I.L.R. (1941) Mad. 258=192 Ind. Cas. 263.

—**S. 403—Procedure.**

Charge under S. 403, not properly drawn up—It is not fatal unless prejudicial to the accused. 70 C.L.J. 301.

—**S. 409—Procedure.**

Trial of accused under S. 409, Penal Code—Application by him to be committed to Sessions after prosecutions case was over—Jurisdiction of Sessions Judge to order Magistrate to commit accused—Sessions Judge can only make reference to High Court if reference is necessary. A.I.R. 1938 Cal. 416=39 Cr.L.J. 569=175 Ind. Cas. 521.

—**S. 409—Procedure—Charge—Framing of.**

A charge of conspiracy in respect of an offence or offences under S. 409, Penal Code, need not be as specific as a charge of offence under that section. A.I.R. 1938 Cal. 195=42 C.W.N. 246=39 Cr.L.J. 417=174 Ind. Cas. 513.

—**S. 409—Procedure.**

The offence under S. 409 is not triable by the Magistrate of the Second Class and the alteration of the conviction to one under S. 409 read with S. 109 is illegal. A.I.R. 1938 Mad. 315=1938 M.W.N. 223=39 Cr.L.J. 465=174 Ind. Cas. 776.

—**Ss. 405 and 43—Procedure—Jurisdiction—Accused agent of firm in Cawnpore working in Calcutta—Money realised in Calcutta, not remitted—Misappropriation or conversion of money not alleged—Offence—Cawnpore Court, if has jurisdiction.**

The first part of S. 405, Penal Code, will apply where it is known that the accused had dishonestly misappropriated or converted to his own use certain property at a particular place and the jurisdiction to try the accused will be at the place where that dishonest misappropriation or conversion has taken place. But where it is alleged that the accused has failed to account for the property, then the second part of S. 405, Penal Code, will apply and jurisdiction exists at the place where the property should have been delivered by the accused.

The accused was engaged in Cawnpore as an agent of the firm and the accused was sent to Bengal with instructions to effect deliveries of sugar bags and to

realise the price of goods from customers and either personally bring the proceeds to Cawnpore or remit the money to Cawnpore. Accused did remit large sums to Cawnpore and subsequently, he withheld the money collected by him and embezzled. The evidence given on behalf of the complainant showed that these sums had been realised by the accused. It was further shown that the accused absconded and could not be traced. There was no evidence given on behalf of the complainant nor was any allegation made that the accused had actually misappropriated or converted to his own use this money by any positive act. The allegations and evidence of the complainant were that the accused had collected this money and had failed to send it to Cawnpore within a reasonable time.

**Held,** that the Magistrate at Cawnpore had jurisdiction because the allegations in the complaint were that the accused withheld money collected by him and did not forward it to Cawnpore. There was no charge that he misappropriated or converted to his own use the money at any particular place and his offence consisted in failing to carry out his contract and remit the money or bring the money to Cawnpore. He was guilty of an illegal omission, an offence committed within the jurisdiction of the Magistrate at Cawnpore. A.I.R. 1936 All. 193=1936 A.L.J. 3=1936 A.W.R. 23=37 Cr.L.J. 284=58 A. 644=160 Ind. Cas. 356.

—**Ss. 406 and 420—Procedure—Autrefois acquit.**

Charge under Ss. 406 and 420 based on same facts—Charge under S. 420 compounded with permission of Court—Accused acquitted of that charge—Principle of *autrefois acquit* applies and the accused cannot be tried on the charge under S. 406. A.I.R. 1936 Mad. 353=1936 M.W.N. 281=43 L.W. 548=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592(2) (F.B.).

—**S. 405—Procedure—Jurisdiction—Accused bound to render account at a certain place—Failure.**

Under cl. (2) of S. 181 of the Criminal Procedure Code, the offence of criminal breach of trust can be tried by Courts at three places, namely, at the place where the property was received, at the place where the property was retained by the accused or at the place where the offence was committed and under S. 405, Indian Penal Code, the offence can be committed at a place where the accused, according to the contract entered by him, fails to deposit the money and render accounts, and consequently, the Court at that place is fully competent to try the case. A.I.R. 1936 Oudh. 329=37 Cr.L.J. 322=1936 O.W.N. 212=12 Luck. 77=160 Ind. Cas. 567.

—**S. 403—Procedure—Jurisdiction.**

The proceeding must be started where the property is misappropriated. 1935 M.W.N. 649.

—**S. 403—Procedure—Jurisdiction.**

The offence of dishonest misappropriation is committed not at the place where the accused withdraws



the money, but at the place where he dishonestly misappropriates it or converts it to his own use. A.I.R. 1935 Oudh 4=11 O.W.N. 1392=36 Cr.L.J. 112=152 Ind. Cas. 463.

—S. 408—Procedure—Complaint under—Production of receipts by accused—Trial Court finding them to be not genuine—Appellate Court recording order of acquittal on order sheet—Procedure, legality of—Question to be considered—Criminal trial—Judgment.

In a complaint under S. 408, the accused produced a receipt and a *shiaha*. The Magistrate found these papers to be suspicious and convicted the accused. The Appellate Court considered that the *shiaha* and receipt were "highly suspicious," but observed that direct evidence to hold it to be a forgery was lacking. He thought that the absence of proof that the *shiaha* was bogus and the receipt a forgery was fatal to the prosecution case and recorded an order of acquittal on the order-sheet :

**Held**, that the procedure was to be deprecated and that Magistrates should ordinarily write regular judgments except in very simple cases. If the receipt and *shiaha* were not forgeries, the question was still to be considered whether in respect of such items there was failure to credit the money at the time when it ought to have been credited and to remit it at the time when it ought to have been remitted and whether this failure was dishonest or not, and the question was whether there was dishonesty at the time, and this question not having been considered, there was no proper trial of the appeal which would, therefore, have to be heard again. A.I.R. 1935 Pat. 495=1 B.R. 878=36 Cr.L.J. 1375=158 Ind. Cas. 332.

—S. 408—Procedure—Jurisdiction—Complaint—No allegation as to place where money was misappropriated—Case founded on allegation as to absence of account.

Where it is not alleged by the complainant that there has been misappropriation committed in respect of the sum which forms the subject-matter of a charge or any component parts of it at any particular places but the whole of the case as to misappropriation is founded upon the allegation that there was no account in respect of the money and account was to be rendered at a place within jurisdiction of the Presidency Magistrate's Court at Calcutta :

**Held**, that the Calcutta Court had jurisdiction to entertain the case. A.I.R. 1934 Cal. 392=35 Cr.L.J. 734=148 Ind. Cas. 736.

—Ss. 409 and 477-A—Criminal Procedure Code, S. 215—Procedure—Joint trial for conspiracy.

Separate trials and convictions of two persons—Order for commitment of both to Sessions for joint trial for conspiracy—Commitment on evidence taken in former trials :

**Held**, that the commitment was illegal inasmuch as the evidence against each accused was given in the former trials in the absence of the other. A.I.R. 1934 Mad. 691(2)=1934 M.W.N. 1095=36 Cr.L.J. 319(1)=68 M.L.J. 330=41 L.W. 704=153 Ind. Cas. 256.

—S. 409—Procedure—Jurisdiction to try complaint.

Where A, who resided at Cawnpore filed a complaint for criminal breach of trust at Cawnpore against B who resided at Faridpur in Bengal alleging that he had appointed B as his commission agent for the District of Faridpur on the understanding that the sale proceeds will be remitted by B to the complainant to Cawnpore :

12 F. Y. D.—30.

**Held**, that there was jurisdiction in a case of this nature in the Courts of the District to which the accused is alleged to be bound to make a remittance and the Cawnpore Court had, therefore, jurisdiction to try the charge. A.I.R. 1932 All. 367=1932 A.L.J. 269=33 Cr. L.J. 711 (2)=139 Ind. Cas. 159.

—Ss. 403 and 411—Procedure—Alternative charges—Validity of trial.

Offences under Ss. 403 and 411, Indian Penal Code, where several charges were rightly joined against the same accused under S. 235, Criminal Procedure Code—There can be no objection to one of such charges being in the alternative as provided by S. 236, Criminal Procedure Code nor can there be any objection to another accused being joined under S. 239, Criminal Procedure Code as regards one of those charges. A.I.R. 1932 All. 25=33 Cr.L.J. 122=1932 A.L.J. 113=54 A. 337=135 Ind. Cas. 225.

—Ss. 409 and 477-A Procedure—Joint trial.

Three offences of criminal breach of trust may be tried together and three offences of falsification of accounts may be tried together but they being of different kind, the trial of two or more charges of criminal breach of trust cannot legally be joined with two or more charges of falsification of accounts. A.I.R. 1932 Cal. 486=55 C.L.J. 111=33 Cr.L.J. 265(2)=36 C.W.N. 542=136 Ind. Cas. 136.

—S. 409—Procedure—Manager of Court of Wards discharged by Collector—Prosecution for criminal breach of trust—Sanction of Collector, necessity of.

A manager appointed by the Collector on behalf of the Court of Wards, who has been discharged by the Collector cannot be prosecuted for criminal breach of trust in respect of acts committed by him as manager except with the sanction of the Court of Wards through the Collector. A.I.R. 1931 Pat. 86=32 Cr.L.J. 555=12 P.L.T. 421.

—S. 408—Procedure—Fresh proceedings—Long delay—Procedure.

A complainant who allows a long period to elapse before resurrecting a case under S. 408, Indian Penal Code cannot possibly be allowed to re-agitate the matter on the ground that his feelings have been outraged by the action taken by the accused and that as a sort of retaliation he should be so allowed. 96 Ind. Cas. 388=27 Cr.L.J. 932=A.I.R. 1926 Lah. 213.

—S. 408—Procedure—Jurisdiction—Applicability of Criminal Procedure Code, Sec. 179.

Section 179 does not govern the jurisdiction of a Court to try the offence of criminal misappropriation or of criminal breach of trust for which a special provision is to be found in Section 181 (2). 22 P.R. 1915 (Cr.), foll. 77 Ind. Cas. 490=25 Cr.L.J. 410=A.I.R. 1924 Lah. 663.

—S. 406—Procedure—Jurisdiction—Goods held on trust at Calcutta—Payment to be made at Delhi—Fraudulent sale at Calcutta—Jurisdiction of Delhi Court.

The accused who was carrying on business at Calcutta ordered certain goods through complainant, a commission agent at Delhi. The goods were to be delivered at Calcutta and payment was to be made at Delhi. The goods arrived in Calcutta and the accused was allowed to take delivery on condition that he would hold them in trust till payment but he disposed of them before making the payment.



**Held**, that the offence was complete as soon as he misappropriated the goods by selling them without authority at Calcutta. And the fact that he did not first pay at Delhi as agreed upon did not affect the case. The loss at Delhi was not a "consequence" such as is referred to in S. 179 of the Code. 69 Ind. Cas. 631=A.I.R. 1924 Lah. 353.

—S. 403—Procedure—Articles found in possession at one time—Trial in regard to some and acquittal—Second trial in regard to others—Legality.

There was evidence that the different articles which were the subject of the charges in the two trials were stolen from different persons, but there was no evidence that they were received at different times. With respect to some the accused was tried and acquitted in the first trial.

**Held**, the second trial was illegal under the provisions of S. 403, Criminal Procedure Code, 73 Ind. Cas. 931=37 C.L.J. 326=27 C.W.N. 554=50 Cal. 594=24 Cr.L.J. 707=A.I.R. 1923 Cal. 557.

—S. 405—Procedure—Money sent from place A to agent in place B—Breach of trust in B—Jurisdiction of Court at A.

One of the consequences of criminal breach of trust, if committed by an agent, would be loss to the person to whom, the property entrusted to the agent, belonged, and therefore as the complainant would be entitled to get the proceeds of the articles, sent to the agent, paid to him; if the proceeds were not paid to him, loss would be incurred at the place where he lives and therefore the Court would have jurisdiction. Section 181 (2) in no way restricts the provision of Section 179. There is nothing in that section which prevents a Court within whose local limits any consequences of an offence have ensued, having jurisdiction to try the offence.

The word "Consequence" in Section 179 bears its ordinary grammatical meaning and is not restricted to meaning a consequence which is a necessary ingredient of the offence. 65 Ind. Cas. 637=46 Bom. 641=24 Bom. L.R. 46=23 C.L.J. 173=A.I.R. 1922 Bom. 39.

—S. 406—Procedure—Breach by administrator—Prosecution—Sanction of appointing Court.

A criminal Court cannot take cognizance of an offence under S. 406 of the Penal Code, against an administrator appointed under the Probate Act, without the sanction of the High Court, when such administrator has submitted his accounts to the Court and the mere fact that accounts have been filed in the Probate Court or even the fact that the accounts have been passed by the Court, does not absolve the administrator from his liability for any particular sums of money which may have been misappropriated by him. 46 Cal. 432. Rel. on. 60 Ind. Cas. 791=33 C.L.J. 252=22 Cr.L.J. 295=A.I.R. 1921 Cal. 431.

—S. 403—Procedure—Offence—When complete—Place of trial.

An offence under S. 403 is complete the moment the accused receives or retains the money with a dishonest motive of appropriating it or converting it to his own use. The failure to return it to the complain-

ant's master is not an essential ingredient for the offence of misappropriation.

A servant withdrew money from a firer at Barh deposited by him in his master's name but failed to account for it. The complainant was filed in Patna Court. The facts do not necessarily involve question of adjustment of accounts but establish an offence under S. 403, and the Patna Magistrate has no jurisdiction to try the case as money was received and retained at Barh. 1 P.L.T. 200=21 Cr.L.J. 519=56 Ind. Cas. 775.

—S. 406—Procedure—Article given to accused under written agreement—Jurisdiction of Criminal Courts to decide whether agreement was real or nominal.

Where a person is guilty of criminal breach of trust in respect of articles delivered under a written instrument which expressly recites that they were returned to him after money received, the Magistrate cannot enquire whether the instrument represents a real transaction between the parties or a mere *benami* arrangement making the accused a trustee in respect of those articles. (1916) 2 M.W.N. 158=4 L.W. 198=18 Cr.L.J. 34=36 Ind. Cas. 866.

—S. 409—Procedure—Jurisdiction to try an offence.

An offence under S. 409 can be tried by a Magistrate if the embezzled property has been received or retained within his jurisdiction. 4 M.L.T. 481=9 Cr.L.J. 92=1 Ind. Cas. 796.

### 17. Retention.

—S. 406—Retention—Jewel taken from goldsmith as sample for approval—Retention towards debt due by goldsmith.

Where a person takes from a goldsmith a gold jewel for showing it to his wife and placing an order for a similar jewel if she approved of it but fails to return it and retains it with himself towards some debts due to him by the goldsmith, he will be guilty of an offence under S. 406 of the Indian Penal Code. He has utilised the jewel for a purpose not intended and against the express agreement. The mere fact that the jewel is intact is irrelevant. 1949 M.W.N. 631=62 L.W. 613=3 A.I.Cr.D. 669=A.I.R. 1950 Mad. 49=51 Cr.L.J. 330=(1949) 2 M.L.J. 296.

—S. 403—Retention—Retention without justification of money realised—Inference from.

Although it is true that mere realisation of money and failure to credit the same is not in itself criminal misappropriation, the retention of money realised for a particular purpose without any justification shown ordinarily leads to the inference that it has been misappropriated; and the reasonable inference to draw when a person has realised money for somebody else and has not paid is that he has appropriated it to his own needs. It is of course open to such person to show that such an inference ought not to be drawn. 51 C.W.N. 301.

—S. 405—Retention—"Entrustment"—Meaning of—Secretary selling Government Promissory Notes and retaining amount.

When a secretary of a bank who is authorised under the terms of a power-of-attorney to purchase Government Promissory Notes on behalf of the bank purchases the notes and receives them, he becomes "en-



trusted" with them by the bank within the meaning of S. 405, Indian Penal Code. He is bound to pay to the bank the money received by him which was due to the bank and has no authority to keep the money in his hands in satisfaction of any claim he may have against the bank. Such retention amounts to misappropriation. A.I.R. 1942 Oudh. 473=1942 O.W.N. 485=43 Cr. L.J. 830=1942 A.W.R. 295=18 Luck. 408=202 Ind. Cas. 382.

#### —S. 409—Retention.

The accused who was the Village Munsif collected certain amounts from certain persons on March 15, 1937 and April 17, 1937. The amounts were remitted to the treasury on May 21 and April 24, 1937, respectively before any complaint was received:

**Held**, that the retention of the amount in the interval would not, by itself, justify the conviction under S. 409, Indian Penal Code. A.I.R. 1941 Mad. 761=54 L.W. 235=1941 M.W.N. 667=43 Cr.L.J. 445=198 Ind. Cas. 893.

#### —S. 403—Retention.

Mere retention of money would not warrant a conviction under S. 403 unless there is evidence that accused used the money. A.I.R. 1941 Mad. 250=52 L.W. 633=1940 M.W.N. 1110=(1940) 2 M.L.J. 748=42 Cr.L.J. 296(1)=192 Ind. Cas. 404.

#### —S. 405—Retention.

Mere retention of money entrusted to a person without any misappropriation, even though he was directed by the person to pay it to so and so, or to deal with the money in a particular way is not a criminal breach of trust; unless there is some actual user by him which is in violation of law or contract, there is no criminal breach of trust; and even if there is such user, there must be a dishonest intention. Putting the money into one's own account in the Bank may be misappropriation or may not be misappropriation. If it is drawn upon for his own purposes, it is misappropriation. But if he did not draw on it but kept the money in the Bank, there is no misappropriation, and no criminal misappropriation. A.I.R. 1940 Mad. 329=1939 M.W.N. 1213=41 Cr. L.J. 824=190 Ind. Cas. 123.

#### —S. 403—Retention.

Mere retention is not sufficient—The property misappropriated must be used, disposed of or appropriated. 1935 M.W.N. 1063.

#### —S. 409—Retention—Offence, when complete—Mere retention, if raises presumption of dishonest intention—Money not used for purposes intended but retained for a long time—Inference.

The offence of breach of trust is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged.

Mere retention of money would not necessarily raise a presumption of dishonest intention: but it is a step in that direction. The fact that money entrusted to be used for a particular purpose was not used for such purpose, that there was retention for a sufficiently long time, would justify the inference that the accused did

not intend to pay. A.I.R. 1934 Cal. 532=38 C.W.N. 467=35 Cr.L.J. 1279=59 C.L.J. 306=151 Ind. Cas. 22.

#### —S. 403—Retention.

Ordinarily mere retention of money will not suffice to constitute the offence of criminal misappropriation. 111 Ind. Cas. 730=11 A.I.Cr.R. 82=30 Bom. L.R. 624=29 Cr.L.J. 922=A.I.R. 1928 Bom. 205.

#### —S. 406—Retention of money against debt—If offence.

Where money is placed in the hands of the accused by the complainant and is retained by the accused against a debt due from the complainant, the accused cannot be said to have acted dishonestly within S. 406. 92 Ind. Cas. 895=27 Cr.L.J. 383=7 L.R.A. Cr. 89=A.I.R. 1926 All. 298.

#### —S. 409—Retention—By President of Co-operative Society—President of Co-operative Society retaining money drawn from Bank with permission of fellow members—No offence.

A President of a Co-operative Credit Society was authorised to draw a certain amount of money from a bank. After so doing, he himself retained the amount instead of crediting it to the Society. It was proved that he did this with the permission of his fellow members of the managing committee, as he needed it for some work.

**Held**, that under the circumstances the offence committed may be said to be purely of a technical nature and even this is doubtful. 12 L.L.J. 165=129 Ind. Cas. 286=A.I.R. 1930 Lah. 1045.

#### —S. 406—Retention—Criminal breach of trust—Agent entitled to adjust collections towards remuneration—Retention of money.

The accused who was employed as agent for collection of taxes by the Union Committee was under agreement to take 10 per cent of the collection as remuneration and to hand over the balance to his master or to deposit it into the treasury, no period being fixed for the latter purpose. On being convicted on a charge under S. 406, Indian Penal Code, for having failed to account for a certain sum of money collected by him.

**Held**, in revision that as the accused was entitled to deduct his remuneration from the collections and as no period was fixed for payment into the treasury, a charge of the criminal breach of trust could only be maintained after an adjustment of accounts. The mere fact that he retained the sums collected is not a conclusive proof of criminal breach of trust. 21 Cr. L.J. 509=56 Ind. Cas. 669 (Pat.).

#### —S. 408—Retention—Retaining money for fifteen months.

The act of a servant or clerk retaining money for 15 months throws doubt on the *bona fides* of the accused, though it is not by itself conclusive on the question of criminal misappropriation or breach of trust. 18 Cr. L.J. 655=40 Ind. Cas. 303 (All.).

#### —Ss. 406 and 417—Retention—Criminal breach of trust—Cheating—Payment of rent by tenant—Detention of money towards abwab.

Where a tenant paid Rs. 90 as rent to his landlord who deducted Rs. 25 towards some subscription and



refused to grant a *Dakhila* or return of money until Rs. 25 more were paid,

**Held**, that the landlord did not commit any criminal offence. 15 C.L.J. 515=13 Cr.L.J. 512=15 Ind. Cas. 656.

### 18. Revision.

#### —S. 408—Revision—Conviction under—Concurrent findings of fact by lower Courts—Interference.

Ordinarily, the High Court will not interfere in revision with the concurrent findings of fact of the two lower Courts, but interference is proper where, in a case under S. 408, Indian Penal Code, it appears to the High Court that the prosecution of the accused has been misconceived and there is really no legal and satisfactory evidence to convince the Court that the accused, at the time when he is said to have misappropriated certain sums of money, had guilty knowledge or *mens rea* so as to convert what at best amounted to a civil wrong or tort into a penal offence amounting to criminal breach of trust by a servant. A.I.R. 1937 Oudh. 331=38 Cr.L.J. 491=1937 O.W.N. 505=168 Ind. Cas. 58.

### 19. Theft.

#### —Ss. 403 and 378—Theft.

Cattle turned out in pasture to graze are in possession of owner—Taking of such cattle is theft and not criminal misappropriation. A.I.R. 1938 Rang. 138=1938 Rang. L.R. 63=39 Cr.L.J. 607=175 Ind. Cas. 515.

#### —Ss. 405 and 379—Theft—Persons entrusted with paddy crops—Removal.

Where the accused were entrusted to watch the paddy crops of the complainant and they cut the crops and disposed of the same themselves, they were guilty of either theft or criminal breach of trust. 36 Cal. 758=10 Cr.L.J. 253=3 Ind. Cas. 189.

#### —Ss. 403 and 379—Theft—Bullocks following cow—Possession.

Where the bullocks follow a cow and disappear, the owner has lost possession of the animals and they cannot be subject of theft but can be of criminal misappropriation. 10 Bur. L.T. 261=18 Cr.L.J. 300=38 Ind. Cas. 332.

### 20. Wrongful gain.

#### —S. 409—Wrongful gain—Adatya selling cotton to ginning factory according to custom of market—Held, no wrongful gain—Owner of cotton, held entitled to price prevailing on day of demand.

The complainant gave cotton to the accused who was an *adatya*, to be sold when instructions were given to sell them. There was no particular agreement but the understanding was to be governed by the custom of the market. The *adatya* at once handed the cotton over to the ginning factory. All cotton delivered to the ginning factory was lumped together and ginned and sold as the factory thought fit. When the *adatya* demanded payment the factory paid him at the rates prevailing on that day; and when the seller demanded payment the *adatya* paid him at the rate prevailing on that day:

**Held**, that by sale of the cotton to the factory according to custom, it could not be said that the *adatya* caused wrongful gain to himself by converting it to his own use. The parties had impliedly agreed that the transaction should be governed by the custom of the market and in selling the cotton to the ginning factory, the *adatya* was merely acting in accordance with that custom. The property in the cotton had passed from the complainant and he was entitled merely to payment at the rate prevailing on the day when he asked for it. A.I.R. 1943 Nag. 168=1943 N.L.J. 128=44 Cr.L.J. 423=I.L.R. (1943) Nag. 436=205 Ind. Cas. 529.

#### —S. 405—‘Wrongful gain,’ ‘wrongful loss,’ meanings of.

Wrongful gain includes wrongful retention, and wrongful loss includes being wrongfully kept out of property as well as being wrongfully deprived of property. A.I.R. 1936 Pat. 350=15 Pat. 108=17 P.L.T. 302=2 B.R. 696=37 Cr.L.J. 877=164 Ind. Cas. 74.

### 21. Miscellaneous.

#### —S. 409—Abetment, what is—Offence complete—Subsequent help to real offender to conceal embezzlement—If abetment.

Where the offence of embezzlement was *ex hypothesi* complete long before, anything done subsequently to help the real offender to conceal the embezzlement might be punishable under some other section but does not amount to abetment of the offence under S. 409. 112 Ind. Cas. 850=30 Cr.L.J. 18=11 A.I.Cr.R. 405=A.I.R. 1928 Lah. 382.

#### —S. 409—Miscellaneous—Power to grant bail.

Under the provisions of S. 497, a Magistrate has no power to grant bail in cases falling under S. 409, Penal Code. 3 Rang. 538 Rel. on. 128 Ind. Cas. 577=A.I.R. 1930 Rang. 335.

#### —S. 409—Miscellaneous—Similar offences distinguished—Difference between offence of theft, cheating, criminal misappropriation and criminal breach of trust.

An easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner. 106 Ind. Cas. 678=9 A.I.Cr.R. 282=29 Cr.L.J. 86=A.I.R. 1928 Nag. 113.

#### —S. 409—Miscellaneous—‘appropriate,’ ‘to misappropriate,’ meaning of.

The words ‘to appropriate’ mean setting apart or assigning to a particular person or use. The words, ‘to misappropriate,’ mean to set apart for or assign to the wrong person or a wrong use and this act must be done dishonestly. 13 A.L.J. 1131=16 Cr.L.J. 795=31 Ind. Cas. 651.



## —Ss. 410 to 414.

## Synopsis

1. Abetment.
2. Constructive liability.
3. Conviction and sentence.
4. Evidence and proof.
5. Intention and knowledge.
6. Interpretation.
7. Lost property.
8. Presumption of guilt.  
See also EVIDENCE ACT, S. 114—RECENT POSSESSION.
9. Procedure.
10. Several articles.
11. Stolen property, what is.
12. What constitutes offence.
13. Miscellaneous.

—Ss. 411, 414—Joint trial—Same transaction.  
See CR. P. C., S. 239. 6 Bom. L. R. 361.

—S. 411—Possession of stolen property—Presumption. See S. 379. 9 Bom. L. R. 27=5 Cr. L. J. 63.

—S. 411—Possession of stolen property—Possession in place common to several, not possession of stolen property—Possession of each. See EXPLOSIVE SUBSTANCES ACT. 9 C.L.J. 663=2 Ind. Cas. 681=10 Cr. 155=L. J. 13 C.W.N. 861.

—S. 411—Not applicable to thief himself. See SS. 224, 411. (1901) A.W.N. 77=23 A. 266.

—S. 411—Dishonesty receiving stolen property. See 26 M. 467.

## 1. Abetment.

—Ss. 411, 412—Accomplice.

A person who himself steals and hands over the stolen property to another who is charged with having received and retained the stolen property with dishonest intention would be an accomplice in offence of receiving stolen property. A.I.R. 1934 Sind 185=28 S.L.R. 336=36 Cr.L.J. 608=154 Ind. Cas. 937.

## 2. Constructive liability.

—S. 412—Constructive liability—Proof of exclusive possession of room in which stolen articles are found—Necessity.

Where stolen articles are found in a box in a room in the joint occupation and possession of a husband and wife, the husband cannot be convicted of an offence under S. 412, I.P. Code, without proof that he was in exclusive possession. 4 A.I.Cr.D. 286=1950 A.W.R. 265.

—Ss. 411 and 412—Constructive liability—Stolen articles in a dacoity found in house not in the exclusive occupation of accused.

Where the articles stolen during the course of a dacoity are found in a house which is not in the exclusive occupation of the accused but is in the occupation of the accused and his brothers, the accused cannot be convicted under S. 412, I. P. Code. A.I.R. 1950 All. 180=51 Cr.L.J. 586.

—S. 412—Constructive liability—Charge under —Proof required—Possession of junior member of family—Evidence Act, S. 114, Ill. (a).

A charge under S. 412, I.P. Code, will not be proved by merely proving knowledge or belief that the articles were stolen articles. It must further be proved that he accused had knowledge or belief that the possession

of the articles had been transferred by the commission of the technical offence of dacoity. There must be positive evidence proving such knowledge or belief. The presumption under S. 114, Ill. (a) of the Evidence Act cannot possibly suffice.

When a number of persons are living in the same family under the common headship of one of them who is the principal member and who owns the house, possession of any article found in the house is **prima facie** the possession of the master. Possession cannot be found against a junior member except on proof of special acts of appropriation or acts indicating exclusive control on his part. 15 A. 129 and 67 Ind. Cas. 588, approved. I.L.R. (1946) 2 Cal. 619.

—S. 411—Constructive liability—Joint possession of room where stolen property was found.

In a case under S. 411, even if it be found that the accused was the sole occupant of the room, it does not necessarily follow that he must have been aware of the presence in the room of all the articles that were found therein. It is incumbent upon the Judge to consider the circumstances of the occupation of the room and to consider whether it was reasonably possible for other persons to introduce the articles into the room without the accused's knowledge. The mere fact that he failed to prove that he had guests in his house in the previous night is not in itself sufficient to prove that the circumstances of his possession of the house were such as to preclude the reasonable possibility of other persons introducing the stolen goods into the house. This is specially so when it is the case of the prosecution that the accused and another person were in joint possession of the room and the finding that the accused was not in joint possession was based on inadequacy of prosecution evidence and not on positive evidence. A. I. R. 1942 Cal. 440=43 Cr.L.J. 561=199 Ind. Cas. 442.

—S. 411—Constructive liability—Husband and wife.

The mere fact that the accused's wife produced the stolen properties from the house where both were living would not warrant his conviction under S. 411. A. I. R. 1941 Mad. 694=1941 M.W.N. 479 (2)=42 Cr.L.J. 738=195 Ind. Cas. 432.

—S. 411—Constructive liability—Father and son.

The mere fact that a thing is found in a house occupied by father and son in common, is no proof that the one was in possession of it. A.I.R. 1941 Pat. 383=7 B.R. 384=42 Cr.L.J. 293=22 P. L. T. 694=192 Ind. Cas. 403.

—Ss. 412, 411—Constructive liability—Father and son.

When the son had taken part in the commission of a dacoity, the presumption, which would naturally be drawn, would be that the **dhoti**, which had been stolen and found in the house had remained in his possession, and the father cannot be made, in any way, accountable for it merely because it was in the house which his son and himself jointly occupy. A.I.R. 1941 Pat. 223=7 B.R. 361=42 Cr.L.J. 258=192 Ind. Cas. 253.

—S. 411—Constructive liability.

It is certainly not intended that no person in possession of house shall be convicted of being in possession of stolen property if there happen to be other people living in his house. A.I.R. 1936 All. 650=1936 A.L.J. 508=1936 A.W.R. 456=37 Cr. L.J. 551=162 Ind. Cas. 295.



**—S. 411—Constructive liability—Brothers living jointly.**

Where some stolen articles are found in a house occupied by two brothers who used to live jointly, younger of them being the *karta*, and it is found he was often visited by absconding members of criminal tribe, the elder brother cannot be convicted under S. 411 as it is not safe to attribute knowledge to him simply because his brother kept bad company. It is difficult to hold that his knowledge extended to every item of property received by his brother or brought to him by the members of the criminal tribes. There may be a strong suspicion against him, but for convictions in a criminal case mere suspicion is no proof of guilt. A.I.R. 1936 Pat. 534=3 B. R. 22=37 Cr. L.J. 1123=165 Ind. Cas. 230.

**—S. 411—Constructive liability—Stolen property found in a house—Liability of head of family and members.**

That property found in a house occupied by several male and female members residing therein should be considered to be in possession of the head of the family, is a wholly unwarranted assumption and can have no place in cases in which possession and criminal intent form the essential elements of an offence. It is equally unwarranted to assume that every one residing in the house should be deemed to be in possession of an article recovered from it. Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and can exercise it. A person cannot be said to be in possession of a thing unless it is shown by evidence that he had, dominion over it and knew that he had it. The mere fact that a thing is found in a house occupied by a person in common with others or at a place in the house which is as much accessible to others as to him is no proof that he was in possession of it.

In such cases, difficulty in securing evidence cannot obviously justify dispensing with it and assuming the guilt of any one of the members of the family. A.I.R. 1933 All. 437=34 Cr. L.J. 930=1933 A. L. J. 1338=145 Ind. Cas. 130.

**—S. 411—Constructive liability—Liability of all.**

In a case under S. 411, if the circumstances are such as to raise a presumption that two or more persons are in joint possession of stolen property, both of them may be convicted. There is no justification for the view that there cannot be a joint criminal possession. A.I.R. 1933 Lah. 148=34 P.L.R. 576=34 Cr. L.J. 604 (1)=143 Ind. Cas. 463.

**—S. 412—Constructive liability—Step-father and son.**

Where in a case of dacoity no stolen property is recovered from the accused but some of it is given up by his step-father with whom he was living, the accused cannot be convicted under S. 412, I.P.C., in the absence of sufficient proof that the property had been taken to the house inhabited by the accused and his step-father. A.I.R. 1933 Oudh 423 (1)=10 O. W. N. 842=35 Cr. L.J. 165 (1)=146 Ind. Cas. 708.

**—S. 411—Constructive liability—Stolen article found by Police in a house occupied by accused and his mother—No evidence as to accused knowing of it—Conviction if sustainable.**

An ornament called a *kangni*, stolen in a burglary, was found by the Police in a jar of chillies in a house occupied by the accused and his mother. There was nothing to show that the accused put the *kangni* in the jar or knew that it was there.

Held, that he cannot be convicted under Penal Code, S. 411. 94 Ind. Cas. 909=27 Cr. L. J. 717 (Lah.).

**—S. 411—Constructive liability—Property found in room accessible to persons other than accused.**

Where the goods which were alleged to be stolen property were found in a room which had no shutters and which was accessible to all the members of the accused's family.

Held: that the accused could not be conclusively said to have been in possession of the stolen articles. 87 Ind. Cas. 846=4 All. 511=23 A.L.J. 421=26 Cr.L. J. 1022=A.I.R. 1925 All. 478.

**—S. 411—Constructive liability—Joint Hindu family—Wife of one member in possession of stolen property—Presumption as to guilt of husband.**

Where in a house occupied by several male and female members of a joint family, a locked box containing stolen property was found, the key of which was produced by the wife of a member of the family who was not in the house at that time, the husband of the woman who produced the key upon these facts, was convicted under S. 411 of the Indian Penal Code.

Held, that from the mere fact of the actual possession being with the wife, it cannot be presumed in every case of this kind that the possession of the wife was *per se* the possession of the husband. Possession of wife would frequently be the possession of the husband. In fact it would usually be the possession of the husband, but there must be something, to connect the husband with the possession, more than the mere fact that he is the husband. 67 Ind. Cas. 338=20 A.L.J. 162=23 Cr. L.J. 386=A.I.R. 1922 All. 83.

**—S. 411—Constructive liability.**

The mere fact that accused and his father lived in the same house, that the father had been convicted under S. 411 and that the accused denied the existence of stolen property in the house, is not enough to justify his conviction. 67 Ind. Cas. 588=24 O. C. 294=A.I.R. 1921 Oudh 225.

**—S. 410—Constructive liability—Possession—Doubtful.**

When a place in which the article is found, is one to which several persons have equal right of access, the article cannot be said to be in the possession of any one of them. 9 C.L.J. 663=13 C.W.N. 861=10 Cr. L.J. 125=20 Ind. Cas. 681.

**—S. 411—Constructive liability—Possession, meaning of—House in possession of Manager of joint Hindu family—Liability.**

The Manager of a joint Hindu family is *prima facie* responsible for the illegal possession of stolen articles found in his house unless the presumption is rebutted upon the particular facts and circumstances of the case. Where the possession of different stolen properties found with different accused persons is under the joint control of all of them, or is due to concert or collusion amongst them, a joint trial of all of them is not illegal. 33 Cal. 1256, Foll. 1 Pat. L.T. 431=58 Ind. Cas. 341=21 Cr. L. J. 757.

**—S. 411—Constructive liability—Possession meaning of—House occupied by several persons.**

Where stolen property is found in a house occupied by several persons it is not enough to show that the



property was found in the house, to convict a member of the family who might have had nothing to do with bringing or keeping it there. 22 O.C. 256=21 Cr.L.J. 40=54 Ind. Cas. 248.

—S. 411—Constructive liability—Possessing property some time after—Twelve days.

Where a stolen property was found on accused's sister, twelve days after the theft and the accused and his sister were living in the same house.

Held, possession was rightly traced to accused. 9 M.L.T. 291=12 Cr. L.J. 48=9 Ind. Cas. 288.

—S. 411—Constructive liability—Possessing property sometime after—Four months.

Possession of sundry articles traced to the accused four months after the theft cannot sustain a conviction for anything more serious than under S. 411. An accused cannot be made liable for the property found in his wife's house when he does not live there and is not on good term with her people. 10 M. L. T. 237=12 Cr.L.J. 549=12 Ind. Cas. 525.

—S. 411—Constructive liability—Possession, meaning of—House occupied by several persons—Property found in that house.

Where property is found in the house in the possession of some persons, mere discovery of any stolen property in that house does not sufficiently prove that the possession was of any one of those persons. 19 M.L.J. 301=9 Cr.L.J. 52=4 Ind. Cas. 163.

—S. 411—Constructive liability—Possession of stolen property—Joint Hindu family—Liability of head of the family or managing member.

Stolen property consisting of a considerable quantity of cloth weighing about five maunds was discovered on search by the Police in a locked room in a house belonging to and inhabited by a joint Hindu family composed of a father, son and grandson. The son was found to be the managing member of the family. The key of the room in which the stolen property was found was produced by him. The circumstances were such that it was very improbable that the cloth could possibly have been placed where it was found without the connivance of some or all of the members of the family.

Held, that under the above circumstances the conviction of the managing member of the family under S. 411 was a proper conviction. 1907 A.W.N. 187=29 A. 598.

### 3. Conviction and sentence.

—S. 411—Conviction and sentence.

Ingredients of offence—Absence of evidence to prove receipt of stolen goods with knowledge that they were stolen—Conviction—Not sustainable. 219 Ind. Cas. 391=46 Cr.L.J. 613=10 Cut. L. T. 87=11 B. R. 408=A.I.R. 1945 Pat. 161.

—S. 411—Conviction and sentence.

That the accused is a member of the criminal tribe is no ground for differentiation of sentence for an offence under S. 411. A.I.R. 1941 Mad. 708=(1941)2 M.L.J. 253=42 Cr. L.J. 224=54 L. W. 479=1941 M. W. N. 480=196 Ind. Cas. 227.

—S. 411—Sentence of fine only if insufficient.

Where, on conviction of an offence under S. 411, the accused were sentenced only with fine which was less than the value of the cattle stolen :

Held, that the sentence was so light as to form a direct encouragement to other persons who may wish or be tempted to indulge in cattle theft or in the sale of stolen cattle and that in the circumstances, a sentence of one year's rigorous imprisonment should be awarded. A.I.R. 1935 Pesh. 100=36 Cr.L.J. 1138=157 Ind. Cas. 169.

—S. 411—Conviction and sentence.

Person found in possession of a stolen revolver without license. He can be tried both under I. P. C and Arms Act and can be punished under both enactments; S. 26, General Clauses Act is no bar. A.I.R. 1933 All. 461=1933 A.L.J. 523=34 Cr.L.J. 1018=145 Ind. Cas. 609.

—S. 414—Conviction and sentence.

The fact that certain persons were convicted in respect of possession of stolen revolver under Ss. 411 and 414, I.P.C. respectively is no bar to their being convicted in respect of it under S. 19 (f), Arms Act, also. A.I.R. 1933 Oudh 470=10 O.W. N. 895=35 Cr.L.J. 36=146 Ind. Cas. 354 (2).

—S. 412—Conviction and sentence—Dacoit—Receiver of stolen property.

A receiver of the articles of petty value stolen at a dacoity should not be treated in practically the same manner as though he were one of the actual dacoits. 103 Ind. Cas. 62=1 L.C. 163=28 Cr.L.J. 638=8 A.I. Cr. R. 312=A.I.R. 1927 Oudh 277.

—S. 411—Conviction and sentence.

A boy of 14-1/2 years, convicted under S. 411, I.P.C. cannot be let off after mere admonition though 6 months' rigorous imprisonment is not proper on a youthful first offender.

A security for good behaviour for 1 year was thought to be sufficient in the case. 82 Ind. Cas. 480=1 P.L.R. (Cr.) 177=25 Cr. L. J. 1312=6 P.L.T. 294=A.I.R. 1923 Pat. 297.

—S. 411—Conviction and sentence.

If the stolen property cannot be identified, conviction under S. 411 is untenable. Sweets cannot generally be identified. 35 P.W.R. 1912 (Cr.)=194 P.L.R. 1912=13 Cr.L.J. 720=16 Ind. Cas. 528.

### 4. Evidence and proof.

—S. 411—Evidence and proof—Offence under facts to be proved.

The prosecution, for a successful conviction under S. 411, I.P. Code, has to prove, firstly that the stolen property was dishonestly received or retained by the accused and secondly that he should have known it or should have had reason to believe that it was stolen property. If either ingredient is not established, the charge under S. 411 is not proved. 1949 A.L.J. 445=1949 A.W.R. 532.

—S. 411—Evidence and proof—Gist of offence—Proof required.

Once the property has been proved, beyond all reasonable doubt, to have been stolen and properly identified, the possession of such property or retention of it knowing it to have been stolen will amount to an offence under S. 411, I. P. Code. It is not necessary for the prosecution to prove from where the accused received the stolen property or the time when he did receive that. A.I.R. 1949 H.P. 15.



—S. 412—Evidence and proof—Offence under—  
Essentials to be established.

In order to establish an offence under S. 412 of the I.P. Code, there must be some evidence to show that the accused knew or had reason to believe that the property was stolen in course of dacoity. Such knowledge or belief cannot be presumed from mere possession of stolen property. The prosecution has to show something more than the mere possession of stolen goods if a conviction under S. 412 of the I.P. Code, is to be sustained. 1948 O.W.N. 404=1948 A.L.W. 402=1949 A.W.R. 299=A.I.R. 1949 A. 245=3 A.I. Cr. D. 324=50 Cr. L.J. 379=1949 A.L.J. 202.

—S. 411—Evidence and proof—Burden of proof—  
Duty of prosecution on rebuttal of presumption  
from possession by reasonable explanation of  
possession—Rule.

In a prosecution on a charge under S. 411, I.P. Code, as soon as the prosecution produce evidence to the effect that the accused was found in possession of stolen property, a presumption arises that he is either the thief or the receiver of stolen property, and this presumption, when unexplained, is regarded by the Court usually as conclusive. But if a prisoner in a receiving charge puts forward a reasonable explanation which might be true, a duty is cast on the prosecution to prove that the explanation is false if they want to secure a conviction of the accused. 49 Cr. L.J. 147=A.I.R. 1948 Lah. 80.

—S. 411—Evidence and proof—Conviction under  
—Evidence necessary—Evidence of Head Constable  
and alleged information upon which the  
constable proceeded—Articles found in the house  
where accused lived—No other circumstances  
connecting either of the accused with the stolen  
property—Legality of conviction.

In a case against petitioners convicted under S. 411, I.P. Code, the evidence upon which the conviction was based consisted of the evidence of Head Constable on the railway platform who arrested the accused and the seizure of the articles from the house in which they were living on information alleged to have been given by one of the petitioners.

Held, that the mere recovery of certain property from the house of the two petitioners was not sufficient by itself to attribute guilty knowledge to either of them unless there were some other circumstances connecting them with the possession of the property. Except the alleged statement or information given to the Head Constable regarding the stolen property in the possession of the accused there was hardly any legal evidence on which a conviction under S. 411, I.P. Code, could be justified. 1946 M.W.N. 732=A.I.R. 1947 Mad. 195=48 Cr. L.J. 720=231 Ind. Cas. 248=(1946) 2 M.L.J. 435.

—Ss. 411, 412—Evidence and proof.

It is quite meaningless to convict the accused both under S. 395 and under S. 412 with regard to the evidence about the finding of certain articles in their possession. If, from the evidence on record, an inference of a person being a dacoit can be drawn, conviction under S. 395 is proper. But when there is no evidence that accused knew that the property was stolen the conviction can be under S. 411 and not under S. 412. A.I.R. 1944 Cal. 39=45 Cr. L.J. 468=211 Ind. Cas. 624.

—S. 411—Evidence and proof—Accused pointing  
out place from where property was recovered.

Where the sole evidence against an accused charged with an offence under S. 411 consisted of the fact that upon the Sub-Inspector questioning him, the accused told him that he would point out the property, that he actually took him to the *ghura* and dug out the property and handed it over to the Sub-Inspector:

Held, that this evidence was not sufficient to base his conviction under S. 411. A.I.R. 1943 Oudh 298=1943 O.W.N. 96=44 Cr. L.J. 473=1943 A.W.R. 28=206 Ind. Cas. 299.

—S. 412—Evidence and proof—Possession of  
property taken away by dacoits—When offence.

Mere possession of property taken away by dacoits at the time of commission of dacoity will not be sufficient to bring home the charge under S. 412. It must be proved that the accused had knowledge or had reason to believe that the possession of the property was transferred by the commission of dacoity. A.I.R. 1942 Pat. 439 (1)=43 Cr. L.J. 911=9 B.R. 54=203 Ind. Cas. 16.

—S. 411—Evidence and proof.

An axe was found in the house of the accused. It fitted the marks found on the complainant's box which was broken open:

Held, that to convict the accused merely on this would be dangerous unless the axe was an unusual one, and if it was of an ordinary type, the evidence would be of little value. A.I.R. 1942 Pat. 304 (1)=8 B.R. 773=43 Cr. L.J. 648=8 C.L.T. 17=201 Ind. Cas. 206.

—S. 411—Evidence of proof.

If the person gives a reasonable explanation of the possession, the Court should not find him guilty even if it is not affirmatively satisfied that such explanation is not true. Where the accused was not asked to offer any explanation, the convictions cannot be maintained even if the evidence as to possession is accepted. A.I.R. 1942 Pat. 145=8 B.R. 248=43 Cr. L.J. 234=7 C.L.T. 78=23 P.L.T. 500=197 Ind. Cas. 664.

—S. 412—Evidence and proof—Accused must  
be shown to be at material time in possession of  
place where stolen goods were discovered.

No man can be convicted under S. 412 for "receiving or retaining" stolen goods unless he is shown at the material time to have been in possession or control of the place where they were discovered or at least to have had some knowledge of their deposit there. A.I.R. 1940 All. 291=1940 A.L.J. 206=41 Cr. L.J. 647=1940 A.W.R. 85=188 Ind. Cas. 649.

—S. 411—Evidence and proof—Conviction.

Where the only evidence against the accused is that he was with the other accused before and after the theft, this can hardly warrant his conviction under S. 411. A.I.R. 1939 Mad. 765=1939 M.W.N. 739 (1)=41 Cr. L.J. 96 (1)=184 Ind. Cas. 609 (1).

—S. 411—Evidence and proof—Transaction of  
sale or pledge—No finding as to, though essential.

The evidence against the accused who was convicted under S. 411, was that he himself told at the time of the inquiry by the Police in the theft case that he purchased the articles from the accused in the said case. But in the course of the trial of the case against the accused in the theft case, the accused had deposed in evidence that the articles were pledged with him by



the accused in theft case. The thieves were not examined to prove the nature of the transaction nor was there any other evidence on the point:

**Held**, that there could be no dishonesty unless the transaction was a sale. As there was no evidence to definitely find whether the transaction was a case of sale or pledge, the accused could not be convicted under S. 411. A.I.R. 1939 Mad. 582=1939 M.W.N. 413=49 L.W. 544 (2)=40 Cr. L.J. 828=183 Ind. Cas. 603.

—S. 411—Evidence and proof—"Dishonest intention."

It is of course not possible for the prosecution in a trial for an offence under S. 411 to prove what is in the mind of an accused person, but usually the possession of stolen property knowing it to be stolen is sufficient fact upon which to base an inference of dishonest intention. A.I.R. 1939 Mad. 178=48 L.W. 699=1938 M.W.N. 1124 (1)=40 Cr. L.J. 448=180 Ind. Cas. 601 (D.B.).

—S. 411—Evidence and proof.

Mere intention and preparation to misappropriate the property are not sufficient to constitute offence under S. 411, Penal Code. A.I.R. 1938 Mad. 172=46 L.W. 812=(1937)2 M.L.J. 734=1937 M.W.N. 1321=39 Cr. L.J. 312=173 Ind. Cas. 317.

—S. 411—Evidence and proof.

The conduct of the accused in running away when asked as to how he came to be in possession of the stolen property does not suffice to ground a conviction because often an innocent man, when suddenly confronted with a similar situation, is apt to place as much distance between the stolen property and himself as possible. A.I.R. 1937 Pat. 112=17 P.L.T. 754=3 R.B. 287=38 Cr. L.J. 349=167 Ind. Cas. 31.

—S. 411—Evidence and proof.

In cases of receiving stolen property, the onus of proof never passes to the accused. The Crown must prove guilty knowledge. 164 Ind. Cas. 721=62 C.L.J. 257=40 C.W.N. 159=37 Cr. L.J. 976.

—S. 414—Evidence and proof.

Where an accused charged under S. 414, when questioned, offered to indicate the place where the property was and on his master's keys having been obtained, he took the Police to the spot and entering the room, retrieved the currency notes himself from underneath a pile of firewood:

**Held**, that his statement which led to recovery of the property was admissible under S. 27, Evidence Act.

**Held**, however, that there was nothing to show that any of the notes recovered were identical with the notes stolen and consequently, his conviction under S. 414 could not be maintained. 162 Ind. Cas. 779=18 N.L.J. 342=37 Cr. L.J. 718.

—S. 411—Evidence and proof.

Mere knowledge of the place (not exclusive possession or control of the accused) where the stolen property is hidden, is no legal proof and conviction cannot be based on it. 1935 M.W.N. 1340.

—S. 411—Evidence and proof—Pointing out of stolen property, whether evidence of possession thereof.

The mere pointing out or production of property is not in all cases sufficient to fasten guilty knowledge.

Every case depends on the peculiar circumstances under which the prosecution relies on the pointing out or the production of the property as evidence of possession.

No hard and fast rule can be laid down for inferring from the mere fact of pointing out or production of stolen property that the knowledge of the person pointing it out or producing it must be attributed to the fact that he was in conscious possession of the property. A.I.R. 1934 Sind 159=28 Sind L.R. 41=36 Cr. L.J. 704=154 Ind. Cas. 1038.

—S. 411—Evidence and proof.

Failure of the accused to disclose to trackers names of persons from whom property was purchased and promise to disclose names to the Police or **lambardar** is not sufficient to prove that the accused purchased the property dishonestly knowing it to be stolen property. A.I.R. 1933 Lah. 596 (2)=34 Cr. L.J. 957=145 Ind. Cas. 284.

—S. 411—Evidence and proof—Neither receiving nor retaining of stolen property proved.

Where in a trial for an offence under S. 411, neither the receiving nor the retention of stolen property has been established beyond reasonable doubt, the accused is not under any necessity to prove that he had no reason to believe that the property was stolen property. A.I.R. 1933 Sind 359=35 Cr. L.J. 206=146 Ind. Cas. 952.

—S. 411—Evidence and proof—Accused knowing where stolen property was buried and producing it but falsely stating that they did it under instructions from police who themselves had buried it—Value of.

Whether the fact of the accused pointing out stolen property is or is not evidence of possession is a question of fact.

Where the accused know that a considerable amount of stolen property is buried in the ground and concealed from the public view in a certain field and produce the same but falsely state that they had pointed out the property on the instructions to do so by the police who had themselves buried the property there, their knowledge cannot be held to be innocent knowledge and such production is sufficient for conviction under S. 411. 24 S.L.R. 338=126 Ind. Cas. 53=1930 Cr.C. 664=A.I.R. 1930 Sind. 168.

—S. 411—Evidence and proof—Essentials.

In order to bring home the guilt under S. 411 it is essential that some stolen property should have been found in the possession of the accused and there should have been evidence that the accused retained possession of the property either knowingly or having reason to believe that the same was stolen property. 119 Ind. Cas. 863=10 L.R.A.(Cr.) 156=30 Cr.L.J. 1133=1930 A.L.J. 220=13 A.I.Cr.R. 30=1929 Cr.C. 645=A.I.R. 1929 All. 917.

—S. 411—Evidence and proof—Possession of missing bullock.

In order to bring home the guilt under S. 411 it is essential that some stolen property should have been found in the possession of the accused and there should have been evidence that the accused retained possession of the property either knowingly or having reason to believe that the same was stolen property.

A's bullock was missing. After several months it was found in the possession of B. B was prosecuted and convicted under S. 411. B appealed.



**Held**, that a missing bullock could not be stolen within the meaning of S. 410 as no offence was committed with reference to it by theft or by extortion or by robbery etc. This being so the conviction under S. 411 could not be sustained. 119 Ind. Cas. 863=10 L.R.A. (Cr.) 156=30 Cr.L.J. 1133=1930 A.L.J. 220=13 A.I.Cr.R. 30=1929 Cr.C. 645=A.I.R. 1929 All. 917.

—S. 411—Evidence and proof—Dishonesty—Duty of prosecution.

In a trial for an offence under S. 411, it is for the prosecution to prove that the accused received the property dishonestly and the *onus* that he had received the property honestly does not lie on him. 109 Ind. Cas. 674=10 A.I.Cr.R. 354=10 L.L.J. 316=29 Cr.L.J. 594.

—S. 411—Evidence and proof—Burden of proof.—Discovery of stolen property—Long lapse of time—Effect.

Where there is long lapse of time between the theft and the discovery of the stolen property (in this case over 15 months), the *onus* of proving innocent possession should not be cast on the accused. 108 Ind. Cas. 912=29 Cr.L.J. 464=29 P.L.R. 441=A.I.R. 1928 Lah. 687.

—S. 411—Evidence and proof—Proof of facts from which knowledge can be presumed.

The knowledge or belief which is required to be established in order to bring the case under S. 411 implies the existence and the presence of facts or circumstances from which the accused was either made aware or ought to have been made aware of the nature of the property. It may be sufficient to show that the circumstances were such as to make him believe that the property was stolen. The word "knowledge" means a mental cognition and not necessarily visual perception. It implies a notice to the Receiver of such facts as could not but have led him to believe that the property was stolen and could not but have been dishonestly obtained. It therefore lies on the prosecution to prove the presence of certain facts from which the accused might have drawn the inevitable conclusion that the property was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired: 6 Bom. 402, Foll. 97 Ind. Cas. 664=27 Cr.L.J. 1144=A.I.R. 1927 Nag. 40.

—S. 411—Evidence and proof—Proof of theft.

It is not correct that for a conviction under S. 411 there must be proof of theft. 96 Ind. Cas. 869=27 Cr.L.J. 1013=A.I.R. 1926 Lah. 640.

—S. 411—Evidence and proof—Accused found seated around the stolen property disputing as to its distribution—Value of.

The evidence that the accused were all in the house wherefrom the stolen property was recovered disputing as to what was to be done with the boot, is sufficient for their conviction. 94 Ind. Cas. 705=7 P.L.T. 567=1926 P.H.C.C. 139=27 Cr.L.J. 657=A.I.R. 1926 Pat. 316.

—S. 411—Evidence and proof—Proof that the article was stolen.

The offence of receiving stolen property under S. 411 is the offence of receiving a particular article of stolen property or property stolen in a particular theft and so it is necessary that the particular articles stolen should

be allged to be stolen and if possible traced to its origin. 91 Ind. Cas. 64=20 S.L.R. 3=27 Cr.L.J. 32=A.I.R. 1926 Sind 129.

—S. 411—Evidence and proof—Stolen property found in dung heap in courtyard of a house belonging to several persons—Value of.

Where some of the stolen property was found in the dung heap situated in the courtyard of the house belonging to several persons, it could not be said with certainty as to who was in exclusive possession of the stolen articles and none of them could be convicted either under S. 457 or S. 411. 92 Ind. Cas. 425=7 L.L.J. 223=26 P.L.R. 522=27 Cr.L.J. 249.

—S. 411—Evidence and proof—Proof that property is stolen.

In a case under S. 414 the ownership of the property need not be traced. It is sufficient if it is proved that the property is stolen. 14 Bom. L.R. 893, Foll. 27 Bom. L.R. 1373=91 Ind. Cas. 690=49 Bom. 878=27 Cr. L.J. 114=A.I.R. 1926 Bom. 71.

—S. 414—Evidence and proof—Finding that property is stolen—Circumstantial evidence.

The finding that property in question was stolen property is an essential finding for a conviction under S. 414. Sufficiently strong circumstantial evidence may support such a finding. An accused concealing property believing it to be stolen while really it was not, commits no offence.

It is not necessary to prove in what theft or in what manner the property was stolen. 13 C.L.J. 793, Expl.; 6 Bom. 402, Foll. 81 Ind. Cas. 310=18 M.L.W. 743=33 M.L.T. 182=25 Cr. L.J. 790=A.I.R. 1924 Mad. 350=45 M.L.J. 728.

—S. 411—Evidence and proof—Proof that property is stolen.

Though there may be cases in which it may not be necessary under S. 411, or 414, to prove that the property was stolen from a particular individual yet as a rule it may be taken as a settled law that a person cannot be called upon to account for the possession of property when there is no evidence whatever that the property has been stolen. 14 Bom. L.R. 893, Foll. 75 Ind. Cas. 544=19 N.L.R. 176=24 Cr. L.J. 960=A.I.R. 1924 Nag. 48.

—S. 411—Evidence and proof—No proof that article belonged to complainant—Effect.

Where the fact of burglary was not reported until four months had elapsed and goods of common pattern were found in the house of the accused which the accused and the complainant each claimed as his own,

**Held**, there was no satisfactory evidence to prove that the article belonged to the complainant and the accused must be acquitted. 81 Ind. Cas. 48=25 Cr. L.J. 560=A.I.R. 1923 Lah. 36.

—S. 411—Evidence and proof—Accused pointing out place of hiding of stolen property—Value of.

The mere pointing out by an accused person of the place where stolen property is concealed which place is not in his possession, is not of itself sufficient evidence to maintain a conviction for theft or for dishonestly receiving stolen property. 73 Ind. Cas. 331=5 L.L.J. 87=A.I.R. 1921 Lah. 385.

—S. 411—Evidence and proof—Essentials—Value of article—Evidence necessary.

Where a person is charged with receiving or being in possession of stolen property, an important



factor is its value and as to this the Court should insist on having direct evidence, as the accused must have some sworn witness in that respect whom he can cross-examine. 2 U.P.L.R. (All.) 113=21 Cr. L.J. 552=56 Ind. Cas. 856.

**—S. 411—Evidence and proof—Burden of proof—Receiver of stolen property.**

If an accused gives reasonable accounts as to how he came into possession of the property either by telling the real persons or otherwise, it is for the prosecution to show that the account is false. 41 P.W.R. 1915 (Cr.)=17 Cr. L.J. 68=62 P.L.R. 1916=32 Ind. Cas. 660.

**—S. 411—Evidence and proof—Identification—Cereals.**

Where the stolen goods consist of cereals, it must be shown that the cereals stolen were in some way peculiar, the like of which cannot be found anywhere and the consciousness of having received stolen goods must be proved on the part of the accused. 1 Pat. L.T. 727=21 Cr. L.J. 673=57 Ind. Cas. 913.

**—S. 411—Evidence and proof—Identification—Cloth.**

The fact that the cloth found in the house of the accused answers to the general description of the stolen cloth as given by the complainant is not sufficient proof of identity nor the cloth found, had a particular stamp on it, is a sufficient proof. 1 Lah. 102=89 P.L.R. 1920=21 Cr. L.J. 599=1 Lah. L.J. 102=57 Ind. Cas. 167.

**—S. 411—Evidence and proof—Possessing property some time after theft—Three years.**

Where accused is found in possession of stolen property three years after it went out of the owner's possession, very clear evidence is required to show that he must have known it to be stolen. 18 P.W.R. 1914 (Cr.)=113 P.L.R. 1914=15 Cr. L.J. 521=24 Ind. Cas. 833.

**—S. 411—Evidence and proof—Essentials—Guilty knowledge necessary.**

The mere fact that a person was in possession of stolen animal and the sold it to another is not in itself sufficient for a conviction under S. 411. A denial of having any connection with the animal does not prove his guilty knowledge especially when there is enmity between the alleged vendor and vendee. 34 P.W.R. 1914 (Cr.)=229 P.L.R. 1914=15 Cr. L.J. 654=25 Ind. Cas. 982.

**—S. 411—Evidence and proof—Pointing out stolen property—Evidence.**

Where the only evidence against the accused was that he pointed out before several persons where the stolen property was buried, he cannot be convicted of an offence under S. 411, I.P.C. 32 P.W.R. 1913 (Cr.)=315 P.L.R. 1913=14 Cr. L.J. 602=21 Ind. Cas. 474.

**—S. 411—Evidence and proof—Possession, meaning of—Production of stolen property from jungle—If sufficient to sustain conviction.**

The mere production of stolen property by the accused from a jungle which was neither in his possession nor control is not sufficient to support a conviction under S. 411. 46 P.L.R. 1912=13 Cr. L.J. 28=29 P.W.R. 1912 (Cr.)=13 Ind. Cas. 220.

**—S. 411—Evidence and proof—Identification—Ordinary article.**

Where stolen articles is of ordinary make and there is nothing peculiar in it, the mere evidence of the

complainant, a person of ordinary position, as to its identification is not sufficient where it has been equally contradicted by a witness on the other side. 22 P.W.R. 1912 (Cr.)=13 Cr. L.J. 555=15 Ind. Cas. 971.

**—S. 414—Evidence and proof—Concealing stolen property—Owner of property not traced—Offence.**

S. 414 does not impose on the prosecution the requirement to trace in all cases the owners of the property stolen, but requires to show that the accused voluntarily assisted in concealing or disposing of property which he had reason to believe to be stolen property. The latter fact may be proved from the accused's own conduct and actions. 14 Bom. L.R. 893=13 Cr. L.J. 793=17 Ind. Cas. 537.

**—S. 411—Evidence and proof—Essentials—Knowledge of the place of concealment.**

Knowledge as to the place of concealment of stolen property did not establish that the accused were in possession of the same. 3 S.L.R. 136=11 Cr. L.J. 4=4 Ind. Cas. 481.

**—S. 411—Evidence and proof—Possessing property some time after theft—Seven months—Article of small value—Recent possession—Burden of proof.**

An accused was convicted under S. 411 for being dishonestly in possession of stolen property, namely, a copper vessel, which was discovered seven months after its loss:

**Held**, that the conviction was bad; the failure of the accused to account for his possession did not relieve the prosecution of the burden of proving that his possession was dishonest. 8 M. L. T. 418=(1910) M.W.N. 819=11 Cr. L.J. 511=8 Ind. Cas. 145.

**—S. 411—Evidence and proof—Circumstantial evidence—Offence under S. 411, I.P.C.—Suspicious circumstances—Conclusive evidence of guilt.**

In a case under S. 411, it was found that the accused was the father-in-law of one S. who was the cousin of the thief; that he was found in possession of the stolen properties three days after the theft, and that he disposed of them in a somewhat suspicious manner.

**Held**, that the circumstances, though they form grounds for grave suspicion against the accused, do not furnish conclusive evidence against him for his conviction under S. 411. (1905) 10 C.W.N. 219=3 Cr. L.J. 195.

**5. Intention and knowledge.**

**—S. 411—Intention and knowledge—Ingredient of offence.**

The essential ingredient of the offence under S. 411, I.P. Code, is that the accused should dishonestly receive or retain the stolen property, knowing or having reason to believe the same to be stolen property. I.L.R. (1950) Assam 119=51 Cr. L.J. 509=A.I.R. 1950 Assam 87.

**—S. 411—Intention and knowledge—Mere possession not sufficient—Knowledge must be established.**

The prosecution must establish, not only that the stolen property was recovered from the house or other place in the occupation of the culprit but also that the incriminating article was in the house or other place and the culprit was fully aware of its presence there.



[After considering all the evidence and the circumstances of the case, the accused was found guilty under S. 411, Penal Code]. A.I.R. 1945 All. 230=1945 A.L.J. 124=1945 A.W.R. (H.C.) 68 (2)=1945 O.W.N. (H.C.) 152=I.L.R. (1945) All. 290=47 Cr.L.J. 104=221 Ind. Cas. 176.

—S. 412—Intention and knowledge—Essentials.

Before the accused are found guilty under S. 412, it must be established that they knew or had reason to believe that possession of the property had been transferred by a dacoity. A.I.R. 1945 Cal. 482=47 Cr. L. J. 302=49 C.W.N. 537=222 Ind. Cas. 265.

—S. 412—Intention and knowledge—Essentials.

Under S. 412, it is necessary to show, not only that the accused was in possession of the property but further that he knew or had reason to believe that the property had been transferred by the commission of dacoity. The offence under S. 412 is much more serious than the offence under S. 411. 219 Ind. Cas. 376=1945 O.W.N. (C.C.) 113=1945 A. W. R. (C.C.) 71=46 Cr.L.J. 600.

—S. 411—Intention and knowledge—Dishonest retention and dishonest reception.

The offence of dishonest retention of property is almost contemporaneous with the offence of dishonestly receiving it. A man who dishonestly receives property if he retains it, must obviously continue dishonestly to retain it. It would be different, however, if the reception of the property were innocent. Then it clearly would be for the prosecution to show at what stage guilty knowledge of the receiver supervened to make the retention dishonest. A.I.R. 1937 Lah. 700=39 P.L.R. 1=I.L.R. (1937) Lah. 227=38 Cr. L. J. 1066=171 Ind. Cas. 342.

—S. 411—Intention and knowledge—Status and antecedents of accused, value of.

For conviction under S. 411, the prosecution has to establish not only possession of the property but also that such possession was with knowledge, that it was stolen and in deciding the question of knowledge the status of the accused and their good antecedents are relevant in rebutting the prosecution case so far as knowledge of the nature of the property is concerned. 1937 M.W.N. 327.

—S. 411—Intention and knowledge—Deaf and dumb person.

Under S. 411, Penal Code, it is necessary to prove that the property was stolen and that the accused knew or had reason to believe the same to be stolen property and as proof of that is impossible in the case of deaf and dumb person, it is impossible for the Court to record any conviction or therefore, to award any sentence. Nor is the case one which can be referred or reported to the Local Government under S. 471, Cr.P.C., as S. 471 contemplates the committing of a crime by a person who, owing to the state of his mind, cannot be deemed to have known the quality of his act and the offence with which the accused is charged cannot be said to have been committed unless the accused person knew the property to have been stolen and in the case of a deaf and dumb person, it cannot be said to be so. A.I.R. 1935 Pat. 451=16 P.L.T. 568=2 B.R. 96=37 Cr.L.J. 107=159 Ind. Cas. 577 (2).

—S. 411—Intention and knowledge.

A finding that the articles were possessed by the accused dishonestly with the knowledge or with reason

to believe that they were stolen property is necessary for conviction. Mere possession of stolen property is no offence. To retain valuable property which does not belong to the accused does not in itself prove that a man's possession is dishonest. 76 Ind. Cas. 963=25 Cr.L.J. 291=A.I.R. 1923 Lah. 340.

—S. 411—Essentials—Intention and knowledge—Possession of stolen property—Knowledge—Suspicion.

In a case of receiving stolen property, knowledge and not mere suspicion warrants a conviction. (1913) M.W.N. 696=14 Cr.L.J. 591=21 Ind. Cas. 383.

—S. 411—Intention and knowledge—Essentials—Receiving stolen property.

To constitute the offence of receiving stolen property under S. 411 it is not sufficient to prove that the accused suspected that the goods received by him might have been stolen but proof of his knowledge or belief that the goods were stolen and of his having received them in that state of mind are necessary. 4 L.W. 53=17 Cr.L.J. 312=35 Ind. Cas. 488.

6. Interpretation.

—S. 411—Interpretation—Offence under—Proof required—"Believe"—Meaning of.

The word "believe" occurring in S. 411, I. P. Code, is much stronger than "suspect". It involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. It is not sufficient to show that the accused was careless or had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether the property had been honestly acquired. A.I.R. 1950 Assam 193.

—Ss. 411, 412—Interpretation—Possession.

The possession contemplated by Ss. 411 and 412 is exclusive possession, otherwise the receiver or the possessor of the stolen property would run the risk of losing the stolen property if some one else could get hold of it. A.I.R. 1937 Oudh 157=1936 O.W.N. 295=37 Cr. L. J. 454=12 Luck. 88=161 Ind. Cas. 271.

—S. 414—'Believe' meaning of.

The word 'believe' in S. 414 is much stronger than the word 'suspect', and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. A.I.R. 1932 Lah. 434=33 P.L.R. 572=33 Cr. L. J. 764=139 Ind. Cas. 442.

—S. 411—'Believe' meaning of.

The word "believe" in S. 411 is much stronger than the word 'suspect' and involves the necessity of showing that the circumstances were such that a reasonable man must have been fully convinced in his mind that the property with which he was dealing was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired. A.I.R. 1932 Oudh 251 (2)=8 O.W.N. 517=32 Cr. L. J. 1184=6 Luck. 658=134 Ind. Cas. 401.



**—S. 411—Interpretation—‘Believe’—Meaning.**

The word “believe” in S. 411 is stronger than the word “suspect” and involves the necessity of showing that the accused must have felt convinced in his mind that the property with which he was dealing was a stolen property. Mere carelessness, or omission to inquire, or existence of reasons to suspect are not sufficient grounds to accuse him. 6 Bom. 402, Foll. 118 Ind. Cas. 759=6 O. W. N. 208=30 Cr.L.J. 969 =A.I.R. 1929 Oudh 213.

**—S. 411—Interpretation—‘Believe’—Meaning.**

The word ‘believe’ in S. 411 is a very much stronger word than “suspect” and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. It is not sufficient to show that the accused was careless for that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. A.I.R. 1928 Cal. 264.

**—S. 411—Interpretation—Essentials—Proof of receiving stolen property—‘Believe’, meaning of.**

In a charge under S. 411 it is not sufficient to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not sufficiently enquire whether the same had been honestly acquired. The word ‘believe’ is much stronger than ‘suspect’ and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced that the property with which he was dealing must be stolen property. 17 Cr.L.J. 25=32 Ind. Cas. 153 (All).

**—S. 411—Interpretation—Possession, meaning of—Receiving stolen property—Production of Railway receipt—Whether amounts to possession.**

Certain stolen goods were sent from one station to another. At the station of delivery, the accused handed the Railway receipt to the Railway and paid freight. The goods were not removed by the accused. He can be convicted under the section, because though the goods were not removed from the Railway premises, the goods should be regarded to be in the actual possession of the accused. 40 Cal. 990=14 Cr. L.J. 318=19 Ind. Cas. 1006.

**—S. 414—Interpretation—Disposing of—Meaning.**

The words ‘disposing of’ must be construed in the light of the words ‘concealing’ and ‘making away with’ and they do not include ‘restoring to the owners.’ 1.U.B.R. (1910) 8=11 Cr. L.J. 493=7 Ind. Cas. 465.

**7. Lost property****—S. 411—Lost property—Finder of property.**

A very high standard of honesty is demanded of the finders of his lost property. Before appropriating it, they must attempt to find the owner, if they have means of so doing. If there is no clue to the owner, the finder must use all reasonable means to find the owner and must wait a reasonable time to allow the owner to claim the property before he appropriates it.

Where a person lost some currency notes and they were found by a child in the street and ultimately came in the possession of the accused to whom they were traced and ultimately recovered within a short time of the incident;

Held, that no offence was committed under S. 411 in the circumstances of the case. A.I.R. 1938 Mad. 172 2=(1937) 2 M.L.J. 734=46 L.W. 812=1937 M.W.N. 1321=39 Cr. L.J. 312=173 Ind. Cas. 317.

**8. Presumption of guilt**

See also EVIDENCE ACT, S. 114—RECENT POSSESSION.

**—S. 411—Presumption of guilt—Proof of knowledge—Resort to presumption.**

At the existence of knowledge of an accused person cannot ordinarily be proved affirmatively by positive evidence, the prosecution in cases under S. 411, I. P. Code, has necessarily to depend generally either on a presumption arising from possession of recently stolen properties or from inferences derived from proof of circumstances which rendered it difficult to exclude the fact of knowledge. A.I.R. 1950 All. 631.

**—Ss. 411 and 412 and Evidence Act (1 of 1872), S. 114, Illustration (a)—Presumption of guilt in the case of person found in possession of goods stolen in a dacoity—Scope and nature of.**

It is not easy for a person to know or to have reason to believe the exact manner in which that property could have come in the possession of the transferor or could have been lost to the rightful owner. There should be evidence of facts or circumstances or both from which it can be concluded that the accused could have known or could have reason to believe that the stolen property was lost to the rightful owner or possessor in the alleged manner. It cannot be said from the mere fact that the accused was in possession of property stolen during a dacoity that he must have known or must have had reason to believe that the property was stolen in a dacoity by invoking the presumption under S. 114, Illustration (a) of the Evidence Act. 1950 A.W.R. 203=4 A.I. Cr. D. 415=A.I.R. 1950 A. 398=51 Cr. L.J. 1070=1950 A.L.J. 613.

**—S. 411—Presumption of guilt.**

Applicability—Person in possession of stolen bicycle one year after theft—Presumption of guilt—Conviction. 224 Ind. Cas. 372=47 Cr. L.J. 599=A.I.R. 1946 Sind 153.

**—Ss. 411 and 412—Presumption of guilt—Possession of property taken in dacoity—Presumption.**

When a person is found in possession of property taken in dacoity and is unable to give any reasonable explanation for its being with him, it may be presumed that he knew the property to have been stolen, but not that he knew or had reason to believe that it was the proceed of the dacoity rather than of a burglary or theft. In order to justify his conviction on the more serious charge there must be evidence, circumstantial or oral, to show that he knew or had reason to believe that a dacoity had been committed and the property had been taken in it or that the person from whom he obtained it belonged to a gang of dacoits and the property was stolen property. In a case of dacoity, the presumption would not always be that the receiver of property taken in dacoity is guilty under S. 412. In most cases of mere possession of such property the presumption would be of the lower offence under S. 411. 228 Ind. Cas. 78=1946 N.L.J. 566=A.I.R. 1947 Nag. 57=47 Cr. L.J. 822.

**—S. 411—Presumption of guilt—Stolen property in possession of accused after dacoity—Presumption.**

No general principle can be laid down that in a case of dacoity, the presumption would always be that the



receiver of stolen property is guilt under S. 412. In most cases of mere possession of such property, the presumption would be of the lower offence under S. 411. A.I.R. 1945 Bom. 292=47 Bom. L.R. 63=47 Cr. L.J. 51=221 Ind. Cas. 86.

—S. 411—Presumption of guilt.

Animals scattered from herd in forest by cheeta scare—Subsequently accused, cattle—dealer, selling them—There is no theft and hence no inference under S. 114, Evidence Act, can be raised—Conviction under S. 379 or S. 411 cannot stand. A.I.R. 1944 Mad. 26=(1943)2 M.L.J. 334=56 L.W. 547=1943 M.W.N. 580=45 Cr. L.J. 220=210 Ind. Cas. 315.

—S. 411—Presumption of guilt—Benefit of doubt.

In a prosecution of the accused for an offence of receiving the stolen property knowing the same to have been stolen, upon the prosecution establishing that the accused is in possession of goods recently stolen, the jury may, in the absence of any explanation by the accused of the way in which the goods came into his possession which might reasonably be true find him guilty, but, if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not convinced of its truth, the accused is entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. A.I.R. 1943 P.C. 211=1943 A.L.J. 502=56 L.W. 709=54 Cr. L.J. 241=1943 A.W.R. 81=10 B.R. 377=210 Ind. Cas. 589 (P.C.).

—S. 411—Presumption of guilt.

Where the accused produces ornaments of a murdered woman soon after the murder and gives no explanation as to how he came into possession of the same, the presumption under S. 114, Illus. (a), Evidence Act, applies and he can be convicted under S. 411, I.P.C. A.I.R. 1943 Bom. 458=45 Bom. L.R. 884=46 Cr.L.J. 221=1 L.R. (1944) Bom. 25=210 Ind. Cas. 362.

—S. 411—Presumption of guilt—Voluntary production of stolen property.

If a person, of his own accord, hands over stolen property to the Police in order to assist them in investigation, it cannot be said to give rise to a presumption that he is the receiver of the stolen property in the criminal sense. On the contrary, the presumption would rather be that he had a clear conscience in the matter. On the other hand, if he had a guilty conscience, the presumption would be that he had done this as a result of some pressure or inducement, and the whole transaction stands on the same footing as an improperly obtained confession. Such inducement or pressure would presumably be within the knowledge of the prosecution, and if the true state of affairs is not disclosed it is impossible for the Court to arrive at the truth. A.I.R. 1943 Lah. 4=44 Cr.L.J. 186=204 Ind. Cas. 226.

—S. 411—Presumption of guilt—Presumption when arises.

Before anybody can be convicted under S. 411, it must be shown that the property in the accused's possession is stolen property. A Court might suspect that it was stolen, but it is for the prosecution to prove affirmatively that the property in his possession was stolen. Once the prosecution proves possession of property recently stolen, the Court may presume the person in possession to be either the thief or a receiver of stolen property. In the absence of any explanation by the person in

possession, he may be convicted; any explanation can be asked of him, it must be shown that he was in possession of property proved to have been stolen. A.I.R. 1942 Pat. 304 (1)=8 C.L.T. 17=8 B.R. 773=43 Cr.L.J. 648=201 Ind. Cas. 206.

—S. 412—Presumption under Evidence Act, S. 114, Illus. (a)—Applicability of.

Rule as to applicability of presumption under illus. (a) of S. 114, Evidence Act and the burden of proof in such cases and the nature of the charge to the jury on the point, indicated. [The Judge, held misdirected the jury]. A.I.R. 1942 Pat. 250=8 B.R. 393=43 Cr.L.J. 353=198 Ind. Cas. 307.

—S. 411—Presumption of guilt.

Where a man is found in possession of property recently stolen, the Court may presume that he is the thief or that he is in possession of the property knowing the same to be stolen. A.I.R. 1942 Pat. 145=7 C.L.T. 78=8 B.R. 248=43 Cr.L.J. 234=23 P.L.T. 500=197 Ind. Cas. 664.

—S. 411—Presumption of guilt—Possession 4 or 5 months after theft.

Possession of the stolen buffalo 5 or 6 or even 4 or 5 months after the offence, is not such possession as will constitute proof of an offence under S. 411, Penal Code. A.I.R. 1942 Sind 85=1 L.R. (1942) Kar. 186=43 Cr.L.J. 771=201 Ind. Cas. 732

—S. 411—Presumption of guilt—Person found in possession of property taken in dacoity and unable to give explanation—Presumption.

When a person is found in possession of property taken in a dacoity, and is unable to give any reasonable explanation for its being with him, it may be presumed that he knew the property to have been stolen, but not that he knew or had reason to believe that it was the proceeds of a dacoity rather than of a burglary or a theft. In order to justify his conviction on the more serious charge, there must be evidence, circumstantial or oral, to show that he knew or had reason to believe that a dacoity had been committed and the property had been taken in it or that the person from whom he obtained it belonged to a gang of dacoits and the property was stolen property. The conviction under such circumstances ought, therefore, to be altered from one under S. 412 to one under S. 411. Penal Code. A.I.R. 1941 Pat. 223=7 B.R. 361=42 Cr.L.J. 258=192 Ind. Cas. 253.

—S. 411—Presumption of guilt.

Accused found in possession of stolen property soon after theft—Presumption under S. 114, Illus. (a)—Accused should give explanation of possession—Defence story rejected—Accused can be convicted under S. 411. A.I.R. 1941 Pat. 175=21 P.L.T. 1021=7 B.R. 241=42 Cr.L.J. 215=191 Ind. Cas. 702.

—S. 411—Presumption of guilt.

Evidence Act, S. 114, Illus. (a), does not relieve the prosecution of the onus of proving the accused's guilt in respect of charge under S. 411, Penal Code. The onus is there just as in the case of any other charge but under certain conditions presumption may arise to alleviate it. A.I.R. 1937 All. 47=1936 A.L.J. 1158=38 Cr.L.J. 196=1936 A.W.R. 973=166 Ind. Cas. 363.

—S. 411—Presumption of guilt—Possession of ornaments nine months after robbery.

Two persons were suspected of robbery and nine months after the robbery, certain ornaments were found



in their possession. The identification evidence was of no value and the articles produced were of a kind commonly used by ordinary people. There was no evidence that any of them bore any special mark of identification :

**Held**, that it was unlikely that the accused would have kept these articles so long had they known that they were stolen articles, especially as they themselves had been suspected shortly after the theft and it would not be safe to draw the presumption that they were either the thieves or were retaining the property dishonestly. A.I.R. 1937 Lah. 246=38 P.L.R. 975=38 Cr.L.J. 671=168 Ind. Cas. 966.

—**Ss. 411, 414—Presumption of guilt—Possession satisfactorily explained.**

Where, in a case under Ss. 411 and 414, the accused satisfactorily accounts for his possession, so that the question of the application of S. 114, Evidence Act no longer arises, then it is necessary to show by evidence, direct or circumstantial that there was some collusion between the thief and the receiver or that the receiver had real reason to believe that the property which he had purchased was stolen. Accused need not prove affirmatively that he came by the goods innocently. An explanation raising doubt about his guilt in the minds of the jury is enough. A.I.R. 1937 Pat. 191=18 P.L.T. 210=38 Cr.L.J. 129=3 B.R. 124=166 Ind. Cas. 91.

—**S. 411—Presumption of guilt—Possession two and a half years after theft.**

Where the stolen property is found in possession of the accused after two and a half years of the theft, no presumption can arise against him under S. 114, Evidence Act. A.I.R. 1937 Pat. 112=17 P. L. T. 754=3 B.R. 287=38 Cr. L.J. 349=167 Ind. Cas. 31.

—**Ss. 411, 412—Presumption of guilt—Onus of proof is on Crown to prove guilty knowledge.**

Under S. 114 (a), Evidence Act, the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. If he gives an account of his possession which may reasonably be true, though the jury are not convinced that it is true, and there is no other evidence of his guilty knowledge, the prisoner is entitled to an acquittal. There is no obligation to prove that the property is his. All that he is required to do is to give an account, and if that account may reasonably be true, though nevertheless the jury may not be convinced that it is true, he must be acquitted because the Crown have failed to satisfy the onus which always remains upon them to prove his guilty knowledge. 164 Ind. Cas. 721=62 C. L. J. 257=40 C. W. N. 159=37 Cr. L. J. 976.

—**S. 411—Presumption of guilt—Articles in possession of accused for several months.**

Where, in a charge for an offence under S. 411, Penal Code, the identity of the accused with the purchaser of the stolen bullocks was fairly satisfactorily established but there were serious doubts that the accused may have been a *bona fide* purchaser of the bullocks when he purchased them and the evidence of the witnesses went to show that for several months these bullocks were seen in the possession of the accused.

**Held**, that the presumption allowed to be raised under S. 114, Evidence Act, had been sufficiently rebutted by the evidence which the accused had adduced in his defence and the conviction should be set aside.

A.I.R. 1936 Oudh 380=1936 O. W. N. 668=37 Cr. L.J. 907=164 Ind. Cas. 97.

—**S. 411—Presumption of guilt.**

To constitute an offence under S. 411 besides dishonest possession of stolen property there must also be the knowledge of or at least reasonable belief in the property being stolen property, but when some property is proved to be stolen property and the person who is found in possession of it cannot account for its possession especially when he is found in possession of it soon after the theft of the property, it is only reasonable to conclude, not only that he was in possession knowing or having reason to believe it to be stolen property but also, that his possession of it was dishonest. A.I.R. 1935 Oudh 475=1935 O.W.N. 911=36 Cr.L.J. 1206=157 Ind. Cas. 562.

—**S. 411—Presumption of guilt—Possession of stolen revolver—Theft not recent.**

A stolen revolver was found in possession of the accused who were engaged in collecting arms and explosive substances and it appeared that the theft was not at all recent :

**Held**, that the mere fact of possession was not sufficient for a conviction under S. 411. A.I.R. 1933 Cal. 594=57 C.L.J. 57=35 Cr. L. J. 226=146 Ind. Cas. 1051.

—**S. 411—Presumption of guilt—Selling articles more than a month after theft.**

The mere fact that the accused sold certain ornaments more than a month after a theft should not be based to draw an inference that the ornaments were the proceeds of a burglary. A.I.R. 1933 Lah. 987=35 Cr.L.J. 654=148 Ind. Cas. 400.

—**S. 411—Presumption of guilt.**

Accused found in possession of stolen property shortly after theft — No explanation offered — Inference of theft is justified. (1932) 9 O.W.N. 1169.

—**S. 411—Presumption of guilt—Possession of stolen bullocks left for pasturage—Effect of.**

Where bullocks were stolen from one village and taken to another village at a distant place and handed over to a person resident of that another village to pasture them with his own, the mere fact of possession of the bullocks by such person would not warrant the inference that the possession was dishonest so as to cast upon such person the onus of displacing the inference of dishonesty. 122 Ind. Cas. 586=31 Cr.L.J. 437=1930 Cr. C. 584=A.I.R. 1930 Pat. 353.

—**S. 411—Presumption of guilt—Property found 2-1/2 months after dacoity.**

There can be hard and fast rule as to time, within which the stolen article should be found with accused, to hold him guilty of being in possession of stolen articles but two and a half months after a dacoity is not a long time. 103 Ind. Cas. 62=1 L. C. 163=28 Cr.L.J. 638=8 A.I.Cr.R. 312=A.I.R. 1927 Oudh 277.

—**S. 411—Presumption of guilt—Possession recent of otherwise—Value of.**

No fixed time-limit can be laid down to determine whether possession of articles in recent or otherwise. But every case must be judged on its own facts. If a few stolen articles were found in possession of a person under circumstances which may give rise to the probability of his coming by them honestly some time



after the theft the presumption under the law might not arise against him. 94 Ind. Cas. 361=27 Cr.L.J. 617=A.I.R. 1926 Cal. 925.

—S. 411—Presumption of guilt—Property found 19 months after theft.

Possession of stolen property 19 months after theft raises no presumption that the holder thereof was either the thief or received the goods knowing them to be stolen; 22 C.W.N. 597; 11 M.L.W. 43 and 22 Cr.L.J. 595, Foll. 95 Ind. Cas. 471=27 Cr.L.J. 807=A.I.R. 1926 Lah. 528.

—S. 411—Presumption of guilt—Evidence Act, S. 114, Ill.(a)—Article of ordinary type found 2-1/2 years after theft—Presumption as to guilt.

2-1/2 years before the discovery, at the house of accused, of the articles (four silver ornaments of ordinary type worth Rs. 100) there had been removed from the houses of the two complainants by means of a dacoity. The accused was a goldsmith by caste and profession and when asked, he explained that he himself had made them for his wife. The articles were found, except in one case, on the person of the wife of the accused.

Held, that the accused cannot be presumed to be in possession of the articles with guilty knowledge. 29 All. 138, Foll. 85 Ind. Cas. 722=5 L.R.A.(Cr.) 199=26 Cr.L.J. 578=A.I.R. 1925 All. 220.

—S. 411—Presumption of guilt—Mere discovery of stolen article in a roofless room of accused's house—Value of.

A burglary was committed in the house of one Maharaji and she made a report the next morning giving a list of articles including wearing apparel. Among the articles she mentioned was a dhoti said to have had a tear in the border. A few days after the police searched the accused's house and in the presence of two search witnesses a dhoti was found hanging on a peg in a roofless room. This room contained some other articles of household besides the dhoti. In front of this room there was another room covered by a roof and then there was a thatched portion of the house in which the accused, his wife and children lived. Mt. Maharaji and her son both recognised the dhoti as belonging to them.

Held, that an accused person cannot be convicted under S. 411 merely on showing that he was in possession of certain property and failed to account for its possession. The prosecution must prove both that the property was stolen and that the accused received it or retained it dishonestly. But under certain circumstances a Court is entitled to draw presumption under S. 114 of the Evidence Act from the fact of possession. In the present case however there is no necessary inference that the accused had knowledge that the dhoti was concealed in the room attached to this house. 81 Ind. Cas. 558=21 A.L.J. 836=4 L.R.A. Cr. 245=25 Cr. L. J. 942=A.I.R. 1924 All. 192.

—S. 411—Presumption of guilt—Possession of property 2 years after loss—Refusal to explain.

Though usually a Court is not justified in drawing the presumption of guilty knowledge from possession of property such as jewellery nearly two years after the property had been stolen or otherwise lost to the real owner, the Court is always entitled to request the possessor to disclose the name of the person from whom he had obtained the articles and the particulars as to the origin of the possession and the Court is

entitled to draw unfavorable inferences, if the accused refuses to disclose such facts or gives an explanation which can be shown to be false. 81 Ind. Cas. 443=2 Rang. 80=25 Cr. L.J. 907=A.I.R. 1924 Rang. 256.

—S. 411—Presumption of guilt—Inference of possession—Accused joint owner of shop where goods were recovered.

Where the accused was not only a joint owner of a shop but also had the key by which the lock of the shop was opened on the day the property was recovered.

Held, that he must be regarded to be in possession of the goods found in the shop. 74 Ind. Cas. 271=4 L.L.J. 484=24 Cr. L.J. 767.

—S. 411—Presumption of guilt—Finding of property 3 years after theft

The mere finding of stolen property found with the accused three years after the theft does not indicate dishonest intention within S. 411. A.I.R. 1923 Lah. 460.

—S. 411—Presumption of guilt—Property found after 2 months.

It is of the essence of an offence under S. 411, I.P.C. to show that the person was in possession of the stolen property with knowledge of its being so. Where the stolen property was traced to the accused's possession after nearly 10 months at least.

Held, the presumption under S. 114 of the Evidence Act could hardly be applied. It cannot be assumed without evidence that the accused's statement is false. It is one thing to find the entry sought to be proved by the accused suspicious and to refuse to act upon it and another thing to find the falsehood of what is sought to be proved. 72 Ind. Cas. 538=24 Cr. L.J. 426=17 M.L.W. 370=32 M.L.T. 318=A.I.R. 1923 Mad. 365=44 M.L.J. 243.

—S. 411—Presumption of guilt—Failure to explain—Possession of stolen property—Failure to explain the source—Proof of guilt.

Where the accused was found wearing some of the stolen articles while some other articles were found in his possession soon after the theft, and where he sold stolen property and received his share of the price but could not properly explain how they came into his possession and admitted that he had received them from a person convicted of theft.

Held, the accused was guilty of receiving stolen property, knowing it to be stolen. A.I.R. 1922 Lah. 80.

—S. 411—Presumption of guilt—Articles changing hands.

Where the nature of the articles is such that they may be constantly changing hands, the recovery of such articles more than 5 months after the theft cannot, in law give rise to a presumption against the possessor, and it is not incumbent upon him to explain how he came by them. 62 Ind. Cas. 867=22 Cr.L.J. 595=A.I.R. 1921 Lah. 89.

—S. 411—Presumption of guilt—Possessing property sometime after theft—Duty to account for recent possession—Trial by jury—Explanation of accused.

When recent possession of the stolen property by the prisoner is established, and he gives an explanation which in the opinion of the jury may be reasonably true, though they are not convinced that it is true the prisoner is entitled to an acquittal as the Crown in such a case has not discharged the onus of proof



which it had to. In a case under S. 411 in charging a jury it should be pointed out that the stolen goods referred to must be in possession soon after the theft or in other words that the stolen goods must have been recently stolen. 24 C.W.N. 619=31 C.L.J. 310=21 Cr. L.J. 545=56 Ind. Cas. 849.

—Ss. 411 and 396—Presumption of guilt—Possessing property some time after theft—Six weeks—Receiving stolen property—Burden of proof—Identification—Delay.

When the interval between dacoity and finding of the stolen goods is about six weeks and the direct evidence of identification by which it was sought to connect the accused with dacoity failed, the accused should not be convicted of dacoity and the knowledge that the goods found were stolen by dacoity should not be imputed to them. They were guilty of the offence of dishonestly receiving or retaining stolen property punishable under S. 411 of the Penal Code. 29 C.L.J. 325=20 Cr. L.J. 525=51 Ind. Cas. 685.

—S. 411—Presumption of guilt—Possessing property some time after theft.

The possession of stolen property long after the theft does not give room for the presumption that the accused received the property knowing them to be stolen. 22 C.W.N. 597=19 Cr. L.J. 702=46 Ind. Cas. 158.

—S. 411—Presumption of guilt—Possessing property some time after—Seven months—Currency notes.

When currency notes lost more than seven months before are traced to the possession of a shroff, it could not be said that the accused was found in recent possession of stolen articles. The Magistrate was therefore right in not issuing the process. 17 C.W.N. 1129=14 Cr. L.J. 571=21 Ind. Cas. 171.

—Ss. 411 and 414—Presumption of guilt—Essentials—Knowledge of the place of concealment.

The fact of a person being able to show the place of concealment of stolen property, when the place it not his own, is not a proper clue for inferring the person to be a receiver or retainer as mere knowledge would not suffice to make him a participator in the act. 1 P.R. 1917 (Cr.)=18 Cr. L.J. 490=39 Ind. Cas. 330.

—S. 411—Presumption of guilt—Possessing property some time after—Possession of, when to be explained.

If considerable time has passed between theft and the discovery of the stolen property, possession of that property in itself does not require any explanation. (1912) M.W.N. 529=13 Cr. L.J. 596=16 Ind. Cas. 164.

#### 9. Procedure.

—S. 412—Procedure.

When the evidence of recovery of stolen property is attached, the Court has to examine the evidence in the light of the following alternative hypothesis:—

(Hypothesis enunciated.) A.I.R. 1943 Lah. 5=44 Cr. L.J. 62=44 P.L.R. 545=203 Ind. Cas. 62.

—Ss. 414, 411—Procedure—Joint trial.

Where an accused pleads guilty and admits himself to be the thief and not merely the receiver, the conviction should obviously be under S. 414 and not under S. 411.

Where accused A admits commission of theft and in his statement before the charge admitting his guilt states that he sold a part of the property to B but did not tell B that the property was stolen, A and B cannot be tried jointly. The proper course for the Magistrate in such circumstances is to separate the cases and call A as a witness in B's case in order that his exoneration of B might be tested by cross-examination and acted upon if found to be trustworthy. A.I.R. 1940 Lah. 319=41 Cr. L.J. 823=190 Ind. Cas. 116.

—Ss. 411, 414—Procedure—Trial by jury.

In a case under Ss. 411 and 414, the proper way to charge the jury would be to tell them that when once the presumption under S. 114, Evidence Act, ceased to be applicable, there is no evidence of guilty knowledge at all. Omission to state this is a misdirection. The omission to mention before the jury some small items of corroborative or discrepant evidence may be comparatively unimportant, particularly in a case where the jury had been addressed by Advocates on each side. But the omission to make it clear to them exactly what they had to decide and how they have to proceed to decide it, or the stating of points in a manner which is positively misleading is a very serious misdirection since, it is the business of the Judge to explain clearly to jury what is the point which they have to decide. A.I.R. 1937 Pat. 191=3 B.R. 124=38 Cr. L.J. 129=18 P.L.T. 210=166 Ind. Cas. 91.

—S. 413—Procedure.

Joint trial of different sets of persons under Ss. 401 and 413 is illegal. A.I.R. 1932 Lah. 486=33 Cr. L.J. 584=33 P.L.R. 736=138 Ind. Cas. 424.

—S. 411—Procedure—Cr. P. Code, S. 234—Accused charged with removing six animals belonging to five specific persons—Legality of trial.

Where the accused is charged jointly with having stolen six specific animals belonging to five specific persons by five different acts of theft from those five specific persons,

**Held:** that the error is not a mere technicality which can be set right under S. 537. The trial is wholly illegal. 25 Mad. 61 (P.C.), Foll. 91 Ind. Cas. 64=20 S.L.R. 3=27 Cr. L.J. 32=A.I.R. 1926 Sind 129.

—S. 412—Procedure—Directions to jury—Case of dacoity—Possession of stolen property with accused—Charge that there is in law a presumption of guilt—Misdirection.

Where in a case of dacoity the Judge charged to the jury saying that if the articles are stolen properties and were found in possession of the accused it is sufficiently proved that they were thieves or dacoits and the rebuttable presumption that arises in law is that the accused are either thieves or dacoits until they succeed by adducing sufficient proof in establishing their innocence.

**Held:** that the direction was a serious misdirection.

In a case where the evidence of the guilt of the accused rests upon discovery of stolen property from his possession, and which is tried by the jury the proper course is to direct that the jury are entitled to take the explanation offered by the accused of their possession. It is not necessary that such claim by the accused must be proved. 90 Ind. Cas. 542=53 Cal. 157=42 C.L.J. 212=26 Cr. L.J. 1582=A.I.R. 1925 Cal. 1241.



—S. 412—Procedure—Article of small value—Opinion of assessors.

In a case of identification of ornaments of small value the opinion of the assessors is of considerable value as they are well acquainted with the ways and habits of men of ordinary standing. 89 Ind. Cas. 155=12 O.L.J. 339=2 O.W.N. 330=26 Cr.L.J. 1291=A.I.R. 1925 Oudh 452.

—S. 411—Procedure—Trial in Native State—Further trial in British India for same offence—Maintainability.

Where accused committed dacoity in British India but were caught with the stolen property in a Native State and were tried and convicted under S. 411 by the State Court and had undergone the period of imprisonment.

**Held**, another trial for the same offence on the same fact in British India was barred. 73 Ind. Cas. 939=5 L.L.J. 574=24 Cr. L.J. 715=A.I.R. 1924 Lah. 238.

—S. 411—Procedure—Separate charges—Defects in procedure.

Unless stolen articles come into possession of the accused at different times, a separate charge is necessary for each of the articles possessed. It is only such a defect in the charge as has prejudiced the accused that invalidates a conviction. 36 P.L.R. 1910=11 Cr. L.J. 597=8 Ind. Cas. 229.

10. Several articles.

—S. 411—Several articles—Receiving stolen property—Property belonging to different owners and proceeding from different burglaries—Conviction for separate offences.

Where property belonging to different owners and the proceeds of different burglaries are found in the possession of one man, he cannot be convicted of several offences of receiving in respect of the property identified by different owners unless the prosecution proves that they were received by him at different times. 163 Ind. Cas. 132=37 Cr. L.J. 752.

—S. 411—Several articles—Separate convictions, when legal.

When a person is in possession of various stolen articles, he cannot be convicted separately in respect of each article unless the prosecution establish that there were different acts of receiving in respect of these articles. A.I.R. 1932 Lah. 615=34 Cr. L.J. 458=34 P.L.R. 433=142 Ind. Cas. 884.

—S. 411—Several articles—Accused in possession of property belonging to several owners—Several offences—Proof of receipt at different times—Necessity.

A person who is found in possession of properties identified as belonging to different owners should not be convicted of several offences of receiving in respect of the property identified by each owner unless the prosecution proves that they were received by him at different times. It is not for the accused to prove that the act of receiving was only one: 15 All. 317; A.I.R. 1923 All. 547; 15 Cal. 511; A.I.R. 1923 Cal. 557, Foll. 110 Ind. Cas. 673=29 P.L.R. 541=11 A.I. Cr. R. 9=29 Cr. L.J. 737=10 Lah. 158=A.I.R. 1928 Lah. 637.

—S. 411—Several articles—Properties stolen at different places—Separate convictions for receiving stolen property.

When an accused person produces property known to have been stolen at different places he can be convicted

separately of receiving stolen property. 96 Ind. Cas. 120=27 Cr. L.J. 872 (Sind).

—S. 411—Several articles—Accused found with two stolen articles—Source of possession not known—Number of offences.

A packet containing a loose diamond and a diamond-ring was lost and was found with accused two years later.

**Held**, only one offence of retaining stolen property was committed under S. 411 and not two offences under S. 403 one in respect of diamond and the other in respect of the ring. 81 Ind. Cas. 443=2 Rang. 80=25 Cr. L.J. 907=A.I.R. 1924 Rang. 256.

—S. 412—Several articles—Receipt—Offences, if several.

A person found in possession of stolen property identified as belonging to different owners, cannot be convicted separately in respect of property identified by each owner unless there is evidence to prove that they were received by him at different times. [15 All. 317, Foll.] The essence of an offence under S. 411 or 412 is the act of receiving or retaining stolen property. If a thief hands over to the accused a bundle containing a number of articles, the offence committed by the accused in receiving those articles is a single offence and not a number of offences and it makes no difference whether the articles belonged to a single owner or to different owners. 73 Ind. Cas. 520=21 A.L.J. 339=45 All. 485=24 Cr. L.J. 632=4 L.R.A. (Cr.) 104=A.I.R. 1923 All. 547.

—S. 411—Cr. P. Code (1898), Ss. 239 and 233—Several articles—Articles subject of same burglary received by several accused at various times—Transaction, if same.

The fact that the articles were the subject of one theft or burglary would not connect the receiving or the retaining of those articles by the several accused at different times and places with the original theft or burglary, or with themselves in such a way as to show that the offences under S. 411, I.P.C., were committed in the course of the same transaction. S. 239 therefore has no application and the only section of the Code applicable to the case is S. 233. 2 P.L.T. 47=A.I.R. 1921 Pat. 291.

—S. 411—Several articles—Distinct offences—Stolen property—Receipt—Different occasions.

Unless stolen properties were received on different occasions receipts of such properties constitute but one offence and the offender should have but one sentence. (1901) 3 Bom. L.R. 187.

11. Stolen property—What is.

—S. 414—Stolen property, what is—Removal of property from dead body.

An accused misappropriated property from a dead person and voluntarily assisted in disposing of it:

**Held**, that the property was stolen property and on offence under S. 414 was committed. A.I.R. 1938 Rang. 109=39 Cr.L.J. 490=174 Ind. Cas. 839.

—S. 414—Stolen property—Proceeds from sale of stolen property, whether amounts to receipt of stolen property itself.

In order that any person must be convicted of receiving stolen property, it must be shown that the property was stolen. The receiving of proceeds realised from the



sale of the stolen property is not receipt of the stolen property itself. 162 Ind. Cas. 779=18 N.L.J. 342=37 Cr.L.J. 718.

## 12. What constitutes offence.

### —S. 412—What constitutes offence.

Offence under—Facts to be shown—Nature of offence in relation to that in S. 411. 1945 O.W.N. (C.C.) 113=46 Cr. L.J. 600=1945 A.W.R. (C.C.) 71.

### —Ss. 410, 411 and 414—What constitutes offence.

Rs. 1,000 note was entrusted to A for depositing in bank to his master's account—A and his associates changing note of Rs. 1,000 into notes of smaller denomination and distributing same amongst themselves—B and C found in possession of such notes. held guilty under S. 411. A.I.R. 1944 Sind 237=46 Cr. L.J. 243=217 Ind. Cas. 202.

### —S. 411—What constitutes offence—Theft in State—Possession in British India.

Where the theft of a horse in a native State has been very recent, the presumption is that the accused himself (who was found with the horse in British India) stole the horse and brought it to British India. The accused can, therefore, properly be convicted under S. 411 for the offence of dishonestly retaining stolen property knowing it to be stolen, even though the theft had taken place outside British India. A.I.R. 1943 Lah. 162=I.L.R. 1943 Lah. 62=44 Cr.L.J. 706=45 P.L.R. 412=207 Ind. Cas. 514.

### —S. 411—What constitutes offence—Possession must be exclusive and conscious.

Before a conviction can be sustained under S. 411, the exclusive and conscious possession of the stolen articles must be brought home to the accused :

**Held**, after considering all the circumstances that there was no evidence to show that it was the accused who had stolen the articles. From the circumstances, the possibility of somebody putting the articles in the unused part of the house belonging to the accused either to get rid of them or to falsely implicate the accused was not excluded. A.I.R. 1941 Pat. 614=7 B.R. 996 (2)=42 Cr. L.J. 810=196 Ind. Cas. 79.

### —S. 414—What constitutes offence.

The accused, a driver of a taxi, was carrying persons who had hired it. On the way the taxi stopped and two persons got down from it and within a distance of about three and half yards, they without premeditation attached, injured and robbed a man of his purse and then again boarded the taxi and the accused, in spite of the cries of the victim, drove away as fast as he could :

**Held**, the accused having assisted the robbers in making away with the money so robbed, should be convicted under S. 414. I.L.R. (1940) 2 Cal. 9.

### —S. 414—What constitutes of offence.

Jewels entrusted with accused No. 1 for sale—Allegations that accused No. 1, with the help of accused No. 2, pledged the jewels with some third person—In fact the pledge was made by accused No. 2—Accused No. 1 convicted under S. 406 and accused No. 2 convicted under S. 414:

**Held**, that accused No. 2 could not be charged under S. 414 but must have been charged for abetment of breach of trust. 1936 M.W.N. 493.

### —S. 414—What constitutes offence—Spending money stolen by another.

Section 414 provides for the punishment of those who voluntarily assist in concealing or disposing of or making away with property which they know or have reason to believe to be stolen property. In reality the question is whether the words "disposing of" cover spending of money stolen by somebody else. The words cannot be divorced from their context and the intention of the section is to punish persons who, subsequent to the commission of the offence, either conceal it or make away with it by destroying or otherwise disposing of it. The section is intended to penalise persons who deal with stolen property in such a way that it becomes impossible to identify it or use it as evidence. The section cannot apply to a case of a man spending money stolen by another. A.I.R. 1935 Lah. 587=36 Cr. L.J. 1459=158 Ind. Cas. 835.

### —S. 411—What constitutes offence—Stolen gems recovered at instance of accused—Evidence to show that he had the gems for sale and that they were the property of certain jewellers—Inability of accused to explain that property was his—Conviction under—Legality of.

It is true that the mere fact that the accused had pointed out the place where some of the stolen property was concealed is not in itself sufficient evidence to support a conviction under S. 411. But where there is not only the recovery of the stolen property at the instance of the accused from a place but there is the evidence of witnesses to show that the accused had certain gold and diamond stones (the stolen property) for sale and that these diamond stones have been property of certain jewellers and the accused had offered no explanation as to how he, a poor man, came into possession of a packet of diamond stones as well as gold ornaments and he has furnished no explanation as to why he desired the gold to be melted, the charge under S. 411 is fully brought home to the accused, as it is for the accused to explain that the diamond stone proved to be the property of the jewellers were really his and that these diamond stones were purchased by him from somewhere and that he was the real owner of these stones. A.I.R. 1934 Oudh 399=35 Cr. L.J. 1130=11 O.W.N. 905=150 Ind. Cas. 845 (2).

### —S. 411—What constitutes of offence—Ingredients of offence.

In a charge under S. 411, the prosecution has got to prove: (1) that the property was stolen, (2) that it was received or retained by the accused and (3) that the accused knew or had reason to believe the property to be stolen. The prosecution may prove these three ingredients either by positive evidence or by certain presumptions. A.I.R. 1933 All. 893=1933 A.L.J. 1534=35 Cr. L.J. 621=56 All. 250=148 Ind. Cas. 141.

### —S. 411—What constitutes offence.

When receipt or retention of property, not necessarily for disposal, is dishonest, S. 411 is the appropriate section. If, on the other hand, dishonest receipt or retention cannot be proved but only dishonest concealment or disposal, S. 414 is more appropriate. 91 Ind. Cas. 690=49 Bom. 878=27 Bom. L.R. 1373=27 Cr. L.J. 114=A.I.R. 1926 Bom. 71.

### —S. 414—What constitutes offence.

S. 414 requires that the accused should have assisted some one else in the disposal of the property and does not cover a case where a person receives and then disposes of stolen property entirely on his own account. 91 Ind. Cas. 690=49 Bom. 878=27 Bom. L.R. 1373=27 Cr. L.J. 114=A.I.R. 1926 Bom. 71.



—S. 411—What constitutes offence—Jurisdiction—Robbery committed outside British India—Stolen property brought into British territory—Cr. P.C., S. 181.

Two persons—B who was not a British subject and R—were committed to the Court of Sessions at Jhansi. It being alleged against them that they had committed a robbery in an adjoining Native State and had brought the stolen property into British territory.

**Held**, that, though neither could be tried by the Session Judge of Jhansi for the robbery, B, because he was not a British subject, and R because the certificate required by S. 188, Cr. P.C. was wanting, yet both might be tried for the offence of retaining stolen property under S. 411 of the Penal Code. A thief who steals outside British India and enters British territory with the property can be convicted under S. 411. B. 186 foll. 3 A.L.J. 146=1906 A.W.N. 52=28 A. 372.

### 13. Miscellaneous

—S. 411—Duty to make enquiries—If required by section.

S. 411, I. P. Code, does not require that the person receiving article which is subsequently found to be stolen articles, must make enquiries at the time of receiving it whether it was obtained by theft or honestly. 4 A.I. Cr. D. 368=A.I.R. 1950 A. 497=51 Cr. L.J. 1331=1950 A.W.R. 453=1950 A.L.J. 344.

—Ss. 415 to 419.

#### Synopsis.

1. Amendment suggested.
2. Applicability and scope.
3. Attempt to cheat.
4. Burden of proof.
5. Cheating.
6. Civil dispute.
7. Essentials of offence.
8. Interpretation.
9. Jurisdiction.
10. Procedure.
11. Sentence.

#### 1. Amendment suggested.

—S. 415—Amendment suggested.

The definition of 'cheating' in S. 415 requires modification in order to cover cases where one person is deceived and another person suffers, or is likely to suffer damage or harm in body, mind, reputation or property. A.I.R. 1941 Lah. 460=I.L.R. (1941) Lah. 718=43 Cr. L.J. 254=197 Ind. Cas. 711.

#### 2. Applicability and scope.

—Ss. 419, 420.

A went to a **patwari** and told him that B had sold him some land. He produced M who represented himself to the alleged vendor B. The **patwari** made an entry to this effect in the mutation register. The mutation was placed before the Naib-Tahsildar and the same representation was repeated before him.

**Held**, that the case did not fall within the purview of S. 415 and that no conviction under S. 419 could, therefore, be sustained against A and M. They also could not be convicted under S. 420 as M's statement before the Naib-Tahsildar could not be regarded as valuable security. A.I.R. 1941 Lah. 460=I.L.R. (1941) Lah. 718=43 Cr. L.J. 254=197 Ind. Cas. 711.

—S. 417—Nature of offence.

The offence under S. 417 is cheating generally; but that under S. 420 as an aggravated type of the offence involving delivery or destruction of valuable security. 83 Ind. Cas. 57=20 M.L.W. 919=25 Cr.L.J. 1193=A.I.R. 1925M ad. 367.

—S. 415 and 417—Cheating or fabricating false evidence.

Sending Khilafat bonds in an insured postal cover, instead of Government Currency Notes is no offence under this section. It may amount to an offence of fabricating false evidence. 83 Ind. Cas. 993=21 A.L.J. 865=5 L.R.A.(Cr.) 15=26 Cr.L.J. 209=A.I.R. 1924 All. 205.

—Ss. 415, 416, 419—Cheating—Definition.

Where the accused was found to have knowingly represented one Musammam Jasoda to the Musammam Bitia, the mother of a sepoy named Kapur Singh who had been killed in action, and thereby induced the military authorities to grant a pension to Musammam Jasoda to which she was not entitled, it was held that the accused had committed the offence of cheating punishable under S. 419. (1907) A. W. N. 291=5 A.L.J. 57.

### 3. Attempt to cheat.

—S. 417—Attempt and preparation—Distinction.

There is a wide difference between the preparation and an attempt to commit an offence. The preparation consists in devising or arranging means necessary for the commission of an offence, an attempt is the direct movement towards the commission after the preparations are made.

Where a clerk, in charge of weighing the sugarcane which were brought to the sugar company for sale, entered in the register higher weight of the sugarcane but the register had not left his hands.

**Held**, that his action had not passed from the stage of preparation into that of an attempt to cheat. 65 Ind. Cas. 492=23 Cr.L.J. 108=A.I.R. 1923 Pat. 307.

—S. 419 and 511—Railways Act (IX of 1890), S. 112 (a)—Travelling with forged pass—Cheating by personation—Attempt—Conviction.

A person travelling with a forged Railway pass and being detected should be convicted under Ss. 419 and 511, I.P.C., his attempt to cheat by personation not being successful. 21 M.L.J. 748=12 Cr. L.J. 406=11 Ind. Cas. 590.

—Ss. 415, 511—Attempt to cheat—Complaint in a prosecution for attempt to cheat.

The accused without any authority arranged a contract for the delivery of the goods to the complainant firm by Messrs. Birkmyre Brothers. On the repudiation of the contract by the latter, the former pressed their claim under the contract and instructed their pleader to write to the latter firm and demand fulfilment of the contract. The accused then went to the pleader, falsely represented himself to be a member of the complainant's firm and instructed the pleader to write a letter in the name of the complainant's firm to Messrs. Birkmyre Brothers stating that the contract had been cancelled by the complainant's firm. The pleader wrote the letter, but on reference to the complainant's firm refrained from despatching it. On the prosecution of the accused by the complainant under Ss. 417, 511.



**Held**, that the accused committed the offences under Ss. 417, 511, as he fraudulently induced the pleader to write the letter which he would not have otherwise done and as, if the fraud had been successful, it must necessarily have caused injury to the pleader in mind, reputation and perhaps in his business, and might have involved him in litigation; that in a prosecution on a charge of attempting to cheat a certain person, that person need not be the complainant. (1908) 7 C.L.J. 375=12 C.W.N. 750.

—Ss. 415, 417, 511—"Induces thereby"—Attempt to cheat—Cooly recruiting—Attempt under S. 511.

The accused a cooly recruiter, induced the complainant to come to the cooly depot and promising him domestic service entered his name in the book of the depot and wrote a letter to a cooly contractor in Calcutta offering the complainant as a cooly; on the same day the accused persuaded the complainant to go to the Railway station to fetch a parcel and there the accused bought a Railway ticket for Calcutta for the complainant and tried to get him to enter the train but the complainant refused to go. The object of the accused was to get the complainant to go to Calcutta that he might be sent from there to Assam as a tea garden cooly.

**Held**, that the acts of the accused amounted to an attempt to cheat and therefore the conviction under Ss. 417 and 511 I.P.C., was right. (1905) 9 C. W. N. 764=2 Cr. L.J. 422.

—Ss. 415, 511—Attempt to cheat.

Where the evidence established the fact that the accused informed an octroi superintendent that there were 16 maunds of an article in a cart, whereas there were only 6 and by this act he induced the superintendent to grant him a refund of the duty on 16 maunds of the article instead of 6 maunds, and where this was discovered before any money was paid to accused.

**Held**, that the accused was guilty of an attempt at cheating under S. 417 read with S. 511. (1905) 2 A.L.J. 718.

—Ss. 415, 511, 468—Application to University for duplicate certificate by person not entitled.

S held a Matriculation certificate. C failed to pass the Matriculation examination. He wrote a letter purporting to be signed by S asking for a duplicate certificate and enclosed a letter purporting to be signed by the headmaster of a local school, supporting the application for a duplicate. It was not in fact signed by the headmaster, and S had not lost his certificate.

**Held**, (1) there was no cheating, as there was no proof that the deception practised by the accused on the Registrar of the University had caused harm or damage to the University which he represented. Nor was it shown that the accused in applying for the duplicate, intended to cause wrongful gain to himself or wrongful loss to the University to whom he had paid a fee greater than the cost price of the certificate. (2) The charge failed, for, assuming that the accused fabricated the headmaster's certificate, it was not shown that he did so fraudulently or dishonestly and with intent to cause damage or injury to the public or to any one. The question before the court was not as to his intended use of the certificate subsequently. (3) Even if he had such an intention, his mere preparation did not amount to an attempt to commit an offence within S. 511. (1902) 25 M. 726=12 M.L.J. 68. See 28 M. 90 (F.B.)

—Ss. 415, 511.—Traveling without ticket—Attempt to Cheat. See RAILWAYS' ACT, S. 112.

#### 4. Burden of proof.

—Ss. 415 and 420—Gist of offence—Allegation that complainant was deceived into buying stolen shares on representation by accused that they belonged to him—Proof how accused obtained shares soled—Onus, if on accused Evidence Act, S. 106.

To cheat a person there must be a dishonest and fraudulent intent. A man may be induced to do something on a false representation made to him. If the person making the representation honestly believed the representation to be true, there can be no question of cheating. But if he knew that the representation was false and he made it with a view that the other person should act upon it then that would amount to cheating. Where the case for the prosecution is that the complainant was cheated and deceived into buying stolen shares on the representation by the accused that they belonged to him, the prosecution has to prove not only that the shares sold to the complainant were stolen shares and that the representation made that they originally belonged to the accused was false, but also that that representation was false to the knowledge of the accused and was made in order to deceive the complainant and to induce him to buy. S. 106 of the Evidence Act does not cast the burden on the accused person of proving how he acquired the shares although it is a matter especially within his knowledge. This section can never be used to shift the onus of establishing an essential fact from the prosecution on the shoulders of an accused person. A.I.R. 1949 Cal. 586=3 A.I.Cr.D. 631=51 Cr.L.J. 115.

—Ss. 417, 415—Burden of proof.

In a prosecution for an offence under S. 415 the burden is on the prosecution to prove fraud or dishonesty. The burden of proof is not on the accused to prove their honesty. Every ingredient which is included in the definition of the offence must be established by the prosecution. A.I.R. 1933 Pat. 598=35 Cr.L.J. 95=146 Ind. Cas. 580.

#### 5. Cheating.

- (a) Cheating by cheque.
- (b) Dishonest concealment.
- (c) False Insurance of letter.
- (d) Fraudulently or dishonestly.
- (e) Misrepresentation.
- (f) Personation.
- (g) Miscellaneous.

##### 5. (a) Cheating by cheque.

—S. 417—Post-dated cheque.

A post-dated cheque in payment of goods already received is a mere promise to pay on a future date. And a broken promise is not a criminal offence though it may amount in certain business relations discreditable behaviour. A.I.R. 1938 Mad. 129=1937 M.W.N. 999=46 L.W. 629=(1937)2 M.L.J. 878=39 Cr.L.J. 261=173 Ind. Cas. 14.

—S. 415—Cheating by cheque—Duty of prosecution—Proof that non-payment was not accidental but intentional.

What the prosecution has to do in a case of cheating by means of cheque is to establish facts which point *prima facie* to the conclusion that the failure to meet the cheque was not accidental but was a consequence expected and therefore intended by the accused. It will



then be for the accused to establish any facts there may be in his favour which are specially within his knowledge and as to which the prosecution could not be expected to have any information. 32 Bom. L.R. 562=126 Ind. Cas. 868=A.I.R. 1930 Bom. 179.

—S. 417—Cheating by cheque.

The giving of a cheque on a bank as payment for goods, or in payment of a debt does not amount to a representation that the person giving the cheque has money to the amount in the Bank at the time, but does not amount to a representation: (1) that he has authority to draw on the bank for that amount; (2) that the cheque is a good and valid order for the payments of its amount and that the cheque will be paid, i. e., that the existing state of facts is such that in the ordinary course the cheque will be met. (1874) 2 C.C. 134 Foll. 32 Bom. L.R. 562=A.I.R. 1930 Bom. 179=126 Ind. Cas. 868.

—S. 415—Cheating by cheque—Payment by cheques which were dishonoured—Bets on credit in return—No loss caused—No Cheating.

The petitioner was a licensed book-maker of the Royal Calcutta Turf Club. On the assurance of the opposite party, that he would pay up his losses, if any, punctually on the settling day, the petitioner allowed the Opposite Party to take bets on credit on the 9th of December, 1922. The debts due to the Petitioner, by the Opposite party in respect of bets on credit amounted to a sum of Rs. 1,591, for which the Opposite Party sent to the Petitioner, on the 15th December, 1922, a crossed cheque for Rs. 1,591 on the Indian Industrial Bank. The cheque was presented for payment on the 18th December, 1922, when it was dishonoured.

Held that although the Petitioner was deceived and thereby induced to take bets on credit from the Opposite Party, the act which the petitioner was induced to do by reason of such deception has not caused or was not likely to cause damage or harm to him in body, mind, reputation or property. It does not follow that if the Petitioner had refused to take bets on credit from the Opposite Party, the latter would of a certainty have had to offer bets by paying cash. The Opposite Party might not have offered any bets at all. 74 Ind. Cas. 76=39 C.L.J. 273=24 Cr.L.J. 748=27 C.W.N. 919=A.I.R. 1924 Cal. 111.

5. (b) Dishonest Concealment.

—Ss. 417, 415—Concealment and non-disclosure.

There is a difference between mere concealment or non disclosure and a false representation, and while there is no legal duty placed upon the vendor of immovable property to disclose any charge or encumbrance, yet, if a false representation is made and acted upon, and as a result, money passes, then, though the false representation relates to immovable property the offence of cheating may have been committed. A.I.R. 1937 Sind 56=38 Cr.L.J. 510=167 Ind. Cas. 873.

—S. 417—No Offence under—R mortgaging his property to D—Property already sold by a farzi deed to C—D filing a complaint against R under S. 417.

R mortgaged certain property to D. In respect of the same property R had already executed a deed of sale in C's favour who was a minor. D later filed a complaint to the effect that R had executed a farzi deed of sale in favour of C prior to the execution of the mortgage and that the execution of the farzi deeds of sale had been concealed from him and thus he committed an offence of cheating.

Held: that the facts of the case disclosed no cheating and R could not be convicted under S. 417 as the deed of sale to C was a farzi transaction, that is to say, the property was clearly free from any encumbrance created by the deed of sale. 110 Ind. Cas. 332=9 P.L.T. 303=29 Cr.L.J. 700=A.I.R. 1928 Pat. 337.

—S. 415—Omission to disclose facts—Advance obtained for purchase of motor on its security—Car already mortgaged to another—Omission to disclose the mortgage—Cheating.

Applicant obtained an advance for purchase of a motor car from the Government on the security of a mortgage of the car. When he obtained the advance he had already mortgaged the car to a Chetty.

Held: that the omission to disclose the fact of the mortgage was clearly a dishonest concealment. 103 Ind. Cas. 845=5 Rang. 274=28 Cr. L.J. 765=A.I.R. 1927 Rang. 239.

—Ss. 415 and 420—Collection of debt by partner after dissolution of partnership.

A partner collecting a debt due to the firm without paying it over to his co-partner contrary to an undertaking under a dissolution deed not to interfere with the business without knowledge of the co-partner, is not guilty of such a concealment under S. 415, as to charge him for cheating there being no legal duty to disclose the fact. 18 Cr.L.J. 40=36 Ind. Cas. 872 (Mad.).

—S. 415—Concealment of fact—Dishonest—Duty to disclose

No concealment is dishonest within S. 415, I.P.C. unless there is a legal obligation to disclose it. Defects in title being defects in the property under S. 55 (1) (a) of the T.P. Act, there is no duty on the seller to disclose them unless the buyer could not with ordinary care discover them. 9 S.L.R. 97=16 Cr.L.J. 706=30 Ind. Cas. 994.

—Ss. 415, 420—Cheating—Pre-emption—Compromise of suit for Pre-emption, the pre-emptor, plaintiff agreeing to discharge certain incumbrances—Failure to disclose existence of mortgage subsequent to purchase.

The vendee, defendant in a suit for pre-emption, compromised the suit, the plaintiff agreeing to pay a certain sum in cash and to discharge certain incumbrances on the property in suit. It was subsequently discovered that the vendee had, after his purchase but before suit, mortgaged property which was the subject of the suit for pre-emption.

Held, that the vendee could not, on account merely of his omission to disclose the existence of this subsequent mortgage, be held guilty of the offence of cheating. 1904 A.W.N. 265=27 A. 302.

5. (c) False insurance of letter.

—S. 417—Enclosing in insured cover lesser amount than that purported to be sent—Offence under S. 417, if made out.

Where it is found as a fact that a debtor had really enclosed in an insured cover addressed to his creditor a lesser amount than that purported to be sent, he would be guilty of an offence under S. 417. I. P. Code. 1950 A.L.J. 679=A.I.R. 1950 A. 609.

—Ss. 415 and 417—Offence under—Debtor sending cover to creditor insured for a particular sum but actually containing a much smaller sum.

A person commits an offence punishable under S. 417, I.P. Code, if by deceiving his creditor he obtains



from him a document, not necessarily a legal quittance or a valuable security, but such a document as is likely to facilitate the evasion of payment by the debtor and to cause embarrassment to the creditor when he seeks to enforce his claim. Hence where a debtor sends to his creditor a cover insured for Rs. 70, but actually containing 7 one rupee notes and blank sheets of paper, he is guilty of cheating, because he thereby wanted to obtain an acknowledgment from the creditor of payment of the debt which was in fact not paid. The misuse of the acknowledgment signed by the creditor and obtained dishonestly cannot be regarded merely as probability or a remote possibility. I.L.R. (1948) All. 374=1948 A.W.R. (H.C.) 148=1948 A.L.J. 303=1948 O.W.N. 251=A.I.R. 1948 A. 433=1948 A.L.W. 246=49 Cr.L.J. 577.

—Ss. 417, 415—Sending bogus insured letter.

Whatever offence may be committed when a bogus insured cover is sent through the post, the offence of cheating the addressee within the provisions of S. 417, I.P.C., is not committed. A.I.R. 1938 Sind. 193=40 Cr. L.J. 61=I.L.R. (1939) Kar. 165=178 Ind. Cas. 226.

—Ss. 417, 415—Debtor sending blank sheets in insured cover for money due—Creditor signing acknowledgment—Offence of cheating.

A owed a sum of money to B who asked C to recover the money from A. A said he would send the money direct to B. A sent a letter insured for the sum due to B who, after signing the acknowledgment of the receipt of the insured the letter, found that it contained nothing but blank sheets of paper. In criminal proceedings that ensued, A was convicted under S. 417. A applied to the High Court on the ground that as there was no evidence to show that he had actually used the receipt in support of the claim that he had paid, he should not be regarded as having cheated or as having attempted to cheat :

**Held**, that when B signed the acknowledgment which he would not have done if he had not been so deceived an act was committed which was likely to cause damage or harm to him within the meaning of S. 415 and that the question of whether what was obtained from the creditor was a valid quittance or merely something to be used as evidence of payment, was unimportant :

**Held**, also, that the terms of S. 415 were wide and in the case the intention of A was fraudulent and he was rightly convicted and that the commission of the offence under S. 417 was not postponed until B had attempted to use the acknowledgment as proof of payment.

A person commits an offence punishable under S. 417 if, by deceiving his creditor, he obtains from him a document, not necessarily a legal quittance or valuable security, but such a document as is likely to facilitate the evasion of payment by the debtor and to cause embarrassment to the creditor when he seeks to enforce his claim. A.I.R. 1933 Pat. 183=14 P.L.T. 48=34 Cr. L.J. 1020=145 Ind. Cas. 671.

—S. 417—False insurance of letter—Accused sending waste paper by insured packet, purporting to contain currency notes—Applying to file the acknowledgment in suit by the addressee—Nature of offence.

A owed B certain amount. He sent a registered and insured packet to B, purporting to contain currency notes in settlement of debt and got acknowledgment of receipt of the packet. The packet was found to contain waste paper. B sued A for the debt. A applied to Court to admit the acknowledgment in evidence.

**Held**, that A was neither guilty under S. 417 for cheating, nor of attempt to cheat. A's action amounted to preparation.

To satisfy the definition of cheating there must be immediate causation, and the act itself must involve the probability. It is not enough to say that the signed acknowledgment is likely to be used as to cause damage, the act of signing itself must be likely to cause damage.

**Held**, further that A was guilty under S. 193 for fabricating false evidence in relation to judicial proceedings and sanction under S. 195, Cr. P. Code, was necessary. 99 Ind. Cas. 102=24 M.L.W. 725=28 Cr. L.J. 70=38 M.L.T. 187=7 A.I.Cr.R. 7=A.I.R. 1927 Mad. 199=51 M.L.J. 800.

—S. 415—False insurance of letter—Sending insured cover containing waste paper though purporting to contain notes—If cheating.

The accused sent to one N. an insured cover purporting to contain currency notes worth Rs. 800. The envelope was handed over by the accused in person to the despatching Postmaster, and was delivered to an agent of N. On the addressee opening the envelope, the same was found to contain a letter advising the despatch of a sum of Rs. 800 and several bits of waste paper, but no currency notes.

**Held**, All that the person deceived had been induced to do was that he had signed a receipt acknowledging the delivery of a cover and not of any sum of money alleged to be contained in the cover. 73 Ind. Cas. 780=24 Cr. L.J. 684=28 C.W.N. 252=50 Cal. 849=A.I.R. 1924 Cal. 215.

5. (d) Fraudulently or dishonestly.

—S. 415—"Fraudulently or dishonestly" and "property"—Meaning—Cheating—Gist of offence—Procuring motor driving licences from officer without applicants complying with tests and paying fees—Offence.

The offence of cheating is committed by (1) "fraudulently or dishonestly" inducing a person to deliver property and (2) by intentionally inducing a person to do or omit to do anything which he would not do or omit if he had not been so deceived and which act of omission is likely to cause damage or harm to that person in body, mind, reputation or property.

"Fraudulently" and "dishonestly" imply some idea of wrongful gain. Fraud is committed if any advantage is expected to the person who causes the deceit.

A person who took money from applicants for motor car driving licences, promising to get licences without their undergoing any of the tests and paying the incidental fees and deceived the licensing authorities; and obtained licences, his act in procuring the licences is a fraudulent one. It cannot be said that the licences when in the possession of the licensing officer was not property but merely worthless pieces of paper. The accused who procures driving licences without the necessity of the applicants undergoing any test will be guilty of "cheating". I.L.R. (1948) Mad. 578=49 Cr. L.J. 419=A.I.R. 1948 Mad. 268=1947 M. W. N. 762=60 L.W. 690=(1947) 2 M.L.J. 380.

—Ss. 417, 415—Intention to defraud.

The accused who was the lessee of a garden negotiated with the complainant for a sub-lease of it and it was settled that the complainant was to pay the accused a sum of money and he was thenceforth to pay the rent and to take the produce of the trees.



The deed was registered and next month before the complainant paid the rent, the accused paid it and it was found that he had sold the fruit in the garden. He was convicted of cheating by the trial Court :

**Held**, that on the finding of the trial Court that the accused was trying to get out of a bad bargain, since he sold the fruit for a larger sum, it could not be said that from the beginning the accused had the intention of defrauding the complainant and although it could not be said that he did not commit any offence by taking the fruit and selling it after he had transferred his rights in it to the complainant, that not being the offence with which he was charged he was entitled to an acquittal. A.I.R. 1934 Pat. 231=35 Cr. L. J. 456=15 P.L.T. 621=147 Ind. Cas. 674 (2).

**—S. 415—No dishonest intention—Decree-holder given to crossed cheque by judgment-debtor for being accommodated—Cheque dishonoured—No cheating.**

A the decree-holder made on 3rd February, 1927, a settlement with the judgment-debtor by which C executed a surety bond for the latter and an application was made to the Court for the stay of execution proceedings. At the same time, a crossed cheque was given by the judgment-debtor to A. The cheque on presentation on 10th February, 1927 was dishonoured and found its way back into the hands of A. On 11th February, 1927 a sum of Rs. 350 was paid by the judgment-debtor to A's pleader towards part realization of the decree. On the 16th February, 1927, A renewed the execution of his decree with a prayer for attachment of the judgment-debtor's property. The judgment-debtor was prosecuted for the offence of cheating under S. 415. I.P.C., in respect of the dishonoured cheque.

**Held**, that the judgment-debtor could not be convicted of the offence of cheating because the cheque was not, to the knowledge of the decree holder, issued in token of the immediate satisfaction of the decree as an accomplished fact but only as a security and as an accomplished fact but only as a security and as an aide means for the honouring of the cheques within a convenient period of time after issue or to otherwise satisfy the decree. Fraudulent or dishonest intention did not accompany the act of issuing the cheque. 110 Ind. Cas. 209=5 O.W.N. 357=10 A.I.Cr.R. 445=29 Cr.L.J. 657=A.I.R. 1928 Oudh 292.

**—S. 415—Thumb impression on blank paper—If offence.**

Mere taking thumb impression on a blank piece of paper is not sufficient to prove an intention to use the paper dishonestly and does not constitute an offence under S. 415. 94 Ind. Cas. 353=7 P.L.T. 772=1926 P.H.C.C. 110=27 Cr.L.J. 609=A.I.R. 1926 Pat. 267.

**—S. 415—Delivering to and inducing another to give receipt for—Bought Note signed by accused's firm as brokers for a bogus firm—No cheating.**

Where the accused induced another to give him a receipt for a Bought Note which the accused's firm had signed as brokers on behalf of another firm (which was a bogus one).

**Held**, that as in fact the Bought Note was made over to the person received, the accused had no dishonest intention even assuming that his intention was to hold the other party down to the contract. 85 Ind. Cas. 641=40 C.L.J. 283=52 Cal. 188=26 Cr.L.J. 545=A. I. R. 1925 Cal 106.

**—S. 415—Using invalid hundi.**

Where the accused obtained money from the complainant on the strength of a Hundi which he knew was worth nothing.

**Held**, that he was guilty of cheating. 60 Ind. Cas. 993=28 Bom. L.R. 340=22 Cr.L.J. 305.

**—S. 415—Fraud—Distinction between fraud and dishonestly—Intention to cause wrongful loss.**

Whenever the words "fraud" or "with intent to defraud" or "fraudulently" occur in the definition of a crime, two elements at least are essential to the commission of a crime, viz., (1) deceit or an intention to deceive or, in some cases mere secrecy and (2) either actual injury or possible injury or an intention to expose some person either to actual injury or a risk of possible injury by means of that deceit or secrecy. The term "fraudulently" may be defined to imply an intent to deceive in such a manner as to expose any person to loss, or risk of loss. The term "dishonestly" implies a deliberate intention to cause wrongful gain or wrongful loss and when such an intention is proved and is coupled with cheating and the delivery of property, the offence is punishable under S. 420, in which the word "fraudulently" finds no place. A for example may by a false representation induce B to advance him a sum of money in such circumstances that A is aware that he is exposing B to considerable risk of loss, but without the intention of causing wrongful loss: A would be acting fraudulently, and if he intended to cause wrongful loss, would be acting dishonestly. In the former case, he would be punishable under S. 417 and in the latter, under S. 412. 64 Ind. Cas. 33=A.I.R. 1922 L. B. 10=22 Cr. L.J. 721=13 Bur. L.T. 239.

**—Ss. 415 and 420—Sale of trees—Cheating.**

Selling trees which are known to be previously sold is cheating 17 A. L. J. 500=20 Cr. L. J. 331=1 U.P.L.R. (H.C.) 58=50 Ind. Cas. 667.

**—Ss. 417 and 511—Attempt to cheat—Dishonest intention.**

An accused cannot be convicted under Ss. 417 and 511 of the Code unless a dishonest mind of dishonest purpose is proved on the part of the accused. 17 C.W.N. 294=14 Cr.L.J. 120=18 Ind. Cas. 680.

**—Ss. 415 and 418—Statements literally true and fraudulent.**

Statements though literally true are nonetheless fraudulent, if their general effect is to create and if they are intended to create a false impression. 5 S.L.R. 95=12 Cr.L.J. 553=12 Ind. Cas. 641.

**—S. 415—Cheating—Taking delivery of property.**

The constitute the offence of cheating by taking delivery of property, there should be deceit at the time delivery is taken and the seller should be fraudulently and dishonestly induced to deliver the property in consequence of such deceit.

Where the accused induced complainant to part with property on the distinct representation that he would be paid later in course of the day and decamped at the first opportunity.

**Held**, this was sufficient proof of fraudulent intent existing even at the time when the complainant was induced to part with the property. 4 Bur. L.T. 14=12 Cr.L.J. 84=9 Ind. Cas. 458.

**—Ss. 415, 420—Cheating, Contract—Breach—Intention to perform, when contract entered into, absence of—Dishonest intention—Misrepresentation.**



**tion—Appropriation of money to other than purpose for which advanced.**

Complainant's firm had advanced money to the accused on the understanding that the accused would purchase rice from the outlying boats and ship and deliver same at the firm's place of business where it would be sold, the profit on the sale going to the accused, and the accused being liable to pay to the complainant firm the capital advanced with interest and a commission of one anna per maund of rice sold. The accused failed to deliver the rice within the stipulated time and was charged with cheating. The representations made by the accused to the complainant's firm when getting the advance were not entirely false, and it appeared that the accused had to some extent endeavoured to carry out the terms of the agreement, though he was also found to have converted a small portion of the money to his own use in paying off his own debts.

**Held**, that the case was really one of breach of contract. The mere fact that the accused converted a small portion of the money to his own use was not in itself sufficient to prove that the intention of the accused when he received the money from the complainant's firm was dishonest or that he obtained it by fraudulent misrepresentation of facts. The important question to be considered was whether the accused when he took over the money from the complainant's firm had any intention of performing the contract. (1906) 10 C.W.N. 1005 = 4 Cr.L.J. 154.

—Ss. 415, 420—'Wrongful loss, wrongful gain'—**Cheating—Getting subscription for a charity on misrepresentation.**

The Health Officer of a Corporation paid a subscription towards a charity. The applicant represented to him that he was a municipal servant while he was not such. On a charge of cheating being brought, **held** that there was no 'wrongful loss' on the one hand and 'wrongful gain' on the other and the charge cannot be sustained. (1905) 33 C. 50. = 3 Cr. L.J. 224.

—S. 415—**Cheating—Lottery ticket — Taking away on false pretence—Offences.**

B the complainant, purchased a lottery ticket, which, at the final result, carried a prize of Rs. 598. The accused took away the ticket from the complainant, representing that it carried a prize of Rs. 10 or 20 which he offered to pay. Complainant declined to receive the money and demanded back the ticket. The accused failed to do so. The complainant thereupon brought against the accused a charge of cheating. The magistrate discharged the accused, saying that, as the ticket was not a valuable security, the maxim *deminimus non curat lex* applied.

**Held**, that the reason given by the magistrate for not issuing process was bad in law, since if the allegations of the complainant were established, the accused, by deceiving complainant, fraudulently or dishonestly induced complainant to do something which he would not otherwise have done and which was likely to cause him the loss of money to be drawn as the prize won by the ticket in the lottery, and such inducement amounted to cheating. (1901) 4 Bom. L.R. 76.

##### 5. (c) Misrepresentation.

—Ss.—419, 496. Accused misrepresenting himself to belong to same sub-caste as the complainant, marrying her daughter—On account of marriage, complainant excommunicated and suffered harm to reputation and mind.

**Held**, that the marriage not being invalid the accused could not be convicted under S. 496 but was liable to conviction under S. 419. A.I.R. 1937 Cal. 214 = 41 C.W.N. 540 = 38 Cr.L.J. 577 = I.L.R. (1937) 2 Cal. 221 = 168 Ind. Cas. 708 (F.B.).

—Ss. 417, 415—**Property burdened with charge—Representation that property was free.**

There is nothing in S. 415 to exclude from the scope of its provisions cheating which has relation to immoveable property. It is true that so far as that part of the section which relates to dishonest concealment of facts is concerned, it must be read subject to the qualification that there is no duty on a seller to disclose defects in title in immovable property which the buyer with ordinary care could discover.

But where loan is made upon certain property burdened with charge on the representation that the property was free of any charge and there were questions specifically asked, and these questions were answered falsely, and the charge upon the property was not a registered charge, it cannot be said that in this case the creditor could have discovered this charge by reference to the registers. It is a misrepresentation deliberately made for the purposes of deception, amounting to cheating. A.I.R. 1937 Sind 56 = 38 Cr. L. J. 510 = 167 Ind. Cas. 873.

—S. 417—**Misrepresentation for taking daughter home.**

Petitioners were alleged to have gone to a person and asked him to send his daughter-in-law (petitioner's daughter) with them for paying a visit to a goddess. He sent the daughter-in-law with them, but they did not return her to him. He further stated that the daughter-in-law took away with her ornaments, and that the petitioners made a false representation to him in order to take away the girl with her ornament. The petitioners were charged under S. 417.

**Held**, that the facts alleged did not constitute an offence under S. 417. 106 Ind. Cas. 224 = 9 L.L.J. 351 = 28 Cr.L.J. 1040 = 9 A.I.Cr.R. 176 = A. I. R. 1927 Lah. 825.

—S. 418—**Offence under—Representation by a Mahomedan that he is a Hindu with an object of securing service.**

An offence under S. 418 of the Penal Code is committed where a Mohamedan with a view to secure service with a Hindu who would not engage him if he fact that he is not a Hindu is known to him, represents himself to be an orthodox Hindu. 81 Ind. Cas. 309 = 18 S.L.R. 59 = 25 Cr.L.J. 789 = A.I.R. 1925 Sind 57.

—S. 415, Illus. (f)—**Misrepresentation as to age.**

A person borrowing money by setting up that he is major and defending a suit against him for the money on the ground that he is minor as a result of which the suit is dismissed is guilty under S. 415, Illus. (f). 21 Cr L.J. 749 = 18 A.L.J. 408 = 58 Ind. Cas. 253.

—Ss. 415 and 520—**Cheating — Disposing of woman by misrepresentation as to status.**

A person who by representing a woman to be a Jat Widow, when she is really a sweeper whose husband is alive, induces another to pay money to him, commits the offence of cheating under S. 415. 6 P.R. 1918 Cr. = 61 P.L.R. 1918 = 16 P.W.R. 1918 Cr = 19 Cr.L.J. 335 = 44 = Ind. Cas. 351.



—Ss. 415, 419, 511, 182—False representation with a view to have one-self reinstated in a post—Essentials for conviction.

Where a person attempted to get himself reinstated in the post of Karnam by the production of a certificate of having passed a certain examination and representing that the certificate referred to him while in fact it referred to another man bearing the same name :—

**Held**,—That in the absence of proof that the representation caused or was likely to cause damage or harm to the officer to whom the representation was made either in body, mind, reputation or property within the meaning of S. 416, the accused could not be convicted under Ss. 419 and 511. **Semble** :—But the facts might amount to an offence under S. 182. (1908) 19 M.L.J. 271=4 M.L.T. 324=3 Ind. Cas. 609 (1)=8 Cr. L.J. 421.

—S. 415—Cheating—Sale of immoveable property without mentioning incumbrances.

The vendor of immoveable property cannot be convicted of cheating because he omits to mention that there is an incumbrance on the property, unless it is shown either that he was asked by the vendee whether the property was incumbered and said it was not, or that he sold the property on the representation that it was unincumbered. (1905) A.W.N. 98=2 A.L.J. 268=27 A. 561.

—Ss. 415, 417—Cheating—False representation by conduct.

Complainant offered to pay off a zurpeshgi debt which he owed to the accused and the latter, knowing for what purpose the money was being offered and knowing also that the money would not be paid if he did not accept it in payment of that debt and return the zurpeshgi document, accepted the money without saying that he intended to take it in payment of a simple bond debt which he alleged the complainant and several others jointly owed to him, and then gave the complainant a document which was alleged to be the said simple bond, but refused to return either the zurpeshgi document or the money.

**Held**, that the accused's conduct amounted to a representation which he did not intend to give effect to, that he would accept the money in payment of the zurpeshgi debt and would return the zurpeshgi document, and that the accused was guilty of the offence of cheating inasmuch as it was this conduct of his that induced the complainant to pay the money. S. 415, does not in any manner limit the mode in which the deception may take place, nor is it necessary that the deception should be by express words, but it may be by conduct or implied in the nature of the transaction itself. (1905) 9 C.W.N. 1006=32 C. 941.

—S. 415—Cheating—Warrant—Property—False representation.

Where a person induces a karkun under false representation to deliver a warrant of attachment to him, and makes on it an endorsement to his own advantage, and where it appears that but for that false representation the karkun would not have parted with the warrant, the person commits the offence of cheating punishable under S. 415. (1904) 6 Bom. L.R. 375.

—S. 415—Cheating—False representation—Fraudulent or dishonest intention, absence of.

The complainant, a salt merchant, went to buy 34 maunds of salt at Kharagoda and paid Rs. 45 to the accused a shroff in the Kharagoda Salt Department.

The accused asked him for some small change and demanded four annas, on which he tendered a rupee and received only four pice change.

**Held**, that, on these facts, the conviction of cheating could not be supported, as there was no evidence to show that the accused wilfully made a false representation or that he acted fraudulently or dishonestly. (1902) 4 Bom. L.R. 442.

## 5. (f) Personation.

—S. 416—Forging answer papers.

Where an accused, pretending to be a certain candidate for an examination, forges answer papers purporting to be answered by such candidate, he is guilty of both cheating and forgery, and the fact that such candidate has failed miserably in other papers answered by himself does not affect the guilt of the accused. A.I.R. 1936 Cal. 403=40 C.W.N. 956=37 Cr. L.J. 1156 (2)=I.L.R. (1937) 1 Cal. 71=165 Ind. Cas. 505.

—Ss. 415 and 419—Cheating—Obtaining a health certificate—Health certificate, whether property under S. 415.

An accused falsely personating another dishonestly obtained the health certificate from Health officer. He was guilty of an offence under S. 419, health certificate being property under S. 415. 11 L.W. 368=21 Cr. L.J. 478=56 Ind. Cas. 510.

—S. 416—Seduction—False personation.

Where A represented to B that he was a bachelor and proposed for the hand of his daughter and B was willing and admitted him to his house but before the marriage came off, A was discovered to be a married man but the girl nevertheless went away with A.

**Held**, that the seduction having taken place after the deception of A was discovered, it could not be said to be the natural consequence of the deception and therefore A cannot be convicted of cheating. 19 Cr. L.J. 781=22 C.W.N. 1001=28 C.L.J. 485=46 Ind. Cas. 701.

—Ss. 415 and 419—Writing false name in certificate of sale.

Where two persons induced Muharar at a fair to write a false name in certificate of sale, they were guilty of cheating by personation. An expert's opinion on thumb marks being different from that as to handwriting is a sufficient proof that the same thumb made both the marks. 9 P.R. 1914 Cr.=16 Cr. L.J. 139=204 P.L.R. 1915=27 Ind. Cas. 203.

—S. 415—'Fraudulently'—'Defraud'—False personation in proceedings before Collector.

The word 'fraudulently' in S. 415, must mean something different from 'dishonestly'. The word 'defraud' which is not defined in the Code may or may not imply deprivation actual or intended. A Collector refused to pay to the manager of a joint family a sum which the latter was entitled to draw out of the treasury on behalf of the family which included two minors, whereupon the manager and some others produced two persons representing them to be the minors and induced the Collector to pay the money.

**Held**, that no offence of cheating by personation had been committed as there was no interest to 'defraud' the Collector in this case. (1905) 1 C.L.J. 469=9 C.W.N. 807=32 C. 775.



—**S. 415—Cheating—Dishonestly—Bidding under assumed name—Employee in the office bidding at auction.**

In the absence of any rules forbidding an employee in the office to bid at sales of waste paper of the office of Accountant-General, a conviction of an employee under S. 415 for bidding under an assumed name could not be sustained. (1903) A.W.N. 231. See also (1902) M.W.N. 151=26 A. 195.

#### 5. (g) Miscellaneous.

—**Ss. 417, 408—Inducing complainant to compromise case under S. 408, if cheating.**

The charge under S. 408 is not compoundable and even where the accused makes some promise and the case is dropped, the promise would not be enforceable and it would always be open to the complainant to have the case revived if the Magistrate is so disposed. Hence, in such a case, the accused cannot be prosecuted for cheating under S. 417 for having induced the complainant "to compromise the case." A.I.R. 1943 Cal. 41=43 Cr.L.J. 926=I.L.R. (1943) 1 Cal. 154=203 Ind. Cas. 180.

—**Ss. 419, 415, 109—One M discharged from railway workshop and given discharge certificate—Certificate handed over by him to T who giving it to B—B getting service in workshop—Certificate found in workshop office—B convicted under S. 419 and T under S. 419-109—No evidence that manager was induced by discharge certificate in appointing B—Evidence showed that criterion for service was fitness of candidate—Handing over of certificate, held act of deception—But it was held not proved that manager was induced to appoint B on production of certificate and B was therefore not guilty under S. 419—T was, therefore, not guilty under S. 419 read with S. 109. A.I.R. 1942 Pat. 53=43 Cr.L.J. 65=196 Ind. Cas. 748.**

—**Ss. 419, 415—Offence of cheating, held established.**

S had become friendly with one R who was a drunkard and a spendthrift and died a premature death on June 30, 1936. On July 2, the wife of S put in an application before the Sub-Registrar, to the effect that R had, on March 31, 1936 sold a house to her but was refusing to have the sale-deed registered. Her prayer in this application was that there should be a compulsory registration and the Sub-Registrar accordingly issued process to R to appear before him. S wanted to get this compulsory registration effected *ex-parte* knowing that R was dead and that his successor in-interest would probably contest the alienation. He accordingly found out which process-server was to issue the process upon R and having got hold of a third person, pointed him out to the process-server, as R. This person admitted that he was R but refused to accept service. The process-server accordingly made a report to this effect on the back of the process, namely that service had been effected upon R who refused to accept it. In view of his refusal he took R to the Naib-Nazir who directed him to take him to the Administrative Subordinate Judge. On the way, R slipped away and was never seen again. Enquiry followed which resulted in the prosecution and conviction of S under S. 419, I.P.C. It was not clear in the charge by virtue of which of the several consequences referred to in S. 415 he was liable for the offence of cheating:

**Held**, that the offence under S. 419 had been made out. The action which the process-server would have been deceived into taking was such as to cause or likely to cause damage to him in mind, body, property, or reputation. The almost certain result of the act brought

about by deception upon the process-server would have been a departmental inquiry against the process-server:

**Held**, however, that the charge was defective by reason of the failure of the Magistrate to set out in the charge the particular consequences by virtue of which the deception became an offence. The defect was a material irregularity and could not be cured by S. 225; Criminal P.C.

[Charge and proceedings subsequent thereto were set aside and a re-trial from that stage ordered.] A.I.R. 1938 Lah. 828=40 Cr.L.J. 371=180 Ind. Cas. 485.

—**Ss. 417, 415—"Gupta Mantra".**

The accused advertised "Gupta Mantra" by reading which people would achieve desired object without any hardship of effects on their part. The accused advertised a cash prize in case it was proved fallible. A person replied the advertisement, got in return the alleged Mantra along with certain instructions as for example, looking at the moon for fifteen minutes without winking, a feat which, if not impossible, at any rate beyond the powers of ordinary human being except by long training and preparation. Thus the instructions were contrary to the claim made in advertisement and could not be observed without great efforts and preparation:

**Held**, that the accused was guilty of cheating. A.I.R. 1938 Pat. 185=39 Cr. L.J. 442=19 P.L.T. 375=175 Ind. Cas. 635.

—**Ss. 417, 415—Delivery of property not in one's possession but at one's order.**

A man can give delivery through another of property within the meaning of S. 415 which is not in his possession, but which is at his order. If for instance, A had an agreement with B that B will give delivery of certain goods in his possession on account of A on the receipt of delivery note from A, and C by deception obtain a delivery note from A on B and thereby gets possession of goods from B, it cannot be said that he has not got delivery of property from or through A directly as a result of his deception of A. A.I.R. 1937 Sind 293=32 Sind L.R. 87=39 Cr. L.J. 123=172 Ind. Cas. 374.

—**S. 415—Suppressing fact of charge from mortgagee.**

Decree creating charge—Subsequent mortgage of the same property—Mortgagee taking without notice and for consideration:

**Held**, that by suppressing the fact of the charge from the mortgagee, the mortgagor cannot be said to have committed any deception leading to cheating as defined in S. 415. A.I.R. 1934 Nag. 149=35 Cr. L.J. 1063=30 N.L.R. 303=150 Ind. Cas. 20.

—**S. 417—No offence—Decree against the judgment-debtors—Two declared insolvent—Creditor getting his name in Schedule—Creditor obtaining fresh bond from the third party and debt also paid by Receiver subsequently.**

The accused had obtained a decree against three judgment-debtors. Two out of them had subsequently applied to be adjudicated as insolvents. The accused got his name entered in the list of creditors and proved his debts against them. He then proceeded against the third and obtained from him a fresh bond. Subsequently the Official Receiver made payment to the accused.

**Held**, that the receipt of the amount cannot in any way render the accused criminally liable. It is a matter for adjustment in civil Court. 113 Ind. Cas. 536=10 L.L.J. 485=12 A.I.Cr.R. 85=30 Cr.L.J. 162=A.I.R. 1928 Lah. 945.



**—S. 415—Criminal liability—Attempt by person cheated to obtain from the person cheating—Security for the amount—Effect.**

When a person is cheated by another, any attempt on the part of the former to obtain sufficient security from the latter for the payment of the money due by him and the temporary fresh accommodation given to the offender as the result of negotiations to save his reputation in business do not affect the criminal liability of the offender. 90 Ind. Cas. 706=26 Cr.L.J. 1602=2 O.W.N. 760=A.I.R. 1926 Oudh 161.

**—S. 415—Promise to remove untouchability—Investiture of sacred thread—Cheating.**

The accused gave out that he was the President of a certain association which had undertaken the task of socially elevating a certain community of people by investing its members with the sacred thread on the footing that they were kshatriyas, and by other means. Much was made of this. Money was realised for the professed objects. But the arrangements that were made were ridiculously inadequate. The idea of being made touchables on investiture of the sacred thread as kshatriyas did not originate with the accused. The community themselves believed that they were entitled to be classed as such and had petitioned the authorities for the purpose.

**Held**, upon the facts of the case, that it was absolutely necessary to come to a finding in the negative on the question whether the members of the community in question could legitimately claim to be kshatriyas before the accused could be held to be guilty. 86 Ind. Cas. 705=26 Cr.L.J. 849=29 C.W.N. 408=41 C.L.J. 172=A.I.R. 1925 Cal. 603.

**—S. 415—Untrue praise of goods—If offence.**

The giving of untrue praise of an article offered for sale does not come within S. 415.

The accused advertised that he was willing to sell an almost new jazz set. The complainant purchased the goods. On receipt of the goods the complainant found that they were not of the quality he expected and also that certain articles mentioned in the list had not been sent to him.

**Held**, that the facts were insufficient to justify the prosecution of the accused for a criminal offence. 86 Ind. Cas. 985=26 Cr. L.J. 921=29 C.W.N. 362=A.I.R. 1925 Cal. 605.

**—S. 415—Delivery—Wagons taken to colliery siding belonging to Railway, if amounts to delivery.**

Property is delivered when something in the ownership or possession of one man is delivered into the ownership or possession of another. Railway wagons are no doubt "property." They are not as property delivered to a colliery merely by being taken to the colliery siding which belonged to Railway. The colliery is entitled to load the wagons but the amount of control exercised for that purpose is of a very limited character. 84 Ind. Cas. 554=51 Cal. 250=28 C.W.N. 160=26 Cr. L.J. 330=A.I.R. 1924 Cal. 495.

**—S. 415—Obtaining certificate by cheating.**

A certificate that a person has passed an examination is property within the meaning of Ss. 415 and 420 of the Indian Penal Code. Therefore, a person who obtains a certificate from a Deputy Inspector of Schools by stating untruly that he passed the examination in a certain year, is guilty of an offence punishable under S. 420 of the Penal Code. 67 Ind. Cas. 619=18 N.L.R. 52=23 Cr. L.J. 443=A.I.R. 1922 Nag. 229.

**—S. 417—Applicability—Taking complainant to another village on pretence of buying buffalo for him, getting him intoxicated and obtaining by misrepresentation a deed of divorce from him—Offence under S. 420 or S. 417.**

The complainant was taken to another village on the pretence that a buffalo would be bought for him and the money necessary for the purpose would be advanced to him. He was then given a large amount of liquor to drink and when in the state of intoxication a document purporting to be a bond was executed and his signature was obtained. This document was a deed of divorce of his wife who was then taken away by some of the petitioners.

**Held**; that the offence charged did not fall within the purview of S. 417 but of S. 420. 67 Ind. Cas. 588=3 L.L.J. 283=A.I.R. 1921 Lah. 63.

**—Ss. 415 and 420—Cheating—Currency note—Tender of—Shopkeeper retaining a small amount for depreciation.**

Where a shopkeeper was paid in currency notes and gave change deducting a small sum for alleged depreciation of the notes from their face value, the offence of cheating is not committed. There was no deceit, as the customer was not induced to hand over the notes by any representation on the part of the accused that he would get change calculated on the face value of the notes but the notes were handed over in the ordinary course of the sale and purchase and what really happened was that a dispute then arose as to the correct amount of the change. 43 Bom. 842=21 Bom. L.R. 763=20 Cr. L.J. 684=52 Ind. Cas. 604.

**—S. 417—Pleader not liable—No prima facie case.**

When, in a proceeding under S. 107, Cr. P.C., a client on his pleader's advice was willing to give an undertaking, but the opposite party, having first withdrawn on that condition, refused to accept the undertaking, the pleader cannot be charged under S. 417, I.P.C., by the opposite party. 20 C.W.N. 1112=18 Cr. L.J. 50=37 Ind. Cas. 34.

**—S. 415—Object—Mere escape from personal inconvenience or annoyance—Offence.**

Where none of the objects specified in S. 415 is proved, the mere fact that the accused wished to escape from personal inconvenience or annoyance will not make him liable under S. 415. (1902) 4 Bom. L.R. 440.

**—S. 415—Cheating—Licensed opium vender—Selling opium at rates higher than the rates fixed by Government is (1902) 4 Bom. L.R. 823.**

**—S. 415—Inclusion of false item in bill when cheating.**

In order to amount to cheating there must not only be the inclusion of a false item in a bill with intent to defraud, but the other party must have been induced to part with money on the faith of that fraudulent bill. Payments not exceeding the amount admittedly due on the bill cannot be said to have been induced by the false entry in the bill; nor is any damage caused by such payments as they go to discharge a real debt. (1900) 5 C.W.N. 255.

**6. Civil dispute.**

**—S. 417—Giving post-dated cheque by person having no funds in bank.**

Giving a post-dated cheque by person who has no funds to his credit in the bank does not amount to an



offence of cheating when there is no evidence to show that the person to whom the cheque was given parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured. The dispute in such a case is of a civil nature. A.I.R. 1940 Lah. 93=41 P.L.R. 869=41 Cr. L.J. 594=187 Ind. Cas. 123.

—S. 417—Acquittal—False representation by Vendor that property is unencumbered—Acquittal of the offence of cheating—Interference by High Court.

A sold a land to B without disclosing a prior incumbrance. The sale deed contained a clause that the property was unencumbered. Subsequently the incumbrancer sued on his mortgage and got a decree under which B had to pay the mortgage money with interest to save the property from sale. B filed a complaint against A under Penal Code, S. 417; but A was acquitted.

Held, that the question is not of any public interest and the parties had a remedy in Civil Courts and therefore no interference with the order of acquittal is necessary. 84 Ind. Cas. 641=6 L.L.J. 50=26 Cr. L.J. 337=A.I.R. 1923 Lah. 601.

—S. 417—Cheating—Creditor and debtor.

Where a creditor (accused), in whose favour three bonds for Rs. 170 were drawn up, is alleged by the prosecution to have accepted Rs. 116 in full discharge of all the three bonds but to have returned only two bonds and not the third.

Held, that the dispute was a civil nature. 25 P.W.R. 1913 Cr.=14 Cr.L.J. 524=327 P.L.R. 1913=20 Ind. Cas. 1004.

## 7. Essentials of offences.

—S. 415—Essentials of.

In order to constitute an offence of cheating, there must be deception practised upon a person; by that deception the person must be induced to do or omit to do something which he would not have done or omitted to do, had he not been deceived; such act or omission must cause or be likely to cause, to the person deceived damage or harm in body, mind reputation or property.

It is not necessary to constitute an offence of cheating under S. 415, I. P. Code, that the act which the person deceived is induced to do should actually cause harm to him. It is enough that the act which the person deceived has been induced to perform is likely to cause damage or harm to him. 1948 A.L.J. 502=A.I.R. 1949 A. 15=50 Cr.L.J. 31=1949 A.W.R. 89.

—S. 415—Essentials.

The essence of the charge of cheating is that the complainant should have been deceived. A.I.R. 1941 Sind 198=I.L.R. (1941) Kar. 345=43 Cr.L.J. 73=196 Ind. Cas. 755.

—S. 415—Essentials.

Deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception, the person deceived is induced to part with any property or to do or omit to do anything that he would not do or omit to do but for the deception. A.I.R. 1940 Lah. 93=41 P.L.R. 869=41 Cr. L. J. 394=187 Ind. Cas. 123.

—S. 415. The word "manner" in S. 223, Criminal P. C., could fairly be interpreted as including every ingredient by virtue of which the act ceases to become one of mere non-criminal deception and becomes one of "cheating" within the meaning of S. 415, Penal Code, and effect of the deception upon the victim's body mind, reputation or property would thus be a part of the "manner" of cheating. A.I.R. 1938 Lah. 828=40 Cr.L.J. 371=180 Ind. Cas. 485.

—S. 415—Elements of offence.

In order to constitute the offence of cheating under S. 415, there must be active deception, by which the accused must (a) fraudulently or dishonestly induce the person to deliver property, etc., or (b) intentionally induce him to do or omit something which causes damage etc., to him, or there must be a dishonest concealment of facts, with the like results. The word "defraud" is not defined in the Code, but connotes generally an intention to deceive, coupled with the possibility of doing injury. A.I.R. 1938 Cal. 366=60 Cal. 262=149 Ind. Cas. 903.

—S. 415—Essentials.

In the offence of cheating there are two elements—deception and dishonest inducement to do or omit to do something. Mere dishonesty is not a criminal offence. Moreover, to establish the offence of cheating the complainant would have to show not only that he was induced to do or omit to do a certain act but that this induced omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property—which are presumed to be the four cardinal assets of humanity. A.I.R. 1938 Mad. 129=1937 M.W.N. 999=46 L.W. 629=(1937) 2 M.L.J. 878=39 Cr.L.J. 261=173 Ind. Cas. 14.

—S. 415—Essentials.

The essence of the offence of cheating is the original deceit whereby the delivery of property is dishonestly induced. A.I.R. 1936 Rang. 471=38 Cr. L.J. 48=165 Ind. Cas. 596.

—Ss. 417, 415—Intention.

Where the proceedings do not show that the accused had any intention of causing damage or harm by his act, nor can it be shown that his act was even likely to cause damage or harm, a prosecution for cheating is entirely misconceived. (1935) 157 Ind. Cas. 241=36 Cr.L.J. 1136.

—S. 415—First hand materials, disclosing all the elements which are requisite to make out an offence of cheating, must be before the Court before any process can issue in respect of it. A.I.R. 1934 Cal. 457=35 Cr.L.J. 946=33 C.W.N. 578=61 Cal. 792=149 Ind. Cas. 363.

—S. 415—Contingent injury is not enough.

In order to bring a case within the second part of S. 415, damage or harm caused, or likely to be caused must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom, and law does not take into account remote possibilities that may flow from the act. The damage or harm must be the proximate and natural result of the act or omission and does not include vague and contingent injury. A.I.R. 1934 Lah. 833=35 P.L.R. 666=36 Cr.L.J. 276=153 Ind. Cas. 30.

—S. 415—Facts to be considered—Intention at the time of the offence—Damage a necessary consequence—Using false name with object of not fulfilling contract—Remote damage—Effect.

In a case of cheating the intention of the accused at the time of the offence is to be seen and the consequence of the act or omission itself is to be



judged. The damage or harm caused or likely to be caused must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom, and the law does not take into account remote possibilities that may flow from the act. The proximate and natural result of the act has to be judged and not any vague and contingent injury that may possibly arise.

Where the accused used the name of a bogus or non-existent firm, with the object of not fulfilling the contract in the event of the market going up and as the market did go up he did not supply the goods with the result that the party suffered loss:

**Held**, such remote consequences must be ignored for the purpose of S. 415.

**Held**, also that the damage likely to be sustained by the other party on account of the fact of entering into a contract with a bogus firm was a remote contingency. 85 Ind. Cas. 641=40 C.L.J. 283=52 Cal. 188=26 Cr. L.J. 545=A.I.R. 1925 Cal. 100.

#### —S. 415—Essentials.

In order to prove the offence of cheating (Ss. 415 and 420 of the Indian Penal Code) it is necessary to establish: (1) that some one was deceived; (2) fraudulently or dishonestly or intentionally and (3) by means of such deceit he was induced to change his position either by parting with property or by doing something to his own injury. 81 Ind. Cas. 926=26 Bom. L.R. 211=25 Cr.L.J. 1102=A.I.R. 1934 Bom. 303.

#### —S. 415—Adulteration of articles—Adulteration of saccharine with bicarbonate of soda—Sale of the mixture as saccharine through a broker—Abetment of cheating.

One B procured quantities of saccharine and bicarbonate of soda and mixed them and put the mixture into tins which he gave to a broker to sell. The broker sold the mixture as genuine saccharine and received money for it which he made over to B from whom he received his brokerage for the transaction. The Broker was discharged though tried jointly with B and examined as prosecution witness.

**Held**, that under the circumstances B was guilty of abetment of cheating.

In order to prove the offence of cheating (Ss. 415 and 420 of the Indian Penal Code) it is necessary to establish: (1) that some one was deceived; (2) fraudulently or dishonestly or intentionally and (3) by means of such deceit he was induced to change his position either by parting with property or by doing something to his own injury. 81 Ind. Cas. 926=26 Bom. L.R. 211=25 Cr.L.J. 1102=A. I. R. 1924 Bom. 303.

#### —S. 415—Direct damage from deceit.

The person deceived must have acted under the influence of the deceit. The facts must establish damage or likelihood of damage and the damage must not be too remote. The word "cause" doubtless excludes damage occurring as a mere fortuitous sequence unconnected with the act induced by the deceit, except as every event is connected with preceding event's in an unending chain but the definition as it stands, is wide enough to include all damage resulting or likely to result as a natural consequence of the induced act. However the damage must be direct natural or probable consequence of the induced act. 84 Ind. Cas. 554=51 Cal. 250=28 C.W.N. 160=26 Cr.L.J. 330=A. I. R. 1924 Cal. 495.

#### —S. 415—Essentials.

To constitute cheating it is essential in the first place that the person who delivers property should have been deceived before he makes delivery and in the second place he should have been induced to do so fraudulently or dishonestly. The deception may be by words or by conduct. As to what is sufficient to constitute deception must be decided in each case on its merits. 59 Ind. Cas. 921=2 P.L.T. 211=1921 P.H.C.C. 12=22 Cr.L.J. 169=A.I.R. 1921 Pat. 80.

#### —S. 415—Cheating—Elements of offence.

To constitute the offence of cheating under S. 415, the damage or harm caused or likely to be caused must be the necessary consequences of the act done by reason of the deceit practised or must necessarily follow therefrom. Mere possibility of annoyance is not enough. 34 P.R. 1918 Cr.=20 Cr. L.J. 77=48 Ind. Cas. 877.

#### —S. 415—Cheating—Essentials of offence.

To constitute the offence of cheating it is not necessary that the deception should be by express words but it may be by conduct or implied in the nature of transaction itself. The intention of cheating must be inferred from the previous or subsequent conduct of the accused. In order to find whether a person is guilty of cheating, the Court has to take into consideration the cumulative force and effect of all the surrounding circumstances. 18 P.W.R. 1915 Cr.=16 Cr. L.J. 657=30 Ind. Cas. 641.

### 8. Interpretation.

#### —S. 415—Interpretation.

It is clear from the words of S. 415 that mere deceit of a person is not sufficient. The mere doing of something fraudulently or dishonestly is not sufficient. The deceit of the fraudulent or dishonest person must induce the person deceived to deliver some property, or to consent that some property shall be retained, or intentionally induce the person deceived to do or omit to do something which he would not otherwise do or omit to do, and, the words "and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property," are important. But when the section says "which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property," it clearly means—which act or omission in itself causes or is likely to cause damage or harm to that person in body, mind, reputation or property and that if that damage or harm is dependent upon the future act of some other person, then such damage or harm is too remote to be within the provisions of the section which contemplates that the act done is in itself likely to cause damage or harm and which is not dependent for damage or harm upon the entirely problematical action of some other person. To use a trite phrase, the act done or omitted to be done must be the *causa causans* of the harm caused or likely to be caused. A.I.R. 1938 Sind 193=40 Cr.L.J. 61=I. L. R. (1939) Kar. 165=178 Ind. Cas. 226.

—S. 415—The deceit referred to in S. 415 and Ill. (f) to that section may be by conduct and the nature of transaction itself may imply an assertion. A.I.R. 1932 Bom. 273=34 Bom. L.R. 313=56 Bom. 204=33 Cr. L.J. 401=137 Ind. Cas. 142.

#### —S. 415—'Wrongful gain need not accrue from party deceived'.

'Wrongful gain' need not be made out of the person [deceived], to constitute cheating. Either



'Wrongful gain' to party deceiving or 'wrongful loss' to party deceived is necessary under S. 415. I.P.C. 16 Cr.L.J. 753=31 Ind. Cas. 353 (Mad.).

### 9. Jurisdiction.

—S. 415—Jurisdiction—V. P. P. purporting to contain tea but really sawdust sent from Madras to Hyderabad—V. P. P. paid for at Hyderabad—Completion of offence—Jurisdiction of Madras Court.

Accused sent by V.P.P. certain boxes purporting to contain tea at the order of A to Hyderabad. A paid the value payable amount and took delivery of the boxes but on opening found them to contain merely sawdust.

**Held**, the delivery contemplated by S. 415, Penal Code is 'delivery in any person', a phrase which will include even an agent. The deceit and the delivery in consequence of the deceit were complete when the money was handed over to the Post Office and the subsequent delivery by the Post Office to accused was not a necessary ingredient of the offence and therefore the offence was completely committed to Hyderabad and the Madras Court had therefore no jurisdiction. 101 Ind. Cas. 484=1927 M.W.N. 221=28 Cr.L.J. 452=8 A.I. Cr.R. 69=A.I.R. 1927 Mad. 544=52 M.L.J. 511.

### 10. Procedure.

—S. 417—Procedure—Cr. P. Code, S. 233—Joint trial for separate offences—Legality.

The accused were charged with one offence though the complainants stated that they were cheated separately at different intervals. The charge sheet did not make it clear which of the accused persons was being charged with abetment and which of them was being charged with the substantive offence.

**Held**, the offences were all separate and a joint trial of the accused persons for ten separate offences was not only irregular but illegal. 69 Ind. Cas. 271=25 O.C. 151=23 Cr.L.J. 687=A.I.R. 1922 Oudh 250.

### 11. Sentence.

—S. 417—Dual sentence.

Person's connection with specific offence of cheating only through conspiracy—Persons sentenced for conspiracy—Additional sentence for specific offence of cheating should not be passed. A.I.R. 1939 Cal. 376=69 C.L.J. 298=41 Cr.L.J. 255=186 Ind. Cas. 171.

—Ss. 417, 120-B—Conspiracy to cheat—Punishment.

The accused were charged with cheating in pursuance of a conspiracy which was not proved, and the evidence showed that the offence of cheating was committed without conspiracy:

**Held**, that the accused could be punished for cheating only. A.I.R. 1936 Bom. 193=60 Bom. 485=38 Bom. L.R. 153=37 Cr.L.J. 753=162 Ind. Cas. 950.

—S. 419—Sentence—Previous convictions for theft—If can be considered.

It seems somewhat anomalous that previous convictions of an accused for theft and burglary should be taken into account in increasing his sentence where the subsequent offence is cheating by personation under S. 419. 100 Ind. Cas. 536=26 Cr.L.J. 312=A.I.R. 1927 Lah. 220.

—S. 420

### Synopsis.

1. Attempt.
2. Burden of proof.
3. Cheques.
4. Civil Action.
5. Concealment of fact.
6. Conspiracy.
7. Contract.
8. Deception by conduct.
9. Defence.
10. Essentials and scope.
11. Evidence and proof.
12. Fraud.
13. Intention.
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16. Misrepresentation.
17. Procedure.
18. Sentence.
19. Similar offences—Distinguished.
20. Speculative schemes.
21. Miscellaneous.

### 1. Attempt.

—Ss. 420, 511—Attempt to cheat.

A man may be guilty of an attempt to cheat, although the person he attempts to cheat is fore-warned and is, therefore, not cheated. A.I.R. 1941 Oudh 3=1940 O.W.N. 819=41 Cr. L.J. 881=1940 A.W.R. 381=16 Luck.=194=190 Ind. Cas. 259.

—Ss. 420, 511—Trick of doubling notes.

A Sub-Inspector of Police named T on receiving information that the accused gave out that he could double Govt. currency notes, visited the accused in the guise of a Seth and arranged to bring notes on the following night for doubling them. T then took some notes to the accused after arranging that other Police Officers should also come to the place and wait within call. The accused tied the notes together with pieces of paper of same size and performed certain process. After some hours, the accused took up the packet and untied it. While he was so engaged, however he managed to substitute another packet for the packet of notes and concealed the latter packet under his buttocks. The Sub-Inspector detected what had been done, caught hold of accused's hands and shouted to the Police Officers to come up. The Sub-Inspector asked the accused where he had put the original packet and the accused, pointing to the packet which had been substituted for it and which was lying before him said that that was the packet. This packet was opened and was found to contain seven copies of a book. Under the right side buttocks of the accused was found the packet containing the notes. It was in the same condition as when originally tied.

**Held**, that although an offence of cheating was not actually committed, there was an attempt to deceive and the mere fact that the Sub-Inspector did not hand over the notes because he was deceived but merely because he wanted to secure the accused's conviction, did not change the legal position in regard to the accused's guilt. The accused clearly went beyond the stage of preparation when he tried to induce a person to hand over notes to him on the assurance that he



could double them and did an act towards the commission of the offence of cheating. It is not necessary that the accused should complete every stage in the actual offence except the final stage. In these circumstances, the accused could be convicted under S. 420 read with S. 511 of the I.P.C. A.I.R. 1941 Oudh 3 (6)=1940 O.W.N. 819=41 Cr. L.J. 881=1940 A.W.R.C.C. 381=16 Luck. 194=190 Ind. Cas. 259.

—Ss. 420, 511—Pawning of bangles of alloy of gold describing them as 'gold bangles'.

There is no such thing as "pure gold" in the jewellery trade. The purest gold used, is 22 carat, or 22 parts out of 24. When a person pawns bangles of only about 12 carat, that is to say, a good deal below the ordinary standard, he cannot be successfully charged with offence of attempting to cheat, if he describes them as "gold bangles." It is a case of *caveat emptor* i.e., it is for the pawnee to test the articles before taking them. A.I.R. 1935 Rang. 426=37 Cr. L.J. 179=159 Ind. Cas. 789.

—Ss. 420, 511—Attempt to cheat by legal practitioner.

An accused, who was one of the leaders of the Bar, wrote a letter to another containing a definitely false statement with a view to get certain valuable security from the other person and caused the letter to reach such other's hands. But it was not proved beyond reasonable doubt that it was that letter and the deception contained therein alone which induced the other to put the security under the control of the accused. It was clear that the conviction of the accused for attempt to cheat, meant complete ruin to him.

Held, that the accused was not guilty of cheating, but as he had done all he could to bring about the result, he was guilty of attempt to commit an offence of cheating. A.I.R. 1935 Rang. 456=37 Cr. L.J. 217=159 Ind. Cas. 1065.

—S. 420—Attempt—A asking Currency Office for payment for two halves of two currency notes—Currency Office making payment already to L—Non-execution of an indemnity bond by A—Nature of offence by A.

An attempt to commit an offence punishable under S. 511 though the final act short of actual commission of that offence has not been accomplished.

A informed of the Currency Office that he had lost two halves of two currency notes of Rs. 100 during a journey and after getting instructions received in reply to his enquiries, he forwarded to the Currency Office the halves of this two notes still in his possession with the prescribed application forms and affidavits testifying that he was the owner of the notes. The Currency Officer had however already paid the value of these notes to a firm on representation by that firm that the halves of the notes had been stolen from L, one of the partners who was carrying them from Delhi to Alhamadabad. A was prosecuted under S. 511 read with S. 420, Penal Code. The Trying Magistrate, without recording any clear finding as to the dishonest intention of the accused in endeavouring to recover the value of the currency notes, acquitted him on the ground that it was the practice of the Currency Offices not to make payment such in cases until the claimant had executed an indemnity bond, and as no such indemnity bond had been executed by A, his conduct had not amounted to an attempt to cheat but had remained within the stage of preparation for the offence.

Held, that acquittal was bad as the execution of the bond of indemnity was not a portion of the application and was an act which would ordinarily take place before the act of cheating is completed. The applicant would be willing to take the money without an indemnity bond and by his making a false attempt in asking for the money the offence would be just as complete, whether an indemnity bond was or was not insisted upon. 15 All. 173 and 16 Cal. 310, Foll. 110 Ind. Cas. 812=10 A.I. Cr. R. 567=29 Cr. L.J. 780=30 P.L.R. 405=10 Lah. 253=A.I.R. 1928 Lah. 551.

—S. 420—Attempt.

In the offence of cheating the actual transaction must have begun and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt. 99 Ind. Cas. 127.=28 Cr. L.J. 95=A.I.R. 1927 Mad. 77=51 M.L.J. 635.

—S. 420—Attempting to obtain money from another by inducing him to believe that God has ordered him to pay—Nature of offence.

Where the accused attempted to deceive one J. by making him believe that God had ordered him (i.e. J.) to pay money to the accused and thereby dishonestly induce J. to pay him Rs. 300.

Held, that the accused was guilty of an attempt to cheat but neither under S. 503 nor under S. 508. 6 M. 381, Foll. 86 Ind. Cas. 339=26 Cr. L.J. 755=48 Mad. 774=21 M.L.W. 174=1925 M.W.N. 113=A.I.R. 1925 Mad. 480=48 M.L.J. 190.

—S. 420.

It is not correct to say that there can never be an attempt to commit the offence described in S. 420. 77 Ind. Cas. 827=25 Cr. L.J. 475=A.I.R. 1924 Nag. 120.

—S. 420—Sending false claim as to quantity of insured goods lost—Lessor of premises aiding in the claim—Abetment of attempt.

The appellant had insured his stock of paddy which was burnt by fire; he made a claim on the basis that 75,040 baskets of paddy were stored. It was found that the mill godowns could not accommodate more than 15,000 baskets.

Held, that the claim was not a mere exaggeration but was a false statement as to the quantity stored: that the first appellant having sent the notice of the fire and also the claim papers, must be regarded as having gone beyond the mere stage of preparation to the stage of attempt.

Where A let B use his mill for storing paddy and his cover notes on the mill and stated to witnesses that 75,000 baskets of paddy were in the mill when it was burnt knowing that the capacity of his mill was only 15,000 baskets, and further having stocked paddy refuse in the godowns pretended it was paddy.

Held, A had aided and abetted the attempt to cheat under the second clause of S. 107, I.P.C. 82 Ind. Cas. 39=2 Rang. 53=3 Bur. L.J. 1=25 Cr. L.J. 1175=A.I.R. 1924 Rang. 241.

—Ss. 420, 417 and 511—Putting blank papers in registered cover to get acknowledgment receipt.

The action of an accused in putting blank sheets of paper in a registered insured envelope and sending the cover to the complainant to whom he owed money to the create evidence to plead discharge, amounts only to an attempt to cheat and not cheating under S. 420.



I.P.C., inasmuch as the acknowledgment receipt of an insured parcel was not a valuable security. 17 Cr.L.J. 272=1 Pat. L.J. 391=3 Pat. L.W. 99=34 Ind. Cas. 992.

—Ss. 420 and 511—Cheating—Attempt—What constitutes.

An offer for sale of certain spurious trinkets under a false representation that they were of gold, supported by an untrue statement that they were stolen goods, is an attempt at cheating under S. 420 and 511 of the I.P.C., the essential test in such cases being the deception of the victim, the dishonest causing to arise in his mind an impression, the reverse of truth calculated to induce him to do or refrain from doing something he would not otherwise do or refrain from doing. 13 P.W.R. 1914 (Cr.)=14 P.R. 1914 (Cr.)=66 P.L.R. 1914=16 Cr.L.J. 265 23=Ind. Cas. 473.

—Ss. 420, 417 and 511—Attempt to cheat — Sending waste paper by registered post.

The despatching of an insured envelope containing waste paper with the intention of furnishing evidence of payment of debt is an attempt of cheating and the sender should be convicted under Ss. 417, 511 of the Code. 10 P.R. 1913 (Cr.)=14 Cr. L.J. 436=30 P. W. R. 1913 (Cr.) 299 P.L.R. 1913=20 Ind. Cas. 596.

2. Burden of proof.

—S. 420—Cheating guilty knowledge—Onus.

Accused pawned six rings stated to be of gold but it was discovered that the rings were of silver gilt.

Held, that the burden of proving that the accused knew that the rings were not what he suggested them to be, was on the prosecution. 20 Cr. L.J. 769=53 Ind. Cas. 609 (Cal.).

—S. 420—Burden of proof.

The onus as regards dishonest or fraudulent representation is upon the prosecution and not on the defence. 15 A.L.J. 807=19 Cr.L.J. 45=42 Ind. Cas. 1005.

3. Cheques.

—S. 420—Goods obtained by tendering post-dated cheque.

In framing a charge under S. 420 it is necessary to set out not merely the fact that the accused had obtained goods by dishonest means, but also the deception which has been practised. It is necessary that the representation should be mentioned in the charge, so that the accused may have an opportunity of saying either that he never made such representation, or that representation was not in fact false, or that it was not in consequence of this representation that the goods were obtained. The need of framing a precise charge is all the stronger when the charge is based on a transaction of obtaining goods by tendering post-dated cheque, in which the representation is implied rather than directly expressed. The act of drawing a cheque is held to imply at least three statements as to the state of affairs existing at the time when the cheque is drawn: first, that the drawer has an account with the bank in question, secondly, that he has authority to draw on it for the amount shown on the cheque and thirdly, that the cheque, as drawn, is a valid order for the payment of that amount, or that the present state of affairs is such that in the ordinary course of events, the cheque will, on future presentment, be honoured. It does not, however, imply any representation that the drawer already has money in the bank to the amount shown on the cheque. What representation are implied by the drawing of a post-dated cheque, and whether these

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representations can be called false in the sense just mentioned are matters which must depend on the circumstances in which the cheque is drawn and delivered as a mode of payment. Where the accused simply stated that he would pay by cheque and left the complainant to discover that the cheque had been post-dated after his departure, the correct procedure would probably be to set forth that the accused stated that he would pay for certain goods which he had ordered by cheque and thereupon delivered a cheque for the amount in question, and thereby implied that he had authority to draw upon the bank for that amount and that the cheque so drawn was a valid order for the payment of the amount shown thereon. His payment by cheque, however, cannot be held to have implied that he already had funds in the bank sufficient to cover the amount shown on the cheque. A.I.R. 1939 Lah. 95=I.L.R. (1938) Lah. 662=41 P. L. R. 214=40 Cr. L.J. 494=181 Ind. Cas. 95.

—Ss. 420, 30—Post-dated cheque.

Where the goods already delivered, the accused gives a post-dated cheque and gets a receipt but the cheque is dishonoured, the receipt not being valuable security within the meaning of S. 30, no offence of cheating is committed. The remedy of the complainant lies in a Civil Court for breach of contract. A.I.R. 1936 Cal. 324=62 C.L.J. 119=39 C.W.N. 1182=37 Cr. L. J. 828=163 Ind. Cas. 232.

—S. 420—Issuing cheque knowing it will be dishonoured.

Where a person issues a cheque to another and it is dishonoured, and it appears that the failure to meet payment is not accidental, the presumption is that the drawer knew that the cheque would be dishonoured and he is guilty of cheating under S. 420. A.I.R. 1933 Oudh 86=9 O.W.N. 1136=34 Cr.L.J. 124=8 Luck. 286=141 Ind. Cas. 192.

4. Civil Action.

—S. 420—Execution of decree.

A decree-holder received a sum of money from the complainants, the grandsons of his judgment-debtor, under a promise of the decree-holder that no further liability under the decree passed against the judgment-debtor would attach to his grandsons, but subsequently the decree-holder filed an application that the names of the complainants should be brought on the record of the execution file, but no relief was claimed against them and the desired execution against the other judgment-debtors. The Court disallowed the objections. Later on, he filed another application for execution and relief was claimed against the complainants also. In a complaint by the grandsons of the judgment-debtor, it was alleged that this application amounted to an offence of cheating. There was no evidence to show that at the time when the decree-holder received the money, he had any dishonest intention to cheat the complainants.

Held, that it could not be said that the decree-holder cheated and thereby induced the persons deceived the complainants, to deliver the money to him and there was no deception practised. At most he might be said to have committed a breach of faith when he proceeded contrary to his promise to execute the decree against complainants but that breach of contract or breach of faith did not amount to the criminal offence of cheating punishable under S. 420 and that the facts only gave rise to a purely civil action and did not amount to the commission of an offence of cheating punishable under S. 420. A.I.R. 1936 Oudh 372=37 Cr.L.J. 907 (2)=1936 O. W. N. 754=164 Ind. Cas. 144.



## —S. 420.

When it is doubtful whether it is a case of breach of contract of cheating and where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in the Civil Court the matter should not be allowed to be fought in the Criminal Courts. 159 Ind. Cas. 167 (1)=37 Cr.L.J. 38=16 P.L.T. 553.

## —S. 420—Using criminal Court to enforce civil claim—Impropriety of.

There is no ground for making a criminal charge against a person against whom there is a civil claim and to use the criminal Courts for enforcing a civil claim is highly improper. A.I.R. 1933 All. 818=35 Cr.L.J. 224 (1)=55 All. 562=146 Ind. Cas. 904.

## —S. 420—Offence under S. 420, if made out under circumstances and facts stated.

The complainant alleged in his complain that he approached the accused to drop certain criminal proceedings in respect of the execution of a decree and to withdraw the execution proceedings against him on receipt of a certain sum of money. The accused agreed to this and an agreement was written out by a petition-writer and also a promissory note. The complainant signed the compromise but the accused took it back from the petition-writer without signing it saying that he had to consult a friend before signing it and never returned the document. On these facts, a complaint under S. 420, I.P.C., was made against the accused.

Held, that these facts did not constitute an offence and in any case, the matter was of such a doubtful nature both on the facts and in law that no criminal proceedings should be taken on the allegations made in the complaint. A.I.R. 1933 Lah. 215=35 Cr. L.J. 103=146 Ind. Cas. 552.

## —S. 420—Sharp practice resorted to for realising debt.

There was a dispute between the complainant and the accused with regard to a cow and calf which had been made over by the former to the accused as security for money lent by him. The complainant took two respectable elders to the accused to demand the return of the cattle. Without having the matter referred to them, they decided that Rs. 50 would be the proper sum to be paid to get them back. On paying Rs. 50 accused accepted it and demanded the balance of the debt due to him.

Held, that though the accused's act might appear to be sharp practice, it was not something for which he could be made criminally responsible under S. 420, and that the complainant might have recourse to the Civil Court. A.I.R. 1933 Rang. 215=34 Cr.L.J. 1197=146 Ind. Cas. 41.

## —S. 420—Civil dispute—Applicability.

Where the dispute between the parties seems to be of a civil nature, the conviction on a charge of cheating is unsustainable. 104 Ind. Cas. 450=28 Cr. L.J. 834=A.I.R. 1928 Pat. 13.

## —S. 420—Applicability.

The complainant sold two huts to the accused for a sum of Rs. 150. Out of the consideration to be paid a sum of Rs. 47 was to be set off on account of a debt which the complainant owed to the accused and the balance was to be paid to the complainant by the accused on the execution of the document. The accused got the *kobala* executed and registered but failed and neglected to pay the balance of the consideration.

Held, that the dispute was of a civil nature and was not one covered by S. 420. 94 Ind. Cas. 204=43 C.L.J. 287=27 Cr. L.J. 588.

## —Ss. 420 and 477—Cheating—Cancellation of document—Fraud.

Where the accused had executed a *Kobala* and presented it for Registration but took it back from the Sub-Registrar before registration on a pretext and tore it to pieces.

Held, that the charge of cheating could not be maintained as the person cheated was the Sub-Registrar and he did not complain. Under the circumstances of the case the charges should not be enquired into by Criminal Court as a civil suit for specific performance was pending. 21 Cr. L.J. 16=30 C.L.J. 175=54 Ind. Cas. 64.

## —S. 420—Cheating—Elements of—Inducing to execute a document, if offence—Judgment-debtor induced to execute bonds on inducement of postponement of sale—Sale held—Offence.

In case of cheating it must be shown how the complainant was misled, what loss he has suffered or what attempt to obtain a benefit to his prejudice was made by the accused. A judgment-debtor was induced by the decree-holder to execute two bonds for fictitious consideration on inducement of postponement of sale. The sale was held. The remedy of judgment-debtor was by civil suit for damages as the offence of cheating is not made out. To induce a person to execute a document is not an offence unless it is shown that the inducement was made by some false or fraudulent representation. 18 Cr. L.J. 131=37 Ind. Cas. 483 (All.).

## —S. 420—Cheating—Life Insurance Company—Death of assured—Declining to pay policy until age of deceased proved.

Where a Life Assurance Company had reason to believe that the age of the assured was much more than that given in the application, i.e. 50 years, and declined to pay the policy on the death of the assured until the age of the deceased was properly proved.

Held, that a charge of cheating was not maintainable against the company and that the proper course would be to institute a suit against the company to enforce payment. 17 C.W.N. 761=14 Cr. L.J. 398=20 Ind. Cas. 222.

## 5. Concealment of fact.

## —S. 420—Fraudulent prospectus.

In order to make a company prospectus fraudulent, it is not necessary that there should be a false representation in it; even if every word is true, the suppression of material facts may render it fraudulent. To judge its effect, it should be read as a whole.

Where two or more persons agree to issue a prospectus and by the concealment of facts deceive the public and fraudulently or dishonestly induce them to take shares in a company, the offence of conspiracy to cheat is complete. A.I.R. 1944 Mad. 410 (2)=1944 M.W.N. 312=46 Cr. L.J. 266=217 Ind. Cas. 220.

## —Ss. 420, 366.

Married girl of 14 years married by accused to another person on taking bride price from him—Fact that girl was already married was not disclosed—Girl's mother consenting party—Offences under Ss. 420, 366 held committed. A.I.R. 1943 Pat. 212=44 Cr. L.J. 590=22 Pat. 263=207 Ind. Cas. 420.



—Ss. 420, 412—Sale—Wilful concealment of incumbrances.

Where the vendor has deceived the purchaser into believing that there was only a particular incumbrance on the property sold whereas in fact there were other incumbrances known to the former, a prosecution of the vendor for cheating cannot be thrown out merely because the purchaser was empowered by a covenant in the sale-deed to recover any further moneys for which the land might be liable, presumably by a civil suit. The existence of a civil remedy would not necessarily exclude a trial by a Criminal Court of an offence. A.I.R. 1933 All. 42=33 Cr. L.J. 884 (1)=140 Ind. Cas. 97. (2)

—S. 420—Silence—Dishonest concealment—Offence.

Silence of accused may be rendered into dishonest concealment by the circumstances of the case and may amount to deception within the section. 84 Ind. Cas. 1041=40 C.L.J. 256=52 Cal. 347=29 C.W.N. 447=26 Cr. L.J. 401=A.I.R. 1925 Cal. 14.

### 6. Conspiracy.

—Ss. 420, 120-B—Conspiracy.

An owner of a tea estate made an application to the Tea Licensing Committee for transfer of export quota rights in which he mentioned the export quota for in excess of what was fixed to his credit by the committee. A clerk of the Committee whose duty was to check whether the transferor had in fact the quota sought to be transferred to his credit, wrote on the application that the quota mentioned therein was 'available' for transfer. Due to this false endorsement, the transferor was granted the quota transfer certificate which enabled him to transfer export quota rights for in excess of what was to his credit and thereby made a huge wrongful gain.

**Held**, that the fraud was committed at the instance of the transferor and as the quota transfer certificates were by themselves property and the documents of title, both the transferor and the clerk were guilty under Ss. 420 and 120-B, Penal Code. A.I.R. 1940 Mad. 155=1939 M.W.N. 1125=41 Cr. L.J. 388=187 Ind. Cas. 33.

—Ss. 420, 420-B—Conspiracy by five persons to cheat.

Where five persons are alleged to have combined to deceive another, and four are given the benefit of doubt, the position of the remaining accused who is found guilty of deception is not affected. The participation of the others being eliminated, he is the only person who was responsible for deception which **ex-hypothesi** did take place. His conviction is not vitiated by the fact that the other four are acquitted. A.I.R. 1936 All. 357=1936 A.W.R. 249=1936 A.L.J. 413=37 Cr.L.J. 697=162 Ind. Cas. 748.

### 7. Contract.

—S. 420—Illegal contract.

The view that a criminal prosecution for cheating must fail if it is based upon a contract which could be enforced in a Civil Court is wrong. A.I.R. 1941 Oudh 3 (6)=1940 O.W.N. 819=41 Cr.L.J. 881=1940 A.W.R. 381=16 Luck. 194=190 Ind. Cas. 259.

—S. 420—Passing of woman to be of different caste.

A person's examination as a witness for prosecution cannot vitiate the trial, where his name is not mentioned in either the complaint or the police **chalan** as the participator in the offence though the Court

discovers him to be so, for the first time as the time of giving evidence. Though a transaction fails to give rise to a legal contract the object of which is unlawful and opposed to public policy, it cannot warrant the assumption that no criminal offences can be perpetrated during it. Where a person passes a **rajput** woman as **kunbin** to the complainant and takes money from him, he is guilty under S. 420. 21 Cr. L.J. 820=58 Ind. Cas. 820 (Nag.).

—S. 420—Cheating—Immoral and illegal contract—False representation.

A agreed to let her daughter on hire to B for concubinage for one year in consideration of B paying her Rs. 70. B paid A Rs. 35 in advance. Subsequently A refused to deliver her daughter to B or to return the sum of Rs. 35 advanced by him.

**Held**, that the conviction of A for cheating should be set aside. A party should not be allowed to prosecute on a charge of cheating, when he would not be entitled to obtain from a Civil Court any relief for breach of the contract. 14 Bom. L. R. 503=13 Cr.L.J. 521=15 Ind. Cas. 793.

### 8. Deception by conduct.

—S. 420—Deception by conduct.

It is not necessary that deception should be by express words and it may be by conduct or implied in the nature of the transaction itself. 101 Ind. Cas. 458=8 A.I.Cr.R. 11=28 Cr.L.J. 426=A. I. R. 1927 Sind 161.

—S. 420—Deception through agent.

Deception may be practised by representation made through an innocent agent, and so more through a conspirator.

It is not necessary that deception should be by express words and it may be by conduct or implied in the nature of the transaction itself. 101 Ind. Cas. 458=8 A.I.Cr.R. 11=28 Cr.L.J. 426=A. I. R. 1927 Sind 168.

—S. 420—Cheating—Raising money on house already sold in execution.

It is not necessary in order to cheat that the deception should be by express words; it may be by conduct or implied in the nature of the transaction itself. 32 C. 941, Foll. A judgment-debtor induced a person to advance money on house already sold in execution and the decree-holder was paid off. The judgment-debtor subsequently withdrew the sale-proceeds from Court and appropriated it.

**Held**, that **prima facie** case of the offence of cheating under S. 420 existed against the judgment-debtor. 114 P.L.R. 1912=10 P.W.R. 1912 (Cr.)=13 Cr.L.J. 456=15 Ind. Cas. 88.

### 9. Defence.

—S. 420—Defence.

If the transactions relied upon by the prosecution and proved to amount to offence of cheating, then whether other transactions between the parties were honestly performed will make no difference. A.I.R. 1943 Sind 51=I.L.R. (1942) Kar. 292=44 Cr. L. J. 324=205 Ind. Cas. 10.

—420—Offence of cheating.

It is no defence that the association of the accused with the complainant has resulted in a net profit to the complainant. A.I.R. 1943 Sind 51=I.L.R. (1942) Kar. 292=44 Cr. L.J. 324=205 Ind. Cas. 10.

—S. 420.

Officer of Board delivering false bill—Prosecution under S. 420—Officer not acting in pursuance of the



Bombay Local Boards Act and hence not protected by S. 136 of that Act. A.I.R. 1940 Bom. 35=41 Bom. L.R. 1227=41 Cr.L.J. 256=I.L.R. (1940) Bom. 29=186 Ind. Cas. 133.

—S. 420—Extracting money for bribing public servant.

Where, while certain persons were being tried for an offence, the accused representing that he could influence the Court in their favour, received money from them and on his being prosecuted for cheating, pleaded that the money having been received for an illegal purpose, it should not form the basis of a prosecution.

Held, that such a contention was unsound. A. I. R. 1933 Rang. 199=34 Cr.L.J. 1255=146 Ind. Cas. 640.

—S. 420—Delivery of property induced by accused's cheating—Representations of a third person.

For a conviction under S. 420, I.P.C., it is necessary for the prosecution to prove that there had been not only an act of cheating on the part of the accused but also that by the very act of cheating the person cheated was induced to deliver property. If property is delivered owing to the effective inducement of a third person's assurance, there is no offence under the section. 18 A.L.J. 371=21 Cr.L.J. 362=55 Ind. Cas. 730.

#### 10. Essentials and scope.

—Ss. 420, 417—Essentials—Offences under—Difference.

The vital difference between the offences under Ss. 417 and 420 is that whereas an offence against the latter section is a cognizable one, that against the former is non-cognizable and investigation of it can only be undertaken by the Police on the instructions of a Magistrate, whereas in the other case, the Police can act on their own motion under Ss. 154 and 156 of the Criminal P.C. A.I.R. 1945 P.C. 18=(1945) A.L.J. 47=(1945) 1 M.L.J. 86=1945 M.W.N. 49=26 P.L.T. 56=46 Cr.L.J. 413=47 Bom. L.R. 245=80 C. L. J. 19=1945 O.W.N. 258=1945 A.W.R. (P.C.) 21=I. L. R. (1945) Lah. 1=I.L.R. (1945) Kar. P.C. 89 Supp=71 Ind. App. 203=217 Ind. Cas. 1 (P.C.).

—S. 420—Offence depends on successful inducement of person cheated.

The question whether an offence has been committed under S. 420, I.P.C., does not depend upon the accused's success in swindling of the amount of times that he has managed to obtain property by cheating but depends in each individual case on the successful inducement of the person cheated.

Held, on facts that there was no infringement of the provisions of S. 234, Criminal P.C. A.I.R. 1936 Cal. 678=38 Cr.L.J. 4=165 Ind. Cas. 817.

—S. 420—Essentials.

An offence under S. 420, does not consist merely in a fraudulent or dishonest representation but also requires the delivery of property by the victim. A. I. R. 1931 Pat. 102=12 P.L.T. 12=32 Cr. L. J. 611=130 Ind. Cas. 796.

—S. 420—Introducing cheat—Offence — Proof of fraud and dishonesty.

In order to sustain a conviction of a middle-man who introduced a cheat to the complainant, under S. 420, it is necessary for the prosecution to establish that he acted dishonestly and fraudulently in the transaction. 102 Ind. Cas. 553=28 P.L.R. 171=8 A.J.Cr.R. 217=28 Cr.L.J. 585=A. I. R. 1927 Lah. 746.

—S. 420—Graver and lesser offence.

The offence under S. 417 is cheating generally but that under S. 420 is an aggravated type of the offence involving delivery or destruction of valuable security. 82 Ind. Cas. 57=20 M.L.W. 919=25 Cr.L.J. 1193=A.I.R. 1925 Mad. 367.

—S. 420—Ingredients of the offence.

To sustain a conviction, it must be proved that the person deceived was induced to do something which otherwise he would not have done, and that his act has caused himself some damage. The damage must be proved by evidence. 2 U.P.L.R. (All.) 179=57 Ind. Cas. 103=21 Cr. L.J. 583.

#### 11. Evidence and proof.

—S. 420—Misrepresentation, proof of.

In a prosecution under S. 420 if misrepresentation has to be proved, it would be better to get the exact words used by the accused. A.I.R. 1940 Pat. 603=41 Cr.L.J. 523=187 Ind. Cas. 862 (D.B.).

—S. 420—Lottery.

Organizers of certain loan company charged and convicted under S. 420 for dishonestly running lottery—Evidence showing that people purchased tickets with knowledge that they were taking part in lottery and application for loan was mere camouflage—Conviction, held was unsustainable. A.I.R. 1938 Rang. 301=40 Cr.L.J. 20=178 Ind. Cas. 113.

—Ss. 420, 415—Goods ordered on credit—Accused in embarrassed circumstances—Intention.

If a person orders goods on credit and promises expressly or impliedly to pay for them on a particular date, then if the prosecution proves that at the date of the contract, the circumstances of the accused were such that he must have known that it was practically impossible that he would be able to pay for the goods, there would be a case of cheating. But the mere fact that the accused was in embarrassed circumstances is not enough.

It is doubtful whether evidence as to the fact that the accused had also ordered goods from others and had not paid for them is relevant under Ss. 14 and 15, Evidence Act, upon the question whether when the accused entered in a contract with the complainant, he had the fraudulent intention of not paying for the goods, and even if relevant, its evidentiary value is very small. A.I.R. 1932 Bom. 273=34 Bom. L.R. 313=56 Bom. 204=33 Cr.L.J. 401=137 Ind. Cas. 142.

—S. 420—Evidence—Contradiction in material particular—Effect.

Where the only witness of the complainant on whom any reliance could be placed had contradicted himself on a very material particular,

Held, that it would be most unsafe to convict the accused of the offence charged against him, especially when there was previous enmity between the accused and the complainant. 28 P.L.R. 461=A.I.R. 1927 Lah. 797.

—S. 420—Making false pretence with intent to defraud—No evidence that property was obtained thereby—Conviction.

If an accused is indicted for obtaining property by false pretences and the evidence proves that the accused made the alleged false pretences, that they were false, and that the accused had an intent to defraud, but the evidence fails to prove that the accused obtained the property or that the alleged false pretences led to the obtaining of the property, accused may be convicted of the offence of the attempt to obtain by false



pretences. 65 Ind. Cas. 994=5 N.L.J. 16=23 Cr.L.J. 210=A.I.R. 1922 Nag. 40.

**—S. 420—Taking receipt but not making payment.**

Where rent was due to A by B and the latter gave letter to A, addressed to the accused, his banker, directing him to pay up the amount and when A took the letter and a receipt to the accused, the latter retained the receipt but refused to pay the amount until certain other receipts for other payments were passed.

**Held**, the accused, knowing that his representations would engender the belief that the payment would be made on giving the receipt, took the receipt when he did not intend to pay, and was therefore guilty under S. 420. In such cases the evidence must establish the existence of a fraudulent or dishonest intention at the time of the commission of the act in respect of which the cheating is alleged. 68 Ind. Cas. 621=23 Cr.L.J. 589=A.I.R. 1922 Nag. 195.

**—S. 420—Cheating—Evidence Act, Ss. 14, 15—Intention—State of mind—Evidence as to previous or subsequent acts forming one series of transactions—Admissibility of evidence.**

Accused was charged with deceiving one B by leading him to believe that he could secure an employment for him and with thereby inducing B to give him some money. Evidence was given to show that this transaction with B was one of a series of similar frauds practised by the accused upon various other persons. **Held**, on a review of the English decisions—such evidence was admissible. (1939) 9 C.L.J. 610=36 C. 573=13 C.W.N. 973=10 Cr. L.J. 91=2 Ind. Cas. 601.

**12. Fraud.**

**—Ss. 420, 120-B—Appeal to gambling instinct, whether per se cheating.**

An appeal to the gambling instinct of humanity does not per se amount to cheating :

**Held**, on facts that in starting an insurance scheme which was calculated to confer money benefits on the policy-holders in the shape of twelve times the money invested by each, the accused were not guilty of either cheating or conspiracy to cheat, as, upon a fair reading of the prospectus, it could not be said that it contained any fraudulent or deceitful representations though it might appear too absurd for such schemes to work with success. A.I.R. 1939 Cal. 327=43 C.W.N. 388=40 Cr. L.J. 600=181 Ind. Cas. 918.

**—Ss. 420, 120-B—Scheme of "Snow ball" nature.**

The scheme as set out in the memorandum of association, which was deposited with the Registrar of Joint Stock Companies was as follows : The applicant for the loan was to pay an admission fee and make a deposit. He was required to secure two co-members or secondaries who were also required to pay admission fee and the deposit called the opening deposit. After payment by the secondaries, the company was to advance loan up to a fixed maximum to the original applicant within a fixed period of 45 to 60 days. After the two co-members had paid admission fees and deposits, the original applicant was to get a refund of his opening deposit ; the co-members or secondaries were in the same way to get loans from the company on their securing two co-members or secondaries each. If, however, the original applicant failed to secure two co-members within a week of his application, he was, on sending a notice to the company, to get a refund of his deposit money with interest at the rate of six per cent. per annum within 180 days of the date of receipt of notice by the company. Company had appointed agents and supervisors. By

misrepresentations, they induced the villagers to apply for loan and pay deposit and admission fee.

**Held**, that the scheme in the case might be of the "snowball" nature but the literature of the scheme principally the loan rules could not be described as misleading and deceptive. All the conditions of the scheme launched by the company were set out in black and white. There was no room for misunderstanding and though highly speculative, it was not dishonest or of fraudulent nature :

**Held further** that so long as the Directors of the company did not themselves induce anybody to apply for loan and pay money to the company, they could not be held to be party to any fraud or conspiracy so as to attract the operation of the penal law. A.I.R. 1936 Cal. 440=38 Cr.L.J. 209=166 Ind. Cas. 412.

**—S. 420—Making of fraudulent and dishonest recital in deed.**

Making of fraudulent and dishonest recital in mortgage deed, that a prior encumbrance which was actually existing, did not exist, would amount to cheating. 1936 M.W.N. 1096 (1).

**—S. 420—Cheating—Contract to supply good cotton—Fraudulent adulteration of cotton bales.**

Where the accused contracted to deliver 260 bales of machine ginned good cotton and delivered 260 bales largely composed of cotton seed, raw cotton and rubbish carefully packed into the middle of the bales while all around was ginned cotton, and the admixture of inferior stuff was from 6 to 15 per cent, against a quantity of half to 1 per cent, and the fraud was perpetrated at a ginning factory where the accused was present whilst the machines were ginning such adulterated cotton, the accused was guilty of cheating under S. 420. 14 Bom. L.R. 137=13 Cr.L.J. 285=14 Ind. Cas. 669.

**13. Intention.**

**—S. 420—Offence under—Amount received by accused for paying bribe to public officer—Retention by accused—Offence—Prosecution for cheating—Maintainability—Grounds of public policy—Relevancy in adjudicating criminal liability.**

The accused who was an auditor was charged with an offence under S. 420, I. P. Code, for having dishonestly induced P.Ws. 1 and 2 to deliver him a certain sum of money for bribing the Income-tax officer. It was shown that having received the money the accused kept the money for himself. It was contended that the money paid by P.Ws. 1 and 2 to the accused could not be recovered even in a civil suit and that in respect of such money a criminal prosecution for cheating was equally unsustainable.

**Held**, that even assuming that the amount could not be recovered in a civil suit it did not follow that the criminal prosecution was not maintainable and that grounds of public policy were not relevant in adjudicating the criminal liability of the accused.

**Held, however**, that the accused could not be convicted of the offence under S. 420, I. P. Code, inasmuch as it was not proved that at the time when P.Ws. 1 and 2 delivered the money to the accused that it was not his intention to utilise the money in the way in which he represented it was to be utilised. 61 L.W. 223=1948 M.W.N. 5=A.I.R. 1948 Mad. 258=49 Cr.L.J. 443=(1947) 2 M.L.J. 594.

**—S. 420—Criminal intent.**

Criminal intent at the time of the alleged bargain must be established for conviction under S. 420. The mere fact that the accused deny the transaction at the trial and refuse to return the money does not necessarily show that they had a criminal intent from the



beginning and their denial may merely amount to the usual mistaken attempt to protect themselves from the result of the prosecution. 169 Ind. Cas. 1007=39 P. L. R. 300=38 Cr. L. J. 845.

—S. 420—What is offence under—Person inducing another to give on credit certain articles not intending to pay—Offence.

Where a person by falsely pretending to be a pensioned Subedar, intentionally deceives the complainant and dishonestly induces the complainant to let him have on credit certain articles for which he did not intend to pay, is guilty under S. 420 and not under S. 417. 115 Ind. Cas. 471=10 Lah. 513=12 A.I. Cr. R. 258=30 Cr. L. J. 480=30 P.L.R. 514=A.I.R. 1928 Lah. 935.

—S. 420—Rash identification—No dishonest—No offence.

Person identifying before Treasury Officer another as the proper payee of a certain money, rashly and without taking care to ascertain as to the truth of his identity is not guilty under S. 182 or S. 420 where it is held that his intention was not dishonest. 99 Ind. Cas. 57=44 C.L.J. 230=28 Cr. L. J. 25=7 A.I. Cr. R. 197=A.I.R. 1927 Cal. 78.

—S. 420—Intention—Taking back ornaments by husband's mother from bride's father as a token of dissolution of marriage with his consent—Action approved by panchas—No dishonest intention—No offence.

A boy Allah Baksh was married to one B who was much older. When the girl had grown up to womanhood, the boy was only thirteen years old. The mother of Allah Baksh and his elder brother Jumman thought it would be inadvisable to bring the bride to the house owing to the infancy of the bridegroom so they went to the father of the bride and suggested to him that if he paid back certain money and ornaments, which apparently had been given to the bride at the time of marriage, the marriage would be put an end to. The father of the bride called a panchayat and asked the zemindar, the school teacher and the Court of Wards Zildar to attend and the panchas came to the conclusion that the arrangement was reasonable, and in accordance with their advice the bride's father agreed and the money and property demanded was made over and a formal receipt was written by the school teacher and the parties affixed their thumb impressions to it. The parties were Muhammadans of humble position and no doubt they thought and everybody thought that the marriage had been legally put an end to. Then the present charge was brought by the bride's father against mother and elder brother of the boy under Section 420.

Held, that there was no dishonest intention on the part of the accused and they are not guilty under Section 420. 21 A.L.J. 321=4 L.R.A. (Cr.) 81=A.I.R. 1923 All. 431.

—S. 420—Denial of payment—Creditor receiving payment and afterwards denying receipt—If offence.

Petitioner was convicted of cheating on the ground that in spite of receiving from his debtor, the complainant, cash and cattle in payment of what he owed him, he gave him notice later on for payment of the debt originally due, and denied what he had already received: Held there was nothing to show that the petitioner received payment with the preconceived intention of denying it later on. If he subsequently denied it, he cannot be said to have cheated the debtor though this conduct of his was highly reprehensible. 32 Ind. Cas. 479=25 Cr. L. J. 1311=A.I.R. 1923 Lah. 621.

—Ss. 420, 109 and 114—Cheating—Abetment—Intention.

The offence of cheating is complete where money is obtained on false pretence that complainant would be married to a woman. A person is guilty of abetment under Ss. 109 and 114 who introduces the complainant to the cheater knowing full well that the offence is going to be committed, is present at the time when the agreement and the payment are made, and does not inform the complainant of what is going to happen though he takes no share in the money. 6 P. W. R. 1917 Cr.=18 Cr. L. J. 827=41 Ind. Cas. 651.

—S. 420—Cheating—Essentials.

The prosecution has to prove that the representation made by the accused was false and that he had no intention of carrying out his promise at the time of making it. 4 Bur. L. T. 279=6 L.B.R. 38=13 Cr. L. J. 15=13 Ind. Cas. 386.

—S. 420—Constituents.

To constitute an offence under S. 420 the dishonest intention must either precede or accompany the dishonest act. 11 Cr. L. J. 295=6 Ind. Cas. 250 (All).

—S. 420—Cheating—Money taken and paid back.

The fact that the accused after obtaining money by a false promise paid back a portion of the same, does not affect his criminality. The test is not what he did afterwards, but what was in his mind at the time when the money was paid to him, whether he then intended to repay the same. 9 C.L.J. 605=10 Cr. L. J. 487=13 C.W.N. 728=4 Ind. Cas. 65.

#### 14. Interpretation.

—Ss. 415 and 420—Valuable security—If includes decree copy.

A "decree" does not come within the definition of a "valuable security"; a decree merely declares the existence of legal rights of extinguishment, extension transfer or restriction of legal rights, etc.; the rights are there, and all that the decree does is that it formally expresses the adjudication by the Court on the rights of the parties. When the Court passes a decree, it does not deliver any property, because the original decree remains in Court and the term "valuable security" assuming that the term is wide enough to include a decree, can only apply to original document and not to any copy of a decree which may be supplied on application to the parties. The same arguments would apply to orders in execution. 81 Ind. Cas. 810=39 C.L.J. 122=28 C.W.N. 414=25 Cr. L. J. 1034=A.I.R. 1924 Cal. 502.

—S. 420—Interpretation—'Fraudulently'—'Dishonestly'—Intention to deceive—Intention to cause wrongful loss.

Whenever the words "fraud" or "with intent to defraud" or "fraudulently" occur in the definition of a crime, two elements at least are essential to the commission of a crime, viz., (1) deceit or an intention to deceive or, in some cases mere secrecy and (2) either actual injury or possible injury or an intention to expose some person either to actual injury or a risk of possible injury, by means of that deceit or secrecy. The term "fraudulently" may be defined to imply an intent to deceive in such a manner as to expose any person to loss, or risk of loss. The term "dishonestly" implies a deliberate intention to cause wrongful gain or wrongful loss, and when such an intention is proved and is coupled with cheating and the delivery of property, the offence is punishable under S. 420, in which the word "fraudulently" finds



no place. A, for example may by a false representation induce B to advance him a sum of money, in such circumstances that A is aware that he is exposing B to considerable risk of loss, but without the intention of causing wrongful loss; A would be acting fraudulently, and if he intended to cause wrongful loss, would be acting dishonestly. In the former case, he would be punishable under S. 417 and in the latter, under S. 420. 64 Ind. Cas. 33=13 Bur. L.T. 239=22 Cr. L.J. 721=10 L.B.R. 366=33=A.I.R. 1922 L.B. 10.

—Ss. 420 and 511—‘Thereby’ meaning—Overt acts.

Under S. 420, I.P.C., delivery is not essential, the word ‘thereby’ after ‘whoever cheats’ only implying that a particular sort of cheating by delivery of property or making alterations or destructions of a valuable security is contemplated by the section, hence an accused who is prevented from taking delivery of property through an obstacle independent of his will, if he commits some overt acts, with that end, is guilty of attempt to cheat. 18 Cr. L.J. 990=11 S.L.R. 67—42 Ind. Cas. 606.

—S. 420—Interpretation—‘Property’.

The word ‘property’ in S. 420, includes money. (1904) 32 C. 22=8 C.W.N. 784.

#### 15. Jurisdiction.

—S. 420—Jurisdiction—Accused living at C—Bogus telegram despatched from T—Jurisdiction of T Court.

Where the accused at C gave the telegram for despatch from T to one J.,

**Held**, that he caused the despatch of the telegram at T and the T Court had jurisdiction to try the offence under Ss. 468-109 and 420-511, Indian Penal Code. 99 Ind. Cas. 127=28 Cr. L.J. 95=A.I.R. 1927 Mad. 77=51 M.L.J. 635.

—S. 420—Second Class Magistrate.

A Second Class Magistrate is not competent to try an offence under S. 420 of the Penal Code though he has jurisdiction to try an offence under S. 417. 82 Ind. Cas. 57=20 M.L.W. 919=25 Cr. L.J. 1193=A.I.R. 1925 Mad. 367.

—S. 420—Decree-holder inducing Judgment-debtor to part with the amount—Receipt for the same withheld—Offence—Second Class Magistrate framing charge under Ss. 417, 384 and 511, I.P.C.—Legality.

After filing a civil suit as to whether a sum of money had been paid by the judgment-debtor to the decree-holder who was alleged to have granted a receipt, the judgement-debtor instituted a complaint under Ss. 417, 384 and 511, I.P.C., against the decree-holder alleging that the decree-holder inclined him to take the receipt out of his **dupatta** and then put out his hand to take it but the decree-holder was not able to touch the receipt which the judgement-debtor replaced in his **dupatta**. The Second Class Magistrate framed a charge under Ss. 417, 384 and 511, I.P.C.,

**Held**, in revision that if any offence was committed it was one under Ss. 420 and 511, I.P.C. and that the Second Class Magistrate had no jurisdiction to deal with such a complaint.

**Held** also that the whole complaint amounted to an abuse of the process of the Court. 11 Lah. L.J. 95.

#### 16. Misrepresentation.

—S. 420—Obtaining possession of the property by trick.

The accused represented to the complainant that he was a tinner while was in fact not a tinner. The

complainant thereupon gave the accused certain utensils to be repaired which were neither repaired nor returned by the accused.

**Held**, that while it might be said using the words of general import, that the complainant entrusted the accused with property, he was in fact tricked out of it. Therefore, the offence fell, not under S. 406, Penal Code but under S. 420. A.I.R. 1942 Sind 167=I.L.R. (1942) Kar. 284=4 Cr. L.J. 123=203 Ind. Cas. 609.

—Ss. 420, 415, 419.

A alleging before **patwari** that B had sold him land and producing M who represented that he was B—**Patwari** making entry in mutation register—Same statement repeated before Naib Tahsildar—A and M, held could not be convicted either under S. 419 or S. 420. A.I.R. 1941 Lah. 460=I.L.R. (1941) Lah. 718=43 Cr. L.J. 254=197 Ind. Cas. 711.

—S. 420—Where the complainant who was a business man had every opportunity find out all about the businessman and did in fact participate in it.

**Held**, on facts that no offence of cheating was committed if the complainant invests money on certain representations of the accused. A.I.R. 1941 Sind 198=I.L.R. (1941) Kar. 345=13 Cr. L.J. 73=196 Ind. Cas. 755.

—S. 420—Selling of bottles of liquor with false labels representing them to be genuine.

A person selling bottles of liquor with false labels representing the liquor to be genuine is guilty of cheating within the meaning of S. 420. Whether there has been or is likely to be, a resale at a profit by the purchaser is wholly irrelevant to the question of cheating; the cheating is complete as soon as the sale to him on a false representation is complete and the price paid. A.I.R. 1940 Cal. 205=41 Cr. L.J. 556=188 Ind. Cas. 267.

—S. 420—To fraudulently induce a person to part with Rs. 7,000 by means of statements ingeniously blended of truth and falsehood amounts to one single transaction of cheating, even if the money is handed over in five instalments. 1935 M.W.N. 1225.

—S. 420—Proof of intention.

When serious charges of fraud are made, the facts must be sworn to by the person who alleges them. The method of getting some subordinate to take the responsibility of making serious charges of fraud which may afterwards turn out to be false is a practice which cannot be allowed.

Where fraud is alleged, it is absolutely essential that there should be clear evidence of intention to defraud or to cheat before the opposite party ought to be allowed to be harassed with a criminal prosecution. A.I.R. 1931 Cal. 452=53 C.L.J. 437=32 Cr.L.J. 1133=134 Ind. Cas. 309.

—S. 420—Absence of intention—Ingredients of—Mere handing over of the rules of a club by its servant—Liability of members.

Officials of a so-called Royal Sports Club whose object was to receive from its clients bets on horse races and employing agents on the race course to put their clients' bets were charged with deceiving certain persons by publishing the rules of the club and inducing them to pay money to the club, whereas no agent at the race was appointed and it was proved that a book of rules was handed over by a servant of the club.

**Held**, that under the circumstances members were not criminally responsible for representations contained in the rules, and as the ingredients of the offence of cheating were absent in this case, they could not be liable for conviction under S. 420. 109 Ind. Cas. 905



=39 M.L.T. 596=9 A.I.Cr.R. 396=29 Cr.L.J. 633=1 M.Cr.C. 174=A.I.R. 1928 Mad. 224.

—S. 420—Denial of liability—Refusal to admit legal liability—Liability otherwise provable—If offence.

A mere refusal to admit a legal liability, the existence of which does not depend upon admission by the person who is to be made liable, is not such a breach of the promise made at the time of the offence, as would amount to make false representation at the time of the payment. 89 Ind. Cas. 247=26 Cr.L.J. 1303=A.I.R. 1925 Sind 231.

—S. 420—Receiving money to exert influence to restore the complainant back into the caste—If cheating.

Where two persons who were outcasted were induced to part with their money on the promise made by the applicant that he and his friends would smoke with them and that they would attempt to have them brought back into caste and the person deceived knew that the applicant could not give a definite promise that they would be received back into the brotherhood as the decision rested not with him but with the panchayat.

Held, that no offence under S. 420 was committed. 69 Ind. Cas. 152=8 O. L. J. 583=23 Cr. L.J. 664=A.I.R. 1924 Oudh 113.

—S. 420—Advance made to a broker on representations not proved to be false—If cheating.

The accused, a paddy broker, represented to the complainant, a Rice Mill, that he would supply a certain amount of paddy within a certain time and got Rs. 4,000 as an advance. It could not be said that the accused had not made arrangements for the supply of paddy but the arrangements failed and paddy could not be supplied.

Held, that the accused was not guilty under S. 420. 76 Ind. Cas. 700=1 Rang. 397=2 Bur. L. J. 139=25 Cr.L.J. 236=A.I.R. 1924 Rang. 31.

—S. 420—Securing advantage by misrepresentation.

To secure by means of a misrepresentation an advantage, the accused's right to which is in dispute at the time, is fraudulent. 65 Ind. Cas. 1005=23 Cr. L.J. 221=25 C.W.N. 618=A.I.R. 1921 Cal. 119.

—Ss. 420 and 489 (a)—Non-fulfilment of representation.

The non-fulfilment of a representation of a person which induced the complainant to advance money to the accused, about the latter's ability to counterfeit currency notes, though not actionable civilly is an offence of cheating, though the accused entertained no intention of counterfeiting at the time. 18 Cr.L.J. 362=10 Bur. L.T. 255=38 Ind. Cas. 746.

—S. 420—Cheating by false representation as to future event.

Cheating by false representation, in respect of a future event must be proved by showing that the representation was false to the knowledge of the accused at the time it was made. 15 Bom. L. R. 297=14 Cr. L.J. 232=19 Ind. Cas. 328.

—S. 420—Mortgagor not disclosing his defective title.

A person mortgaged to another for Rs. 1,000 a mortgage executed in his favour of a house for Rs. 2,000 and also agreed that in case of his mortgagee not being able to recover his money from the mortgagee

rights, he would make good the money from his other property.

Held, that there was no cheating in that person's act, though he knew at the time of borrowing money that his mortgagor's title to the house was defective and did not disclose this defect to his creditor. 40 P.W.R. 1910 Cr.=11 Cr.L.J. 610=8 Ind. Cas. 256.

—S. 420—Obtaining money by false representation—Promise to procure a post and to repay if post not procured—Cheating—Tests of criminality.

The accused falsely represented to the complainant that he would be able to appoint him (the complainant) to a lucrative post on a cash security of Rs. 1,000 of which a third was to be paid in advance when submitting application for the post. The complainant on the faith of this representation paid some money and made the application. Afterwards the accused told the complainant that if he (complainant) did not get the post, he would get a refund of the money. On the accused's failing to keep his promise the complainant demanded the refund which the accused promised to make by instalments and actually paid one of the instalments.

Held, that the accused committed an offence under S. 420, as he obtained the complainant's money by a promise which he knew he could not fulfil and the fact that long afterwards under pressure the accused paid back a portion of what he had received could in no way affect his criminality. The test of the accused's criminality is not what he did months afterwards, but what was in his mind at the time when, and under what circumstances, he received the money from the complainant and whether the accused then intended to repay the same. (1909) 9 C. L. J. 605=13 C.W.N. 728=10 Cr.L.J. 487=4 Ind. Cas. 65.

## 17. Procedure.

—S. 420—Procedure—Criminal breach of trust and cheating distinguished.

Per Lakshmana Rao, J. (Dissentient).—Acts constituting offence of obtaining property by cheating cannot by themselves constitute the offence under S. 405. The ingredients of the offences are different and so is the evidence to establish them. There can be an offence under S. 406 with respect to same property, as distinct from offence under S. 420. The offence under S. 420 is complete as soon as delivery is obtained by cheating and without the further act of misappropriation, there can be no breach of trust. Thus, where the accused is charged for both offences and the charge under S. 420 is compounded and he is acquitted on that charge, he can be tried under Ss. 405, 406. The principle of *autrefois acquit* does not apply. A.I.R. 1936 Mad. 353=1936 M. W. N. 281=43 L.W. 548=70 M.L.J. 635=37 Cr. L. J. 637=162 Ind. Cas. 592 (2) (F.B.).

—Ss. 420, 417—Non-disclosure of insolvency.

Where the accused made a promise to pay the balance due from him to the complainant within 15 days and the complainant stated that he would not have allowed credit to the accused if he had known at the time that the accused was an insolvent and the District Magistrate thought that there were good reasons for taking the view that on the facts, the accused appeared to be technically guilty under S. 420 and that the circumstances did not justify an inquiry being refused by a Criminal Court.

Held, that the view of law taken by the District Magistrate was not erroneous and in the circumstances there was no ground for interference in revision b



the High Court. A.I.R. 1935 All. 439=36 Cr.L.J. 526 =1935 A.W.R. 209=154 Ind. Cas. 513.

—S. 420—Sanction.

The offence under S. 420 being a cognizable offence punishable with imprisonment for more than two years no sanction is necessary for a charge under the section. One cannot compel the prosecution to get charges framed which require sanction. A.I.R. 1935 Pat. 91=36 Cr. L.J. 500=154 Ind. Cas. 387.

—S. 420—Charge—Absence of statement that any person suffered loss by the false representation—Defect if cured by S. 557, Cr.P.C.

F borrowed money from M on security of N, on basis of two mortgage bonds and having arranged to sell the mortgaged property induced M to accompany him to a petition writer to get a sale deed drafted. The bonds were left with the petition writer and M went away to get a document registered. N and F making a false representation to petition writer that M wanted to see to the bonds, took them away. F and N were followed, but the bonds could not be recovered. In the charge it was recited that F and N obtained the bonds after making false representation to the petition writer and that as a result of the misrepresentation M suffered loss. It was contended that the charge was defective.

**Held**, that it was not necessary to state in the charge that as a result of false representation made by F and N, M suffered any loss. The mere fact that the petition writer as a result of the deception of N handed the bond to him was sufficient to bring his conduct within the definition of cheating. The addition in the charge that M suffered loss as a result of the misrepresentation was a mere surplusage and the defect was cured by S. 537, Cr. P. Code. A.I.R. 1930 Lah. 407 =129 Ind. Cas. 298.

—S. 420—Compounding—No sanction of Court—S. 345 (2), Cr. P.C.—Effect.

In cases governed by S. 345 (2), Cr. P. Code, the permission of the Court before which a prosecution is pending is essential before the case can be validly compounded, and so no effect can be given to a compromise as a plea in bar of conviction unless the court has given its sanction. Without the sanction of the Court, the so-called compromise arrived at between the parties outside the Court, is of no legal effect and cannot be taken cognizance of by any Court dealing with the offence. 109 Ind. Cas. 601=9 Lah. 400=29 P. L. R. 510=29 Cr.L.J. 585=10 A.I. Cr.R. 302=A.I.R. 1928 Lah. 232.

—S. 420—Procedure—Evidence of deception—First trial.

In a charge of cheating the complainant must disclose all the evidence of deception at the first trial and he cannot institute a series of trials each based upon different evidence of deception. 99 Ind. Cas. 1035=25 M.L.W. 220=28 Cr.L.J. 235=7 A.I. Cr.R. 390=A.I.R. 1927 Mad. 444.

—S. 420—Restoration of property—Accused acquitted—Order, if legal.

Where a Magistrate finds the accused not guilty of the offence of cheating and acquits him, he cannot order that the property in respect of which the offence was alleged to be committed, and which is in possession of the accused, should be restored to the complainant. The proper order which the Magistrate should make is that the goods should remain in the possession of the person in whose custody they were found. 95 Ind. Cas. 933=27 Cr.L.J. 853=A.I.R. 1926 Cal. 1048.

—S. 420—General rule as to conviction—Taking ransom for restoration of stolen property—Conviction.

Per **Robinson, C. J.**—The General rule which should guide the Courts is to convict of and punish for the most serious offence that is established, provided of course, that the accused has been charged with and has had an opportunity of meeting the charge of that offence. There is no ground for holding that the Legislature meant to confine the Court to that offence when the facts proved amount to another and more serious offence.

When the accused person has taken a ransom for the restoration of stolen property and fails to return that property to the person, who has paid him the ransom, he can be convicted under S. 420, I.P.C., and the conviction need not be confined to one under S. 215, I.P.C. 73 Ind. Cas. 145=1 Bur. L. J. 179=11 L.B.R. 422=24 Cr.L.J. 529=A.I.R. 1923 Rang. 37.

18. Sentence.

—S. 420—Cheating—Sentence—Infliction of fine only—Legality.

S. 420, I.P. Code, requires that on a conviction being recorded, a substantive term of imprisonment should be awarded. Where only a sentence of fine is inflicted, the order has to be quashed. 1946 A. M. L. J. 8.

—S. 420—Cheating by importing goods in port of Karachi by deceiving Customs Authorities by using forged documents—Sentence.

An accused was charged with cheating which involved the use of forged documents under S. 420, I.P.C., for importing goods in Port of Karachi by deceiving the Customs Authorities. The accused, before this fraud, had visited another port and tried to come to an arrangement with the Customs there with a similar object but had failed. Though he was not charged for forging the documents, the lower Court passed a severe sentence in view of the fabrication.

**Held**, that in determining the sentence the making or fabrication of false documents should not be taken into account.

**Held**, also that in prosecution for cheating the Customs at Karachi, the evidence of the closely connected visits of the accused at two places, could be admitted under S. 8 or S. 9, Evidence Act. A.I.R. 1937 Sind 293=32 S.L.R. 87=39 Cr.L.J. 123=172 Ind. Cas. 374.

—S. 420—Sentence.

The effect of the conviction for attempt to cheat together with consequences that were bound to flow from it were probably sufficient punishment in themselves and that a sentence of three months would be sufficient. A.I.R. 1935 Rang. 456=37 Cr. L. J. 217=159 Ind. Cas. 1065.

—S. 420—Extracting money for charitable institution and taking it for himself.

A person who extracts subscriptions from the charitably minded public for a charitable institution and pockets the proceeds himself does not deserve any consideration in the matter of reduction of the sentence imposed on him. A.I.R. 1934 Pat. 114=15 P.L.T. 318=35 Cr.L.J. 1167=150 Ind. Cas. 927 (2).

—S. 420—Motor Insurance frauds.

Offences of cheating like motor insurance frauds should be dealt with rather severely. It is very difficult to catch these motor insurance frauds and when once a man is caught, he should be given deterrent punishment and that a sentence of two years' rigorous



imprisonment would meet the requirements of the case. A.I.R. 1934 Pesh. 67=35 Cr. L.J. 1345=151 Ind. Cas. 249.

—S. 420—Sentence.

The offender convicted under S. 420 "shall be punished with imprisonment and shall also be liable to fine". This means that some sentence of imprisonment must be given and the Court has a discretion to add or refrain from adding a fine, for, to the latter an offender is only "liable". 114 Ind. Cas. 733=1929 A.L.J. 400=10 L.R.A.Cr. 59=11 A. I. Cr. R. 422=30 Cr.L.J. 340=A.I.R. 1929 All. 260.

—S. 420—Sentence of imprisonment is obligatory.

A sentence of imprisonment is obligatory under the law for an offence either under S. 409 or under S. 420. 94 Ind. Cas. 130=27 Cr.J.L. 562=A.I.R. 1926 Lah. 350.

19. Similar offences—Distinguished.

—S. 420—Breach of contract and cheating.

Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act but of which the subsequent act is not the sole criterion. (1935) 159 Ind. Cas. 167 (1)=16 P.L.T. 553=37 Cr.L.J. 38.

—S. 420—Similar offences distinguished—Extortion and cheating.

Although there is a common feature between the offence of extortion and that of cheating, yet they cannot be regarded as two aspects of one offence. 112 Ind. Cas. 586=29 Cr.L.J. 1082=30 Bom. L. R. 967=A.I.R. 1928 Bom. 346.

—S. 420—Difference between theft, cheating, criminal misappropriation and criminal breach of trust.

An easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishonest and whether it was with the consent of the owner, or without it. In theft the original taking is without honesty and without the consent of the owner and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner. 106 Ind. Cas. 678=9 A.I.Cr.R. 282=29 Cr.L.J. 86=A.I.R. 1928 Nag. 113.

—S. 420—Cheating and breach of trust—Pledge of promissory notes—Pledgor retaking them for collection from debtors and paying pledgee—Complaint by pledgee on default—Cheating in respect of one's own property.

The act of the accused in dishonestly inducing the complainant to hand over the promissory notes, which the accused had pledged with the complainant as security for a loan by pretending that he required them to collect money from his debtors with the aid of which he would pay cash to the complainant, would constitute, if proved, an offence of cheating punishable under Sec. 420. It is not impossible under any circumstances for a person to commit criminal breach of trust in respect of his own property. In such a case the complainant has some sort of beneficial interest in the property and when he gives the notes to the accused for a definite purpose and the accused dishonestly disposes of them, there is both entrustment and dishonest misappropriation. 72 Ind. Cas. 612=24 Cr.L.J. 452=17

M.L.W. 580=32 M.L.T. 234=1923 M. W. N. 313=A.I.R. 1923 Mad. 597=45 M.L.J. 133.

20. Speculative scheme.

—S. 420—Speculative scheme.

Financial scheme of "Snow Ball" nature does not amount to cheating. I.L.R. (1939) 2 Cal. 81.

—S. 420—Speculative nature of scheme.

The mere fact that a scheme is of a highly speculative nature is not in itself evidence that it is a scheme put before the public to deceive. There must be evidence of some deception. A.I.R. 1937 Sind 58=38 Cr. L.J. 651=168 Ind. Cas. 827.

—S. 420—Speculative scheme.

A floated a company and had employed B, C and D as agents or canvassers. The main idea of the scheme was to grant loans by four unequal instalments to each applicant, whether he may be an applicant for a small sum of Rs. 50 or for a large amount of Rs. 5000. Each applicant had to deposit a sum of money with the application and the loan was to be made in instalments determined by drawing lots. It was further provided that these loan amounts would be refundable to the company in five to eight years, time according to the conditions agreed upon at the time of the advancement of the loan, and the last condition was that all applications would be understood to have been put in after full understanding and acceptance of the rules and conditions. Some applicants got loans applied for in full. A, B, C and D were prosecuted under S. 420 for cheating.

Held, that although the scheme was highly speculative, it could not be said that the scheme itself was dishonest or fraudulent in the sense that it either represented to the public something which was not true or concealed from them something which the company ought to have disclosed. A.I.R. 1934 Bom. 48=35 Bom. L.R. 1181=35 Cr. L.J. 644=148 Ind. Cas. 271.

21. Miscellaneous.

—S. 420—Conviction of mercantile agent.

In the case of a person having authority to sell goods owned by another, once it is proved that he has the consent of the owner to sell, it is immaterial to the third party to whom he pledges the goods whether he has obtained the consent by fraud or not. He is a mercantile agent, and the pledge under S. 178, Contract Act, is valid and the pledgee's right to hold the goods pledged is secure even if the mercantile agent is convicted for cheating under S. 420, I.P.C. A.I.R. 1937 Rang. 146=38 Cr. L.J. 711=169 Ind. Cas. 221.

—S. 420.

Promise by A to execute a mortgage on 31st May, 1934—Property subject-matter of a gift deed executed on 17th May, 1934—Gift deed subsequently registered on 13th September, 1934.

Held, that A committed no offence, as only on registration could the gift become valid. 1936 M.W.N. 236.

—S. 420—Damage not suffered—Conviction.

Where the accused were charged under S. 420 for having induced the office of the Inspector-General of Police to transfer a lorry to their names from the name of another person A by producing a doubtful receipt from the latter.

Held, that the fact that it was admitted that the receipt was signed by A was sufficient authority for them to transfer the lorry in the accused's name, that the Inspector-General and his subordinates were not



incurring any legal liability by the transfer nor did they suffer any damage in body, mind, reputation or property and consequently, the accused were not liable to conviction. A.I.R. 1934 Pesh. 5=35 Cr. L.J. 872=148 Ind. Cas. 960.

—**Ss. 420, 511**—Where the accused having set fire to his car which was insured, submitted a false information to the Insurance Company in order to obtain the insured amount.

**Held**, that the offence fell under Ss. 420, 511. A.I.R. 1934 Pesh. 67=35 Cr. L.J. 1345=151 Ind. Cas. 249.

—**S. 420—Same transaction.**

To determine whether or not a series of acts would form parts of the same transaction, the most important points to be considered are whether there was a common purpose and design and continuity of action. A.I.R. 1933 Cal. 308=56 C.L.J. 73=34 Cr. L.J. 530=143 Ind. Cas. 120.

—**S. 420**—Suspicion that a company is a swindling concern within meaning of S. 420—All books of the concern are relevant for determining the nature of offence, if any, committed and Police will not be wrong in investigating all the books and seizing them under S. 165, Criminal P.C. A.I.R. 1932 Lah. 581=33 Cr. L.J. 678=33 P.L.R. 824=138 Ind. Cas. 751.

—**S. 420—Offence under special law—Sending blank papers in insured cover addressed to self—Offence under S. 64 of the Post Office Act—Conviction under Penal Code—Is sustainable.**

Where the accused was shown to have sent blank papers in an insured cover addressed to himself and claimed the value of currency notes from the Post Office and proceedings were instituted against him for offences under Ss. 420 and 511, I.P.C. and under S. 64 of the Post Office Act and he was convicted for offences under the Penal Code.

**Held**, that, assuming that the minor offence under S. 64 of the Post Office Act was proved, it was not illegal to convict the accused for the major offence only. 125 Ind. Cas. 770=A.I.R. 1930 Pat. 622=9 Pat. 126=11 Pat. L.T. 224=31 Cr. L.J. 934.

—**S. 420—Railway servant obtaining free pass for wife and mother and giving it to another woman who used it—Offence.**

Where a railway servant applied for and obtained a free pass for his wife and mother and handed over his pass to another woman, who was neither his wife nor his mother, and she used it.

**Held**, the railway servant was guilty under Penal Code, S. 420 and not Railways Act, S. 68. 88 Ind. Cas. 524=2 O.W.N. 510=12 O.L.J. 508=26 Cr. L.J. 1164=A.I.R. 1925 Oudh 479.

—**S. 420—Getting money without inducement—Temporary service during leave—Discharge on getting a month's pay in lieu of notice—Rejoining permanent work and getting pay—No inducement and no offence.**

The applicant Sarada Saran was a temporary clerk at Lucknow, and took leave from the 23rd January 1923, till the 31st of January of that year. While he was on casual leave he went to Cawnpore, and was appointed a permanent head clerk of the Cawnpore, Cantonments by a temporary Cantonment Magistrate. He applied to the Lucknow authorities for an extension of his leave but originally his leave was not granted. His casual leave expired on the 31st January, 1923. On the 2nd of February, 1923, he had been informed that he was ineligible under the rules for a permanent appointment. Captain Pocock told the accused that he could not consider his retention in the

Cantonment Magistrate's office, whereon the accused informed him that he had resigned his post in the Military Accounts Department, and that it would entail considerable loss to him if he did not retain him. He even offered to accept the position of an apprentice clerk. Captain Pocock could not retain him in his office, and so he paid him a month's pay in lieu of notice amounting to Rs. 145. The accused took the pay in lieu of notice and went back to Lucknow. He then got his leave extended and rejoined on the 5th of February. He again drew his pay at Lucknow, where the accused made it clear that he had already drawn his pay for the month at Cawnpore and he would have to refund one of the two sums.

**Held**, that it is very difficult to say that the accused induced Captain Pocock to pay him Rs. 145. 33 Ind. Cas. 997=21 A.L.J. 873=5 L.R.A. Cr. 30=26 Cr. L.J. 213=A.I.R. 1924 All. 209.

—**S. 420—Obtaining certificate by cheating.**

A certificate that a person has passed an examination is property within the meaning of Ss. 415 and 420 of the Indian Penal Code. Therefore, a person who obtains a certificate from a Deputy Inspector of Schools by stating untruly that he passed the examination in a certain year, is guilty of an offence punishable under S. 420 of the Penal Code. 67 Ind. Cas. 619=18 N.L.R. 52=23 Cr. L.J. 443=A.I.R. 1922 Nag. 229.

—**S. 420—Taking complainant to another village on pretence of buying buffalo for him, getting him intoxicated and obtaining by misrepresentation a deed of divorce from him—Nature of offence.**

The complainant was taken to another village on the pretence that a buffalo would be bought for him and the money necessary for this purpose would be advanced to him. He was then given a large amount of liquor to drink and when in the state of intoxication a document purporting to be a bond was executed and his signature was obtained. This document was a deed of divorce of his wife who was then taken away by some of the petitioners.

**Held**, that the offence charged did not fall within the purview of S. 417 but of S. 420. 67 Ind. Cas. 588=3 L.L.J. 283=A.I.R. 1921 Lah. 63.

—**Ss. 420 and 467—Title to current coin—Rights of creditors discharged out of money obtained by cheating.**

Title to current coins passes by mere delivery to a person to whom a debt is due. Where a creditor was paid Rs. 1,168, which his debtor had obtained by cheating, the police was not entitled to recover it from his creditors during their investigations of an offence under Ss. 420 and 467, I.P.C., and the creditors are entitled to the money. 1 P.R. 1915 (Cr.)=165 P.L.R. 1915=16 Cr. L.J. 460=29 Ind. Cas. 92.

—**S. 420—Concession tickets—Misuse of.**

A student producing a certificate, issued to another student for the reduced fare concession and receiving a pass, is not guilty of cheating in absence of any rule prohibiting transfer of students' tickets. 7 M.L.T. 201=11 Cr. L.J. 339=(1910) M.W.N. 510=5 Ind. Cas. 973.

—**S. 420—False pretence.**

Promise to do something in future may not amount to cheating, but it may lead to the inference that the accused has the power to do it in future and hence it is indictable. 26 P.W.R. 1910 (Cr.)=11 Cr. L.J. 428=12 P.R. 1913 Cr.=269 P.L.R. 1914=6 Ind. Cas. 964.



—S. 420—Cheating—Exchange of Railway ticket.  
See S. 403. 1905 A.W.N. 9=2 A.L.J. 16=27 A. 378.

—S. 421—Applicability.

The complainant complained to the Magistrate that he had filed a suit in the Civil Court against A with respect to his land, that he had filed an application in the suit for attachment of the standing crops on the land and for distraint of A's cattle, and that B, joining with A, had removed the harvested crops and the cattle to his own field and claimed them as his with the object of preventing the Receiver from taking possession of this property. The Magistrate came to the conclusion that an offence punishable under S. 421, Penal Code, had been made out against A but not against B. It was argued for the complainant that it was open to a person in filing a complaint to ignore a part of the offence and to file his complaint with regard to the remainder and that therefore, the Magistrate's conclusion that the offence fell within S. 421 was correct.

**Held**, that the allegations in the complaint and in the sworn statement which were the only material on which the Magistrate had to act, implicated B equally with A.

**Held**, also that the offence fell under S. 206 and not under S. 421 and hence the Magistrate had no jurisdiction to entertain the complaint. It was not open to the Magistrate to ignore the essential ingredients of the complaint and treat the offence as one under S. 421. A.I.R. 1942 Mad. 675 (1)=1942 M.W.N. 492=55 L.W. 518=2 M.L.J. 246=44 Cr. L.J. 129=203 Ind. Cas. 670.

—S. 421—Wrongful loss or wrongful gain—Shop-keeper with stock of goods obtaining credit and selling goods without making payment to his creditors.

It cannot be held without further proof that a shop-keeper who has stocked his shop with goods obtained on credit and who sells these goods without making any payment to his creditors has committed an offence punishable under S. 421. In selling these goods, which are his own, in spite of the fact that he has not yet paid for them, he is not causing wrongful gain to himself; neither is he causing wrongful loss to anybody, because unless the creditors have obtained some legal right over the property, he is not, by his action, depriving them of any right of theirs. A.I.R. 1938 Rang. 242=39 Cr. L.J. 767=176 Ind. Cas. 667.

—S. 421—Movable property of insolvent in foreign State.

If a dishonest or fraudulent transfer, removal or concealment or delivery of such property is made by the insolvent without adequate consideration so as to prevent its distribution among his creditors according to Indian Law, the offence under S. 421, would be established even if that property is in a foreign State. A.I.R. 1936 Bom. 167=38 Bom. L.R. 168=37 Cr. L.J. 577=60 Bom. 706=162 Ind. Cas. 310.

—S. 421—"Any property"—Meaning of.

The word "property" in S. 421 is wide enough to include a chose in action. A.I.R. 1936 Bom. 167=38 Bom. L.R. 168=37 Cr. L.J. 577=60 Bom. 706=162 Ind. Cas. 310.

—S. 421—Offence by insolvent—Jurisdiction of Magistrate.

The Presidency Towns Insolvency Act does not take away a Magistrate's jurisdiction to try the insolvent for an offence under Ss. 421 and 424: 35 Bom. 63, Foll. 114 Ind. Cas. 681=6 Rang. 664=30 Cr. L.J. 345=A.I.R. 1929 Rang. 14.

—S. 421—Scope—Inconsistency with Special Act—Magistrate's jurisdiction to try the offence—Presidency Towns Insolvency Act (III of 1909), Ss. 17 and 103—Suit or other proceeding—Rule of construction.

The Magistrate's jurisdiction to try an adjudged insolvent under S. 421 of the Penal Code was not taken away by S. 103 of the Presidency Towns Insolvency Act (III of 1909). The general expression 'or other legal proceeding' in S. 17 of the Act (III of 1909), coming after 'suit' a word of more limited application, must be construed on the principle of *ejusdem generis* and hence it could not be intended to include criminal proceedings. S. 421 of the Indian Penal Code and S. 103 of the Insolvency Act distinguished. 35 Bom. 63=12 Bom. L.R. 750=11 Cr. L.J. 548=7 Ind. Cas. 963.

—S. 422—Fraudulent transfer.

A transfer of the equity of redemption by the mortgagor to a third person does not constitute an offence under S. 422 of the Code. 14 Cr. L.J. 141=18 Ind. Cas. 893.

—Ss. 422, 511—Dishonest or fraudulent prevention of debt being made available for creditors—Application to draw money from Court—Security ample—Fraudulent or dishonest intention.

An attempt by the mortgagor to put an end to an agreement with the mortgagee as to the management of the estate and to recover money which under the agreement is recoverable by the mortgagee is not an offence under Ss. 422 and 511, where the security for the debt was ample and the intention of the mortgagor was to put an end to the management and not to prevent payment of the mortgage debt. 22 W.R. 46, foll. (1900) 5 C.W.N. 174=28 G. 314.

—S. 423—Executing document with false recital.

Where the judgment-debtors executed a document with a false recital as to the consent of the decree-holder to take their land and this was found to have been done fraudulently with the intention of supporting at a later stage a cause of satisfaction of the money-decree which the decree-holder had obtained against them.

**Held**, that this was enough to bring the act of the judgment-debtors within the mischief of S. 423. A.I.R. 1933 Pat. 495=34 Cr. L.J. 346=144 Ind. Cas. 791.

—S. 423—"Consideration" whether includes property itself.

The word 'consideration' in S. 423, does not mean, the property transferred. Therefore an assertion that the whole land belonged to the transferor is not a statement relating to the consideration for the transfer and is not an offence under the section, even though such statement is untrue. Every false statement in a deed of sale is not punishable. It must be a statement relating to consideration or to the person benefited thereby and consideration should not be confused with value or with the property. 37 Mad. 47=10 M.L.T. 383=(1911) 2 M.W.N. 413=12 Cr. L.J. 547=12 Ind. Cas. 523.

—S. 423—Offence under—Fabricating false document to support claim of marriage in judicial proceedings—Intention to injure the woman and her husband—Nature of offence.

An accused had unsuccessfully tried to marry a woman. Thereafter he got registered a document containing a false recital that he had married her and purported to transfer certain land to her in lieu of her dower.



**Held**, that he was acting in furtherance of his desire to secure the person of the woman and this, in the circumstances, he could only do by judicial proceedings. Therefore, his intention was to use this document and the false statements therein in judicial proceedings and thereby mislead the Judge. So accused was guilty under S. 193, I.P.C.

The words "fraud", "fraudulently" and "to defraud" do not connote deprivation of property and the deception of the person so deprived. Deprivation of property, actual or intended, is not an essential ingredient in fraud or the intention to defraud, and it is not essential that the person deceived or to be deceived and the person injured or intended to be injured should be one and the same.

In the present case in addition to an intention to deceive and mislead, the further intention to cause injury to the woman and her true husband, and to support accused's own false claim to that status is clearly to be deduced from the facts. So the accused was guilty under S. 423, I.P.C., also. 66 Ind. Cas. 996=48 Cal. 911=23 Cr.L.J. 340=A.I.R. 1921 Cal. 226.

—S. 423—**Interpretation—'Fraudulently'—Meaning.**

The words 'fraud', 'fraudulently' and 'to defraud' do not connote deprivation of property and the deception of the person so deprived. Deprivation of property actual or intended, is not an essential ingredient in fraud or the intention to defraud and it is not essential that the person deceived or to be deceived and the person injured or intended to be injured should be one and the same. 66 Ind. Cas. 996=48 Cal. 911=23 Cr.L.J. 340=A.I.R. 1921 Cal. 226.

—S. 423—**Scope of—Kabuliyat—Whether a document.**

A kabuliyat is not a document contemplated under S. 423, I.P.C. 46 Cal. 986=29 C.L.J. 522=20 Cr.L.J. 574=52 Ind. Cas. 62.

—S. 423—**'Dishonestly' — 'Fraudulently'—False statement of price in sale deed with the view of defeating claims of pre-emptor.**

The making of a false statement in a sale deed of immoveable property as to the consideration for the sale, such statement being made for the purpose of preventing any person who might have a right of pre-emption in respect of the property sold from coming forward to 'assert his right' of pre-emption, is an offence which falls within the definition contained in S. 423. 1902 A.W.N. 173=25 A. 31.

—S. 424.

#### Synopsis.

1. Applicability and scope.
2. Dishonestly or Fraudulently.
3. Essentials.
4. Illegal attachment.
5. Procedure.
6. Miscellaneous.

#### 1. Applicability and scope.

—S. 424—**Applicability.**

The removal referred to in S. 424 is *ejusdem generis* with concealment which precedes it. Section 424 is designed to meet a special class of cases and has no application to a case where property is openly seized by a person in the exercise of an alleged right. A.I.R. 1939 All. 710=1939 A.L.J. 941=1939 A.W.R. 661=41 Cr.L.J. 111=185 Ind. Cas. 151.

—S. 424—**Removing crop.**

**Obiter.**—It cannot be said that a person who removes a crop which cannot be said to be duly attached because

of a failure in carrying out the provisions of R. 44, O. 21, Civil P.C., cannot be punished for an offence under S. 424, Penal Code. The question under S. 424, Penal Code, is not whether the property passed into the possession of the Court but whether the accused person removed or concealed his own property with intent to defraud or defeat his creditors or partners or others. A.I.R. 1936 All. 364=1936 A.W.R. 325=1936 A.L.J. 283=37 Cr.L.J. 675=162 Ind. Cas. 653.

—S. 424—**'Dishonesty'.**

A person cannot be said to do anything dishonestly within the meaning of the word as defined in the Penal Code if he has merely an intention to cause wrongful loss to some one, when he cannot or does not in fact cause any such wrongful loss. A.I.R. 1936 Sind 20=29 S.L.R. 190=37 Cr. L.J. 485=161 Ind. Cas. 553.

—S. 424—**Refusal to return property.**

An offence of refusing to return property is not contemplated by S. 424, A.I.R. 1933 All. 46=1933 A.L.J. 1=55 All. 119=144 Ind. Cas. 32.

#### 2. Dishonestly or Fraudulently.

—S. 424—**Applicability—Partners — Books of partnership retained by some to the exclusion of others—Prosecution—Legality.**

Partners who are joint owners of the books of the partnership are entitled to retain them. There is nothing dishonest or fraudulent in some partners so retaining the books and the partners who so retain them cannot be prosecuted under S. 424, I.P. Code, at the instance of another partner. The latter can only have a right to have them produced for inspection in a suit for dissolution and accounts. I.L.R. (1948) 2 Cal. 452=52 C.W.N. 441=A.I.R. 1948 Cal. 292=49 Cr.L.J. 543.

—S. 424—**Judgment-debtor knowing that his crop is attached, removing it.**

Where a judgment-debtor, knowing that his crop was attached or even was going to be attached in execution of a decree, removes the crop with the object of preventing the decree-holder from obtaining his money, his action is dishonest because it is intended to cause wrongful loss to the decree-holder and he is, therefore, guilty under S. 424. A.I.R. 1938 All. 449=1938 A.L.J. 528=1938 A.W.R. 361=39 Cr.L.J. 840=176 Ind. Cas. 960.

—S. 424—**Removal of property.**

The case of *Queen-Empress v. Obayya*, (1899) 22 Mad. 151, is not an authority for holding that after attachment has been effected, dishonest removal of moveable property cannot be an offence under S. 206, Penal Code. The offences would fall either under S. 379 or 424 or 206, Penal Code for which sanction is necessary. 1933 M.W.N. 722.

—S. 424—**Reaping of crop.**

Reaping of crop done with the intention of defeating the landlord's claim is an offence. 1932 M.W.N. 639.

—S. 424—**Removal of crop.**

Where it was found that harvesting and removal of crop, done in the night, was dishonest.

**Held**, that conviction under S. 424, Penal Code, was right even if the accused was entitled to exclusive possession of the crop till division. 1931 M.W.N. 1049.

—S. 424—**Avoiding attachment—Concealment of property by debtor—If offence.**

Concealment of property by debtors or taking away of property by others to avoid its attachment if done with a dishonest intention is an offence under S. 424. 1930



M.W.N. 347=3 M.Cr.C. 172=32 M.L.W. 23=126  
Ind. Cas. 601=A.I.R. 1930 Mad. 670.

—S. 424—Accused not judgment-debtor removing crops grown by him but under attachment—Consequent suit to establish his title—Absence of intention to cause wrongful loss—Legality of conviction.

The accused who was not a judgment-debtor was convicted under S. 424 for dishonestly harvesting and appropriating crops grown by him but under attachment in execution of a decree against his uncle. Consequent upon the attachment the accused had filed a case contending that the crops in question could not be legally attached and that he was entitled to the same.

Held, that the crops could not be considered to have been removed with the intention to cause wrongful loss to the decree-holder and hence the conviction could not be sustained under S. 424. 1929 Cr. C. 280=A.I.R. 1929 Pat. 520.

### 3. Essentials.

—S. 424—Essentials.

One of the necessary elements of S. 424, Penal Code, is that some dishonesty or fraud should be made out against the accused. Where the judgment-debtor transfers his property to his wife by gift before attachment, and the property is attached without making the wife of the judgment-debtor party to the execution proceeding and the wife has obtained mutation, of names in her favour, she is not bound by the order rejecting the objection by the judgment-debtor that he had no interest in the property, on the ground that he having gifted away the property, had no *locus standi*. It is the duty of the Collector, to whom the decree is sent for execution to take action under Civil P. C., Sch. III, para. 3, and serve her with a notice calling upon her to submit a statement of her claim. In the absence of all this, if she collects the rent of the property and the tenants pay her, they cannot be prosecuted under S. 424, Penal Code. A.I.R. 1936 Oudh 195=1935 O.W.N. 879=37 Cr. L.J. 1037=164 Ind. Cas. 995.

—S. 424—Essentials for conviction—Dishonesty.

Unless dishonesty is proved, the conviction under S. 424 cannot be sustained. 59 Ind. Cas. 654=3 L.L.J. 99=22 Cr. L.J. 142=A.I.R. 1921 Lah. 185.

—S. 424—Finding of dishonesty.

The essence of the offence under S. 424 is that the removal of the property must be dishonest or fraudulent. The finding as to dishonesty must be clear. 2 P.L.T. 627=A.I.R. 1921 Pat. 506.

### 4. Illegal Attachment.

—S. 424—Removal of property attached under defective warrant.

The person to whom the warrant of attachment is addressed must be named on the face of the warrant and it must be apparent on the face of the warrant when it can be legally executed. It is not sufficient to produce other materials to show what was the date of the warrant and to whom it was addressed.

A warrant which neither bears the name of the person who is to execute it nor bears the date on or before which it should be executed, is, therefore, illegal and the removal of property attached in execution of such warrant does not constitute an offence under S. 424. A.I.R. 1942 Pat 480=8 C.L.T. 40=43 Cr. L.J. 795=202 Ind. Cas. 123.

—S. 424—Illegal attachment of crops.

If the provisions of the law are not complied with the attachment would be illegal and the property would not pass from the judgment-debtor to the Court, and

the removal of crops by the judgment-debtor will not constitute an offence under S. 424. A.I.R. 1934 All. 711=1934 A.L.J. 749=35 Cr. L.J. 1307=3 A.W.R. 682=151. Ind. Cas. 366.

—S. 424—Illegal attachment.

Where a process has a date fixed for its return under O. 21, R. 24 (3), Civil P.C., it cannot be executed after that date; and any person whose property has been attached after that date fixed for the return of the process may, when charged with criminal offence under S. 424, Penal Code, plead that his property has never been lawfully removed from his possession and that therefore, he can commit no offence by taking the property in his own use. A.I.R. 1933 All. 46=1933 A.L.J. 1=55 All. 119=144 Ind. Cas. 32.

—S. 424—Reaping attached crops.

Crops of accused attached by Civil Court—Accused aware of attachment which was invalid—Reaping of crops with intention of preventing decree-holder getting crops.

Held, he was not acting "dishonestly" within meaning of S. 424 and it was not possible in law to cause wrongful loss as crops were not validly attached. 1936 M.W.N. 492 (2).

—S. 424—Crops not validly attached.

A judgment-debtor is entitled to remove his crops which have not been validly attached; and the mere fact that he has removed the crops does not prove that he has done so dishonestly. The word "dishonestly" is used in a technical sense which is at variance with its popular significance as implying deviation from probity. Intention has got to be proved. A dishonest intention may be presumed only if an unlawful act is done or if a lawful act is done by unlawful means. A.I.R. 1936 Sind 20=29 S.L.R. 190=37 Cr. L.J. 485=161 Ind. Cas. 553.

—S. 424—Removing crop attached by Madras Village Courts—Attachment illegal—Removal if offence.

Since a village Court cannot attach crops which are not moveables within the meaning of S. 52 by virtue of Madras General Clauses Act and S. 22, I.P.C., there is no fraud in removing such crops so as to sustain a conviction under S. 424, I.P.C. 1930 M.W.N. 352=31 M.L.W. 719=3 M. Cr. C. 143=A.I.R. 1930 Mad. 509=58 M.L.J. 509.

—S. 424—Attachment not legal—Removal if offence.

Where mode has not been followed, there is no legal attachment and conviction for dishonest removal of property attached is bad. 117 Ind. Cas. 243=30 Cr. L.J. 748=A.I.R. 1928 Rang. 285.

### 5. Procedure.

—S. 424—Property under attachment—Removal of property under attachment by third person claiming title to it—Determination of title by Court.

The crucial question for determination under S. 424 is whether the alleged removal of property is dishonest or fraudulent and therefore if persons claiming title to a property under attachment in execution of a decree on another remove the same, the matter whether such property belonged to the accused or no has to be determined by criminal Court before deciding upon conviction. 124 Ind. Cas. 716=52 A. 214=A.I.R. 1930 All. 329.

—S. 424—Procedure—Complainant and opposite party joint proprietors—Removal of part of joint



**property—Partition suit pending—Duty of Magistrate.**

If on a complaint under S. 424, I.P.C., the complainant and the opposite party are joint proprietors of the same and a partition suit with regard to their joint property is pending in the civil Court, and property with regard to which the complaint is made is a subject matter in dispute in that suit, if the decision of the Magistrate entail prejudging the order of the civil Court the Magistrate can discharge the accused persons allowing them to retain the custody of the property on deposit of the proportionate value of the complainant's share of the property or make it over to the complainant on his depositing the proportionate value of the share of the accused persons. 1929 Cr. C. 273=A.I.R. 1929 Pat. 513.

**6. Miscellaneous.****—424—Landlord and tenant—Bona fide claim for trees.**

When a **bona fide** claim of title is raised, the accused is entitled to acquittal but whether the claim is raised **bona fide** or not is a question of fact and has to be determined in the circumstances of each case. The finding as to 'dishonest' or 'fraudulent' removal can be implied from the judgment read as a whole though those words are not used. 1 Pat. L.T. 318=21 Cr. L.J. 609=57 Ind. Cas. 273.

**—S. 424—Carrying away produce.**

Tenants under **Bhaoli Danabandi** system carrying away the outturn of lands, commit an offence under S. 424 if the landlord has no reasonable time to appraise it. 1 Pat. L.W. 691=18 Cr. L.J. 687=40 Ind. Cas. 335.

**—S. 424—Landlord and tenant—Bengal Tenancy Act, 1885, S. 71 (4).**

S. 71 (4) of the B.T. Act provides the courts with a definite rule as to the value of crops which have been wrongly removed by the tenant. If the tenant acts dishonestly he is also liable under S. 424, I.P.C. 1 Pat. L.J. 353=(1917) P.H.C.C. 71=17 Cr. L.J. 315=3 Pat. L.W. 43=35 Ind. Cas. 491.

**—S. 424—Dishonest removal to avoid distraint for arrears of rent—Onus on prosecution to prove legality of distraint.**

Where a distraint is made for arrears of rent, there is no presumption that it is legally made; and if persons are charged with having dishonestly removed property to avoid, if there is no evidence of the legality of the distraint, the conviction is illegal, as they had a right of private defence of their property unless the distraint was legal. (1902) 25 M. 729.

**—Ss. 425, 426 and 427.****Synopsis.**

1. Applicability and Scope.
2. Bona fide claim.
3. Easement or Customary rights.
4. Essentials.
5. Injurious affected.
6. Intention and Knowledge.
7. Interpretation.
8. Jurisdiction.
9. Negligent acts.
10. Own Property—Damage to.
11. Procedure.
12. Theft and Mischief.
13. Wrongful loss.
14. Miscellaneous.

**1. Applicability and Scope.****—Ss. 425 and 427—Offence under—Essentials—Damage really due to abnormal rains and not to mere storage of materials—Offence under S. 427, if made out.**

S. 425, I. P. Code, which defines the offence of mischief contemplates some direct act on the part of the mischief doer either personally or through some one else, which leads to any of the results mentioned in the section. Where materials are stored in an open space but owing to abnormal rains there is an accumulation of water and there is damage to a neighbour's wall, it cannot be said that an offence under S. 427 is committed. 1950 A.W.R. 346=51 Cr. L. J. 1242=A.I.R. 1950 A. 464=1950 A.L.J. 281.

**—S. 425—Scope.**

Every act appearing to fall under definition of mischief is not criminal.

Thus, when the purchaser of a mortgaged property removes the materials and thereby diminishes the security of the mortgagee, he commits only a civil wrong and not a criminal offence. A.I.R. 1945 Nag. 294=I.L.R. (1945) Nag. 998=1945 N.L.J. 391=222 Ind. Cas. 524.

—S. 425—Section 425, Penal Code, refers to corporeal property and provides for cases in which such property is either destroyed or altered or otherwise damaged with a particular intention. A.I.R. 1944 All. 60=1944 A.L.J. 6=1944 A.W.R. 6=1944 O.W.N. 9=I.L.R. (1944) All. 189=211 Ind. Cas. 621.

—S. 427—Applicability—Essentials—**Mens rea**—Absence of—**Bona fide** belief of right to property in dispute—Offence. See PENAL CODE, Ss. 379 and 427. 16 Cut. L. T. 78=A.I.R. 1950 Orissa 196.

**2. Bona fide claim.****—Ss. 426 and 427—Applicability—Wrongful loss or damage—Intention to cause—Intention to commit offence or intimidate, insult or annoy—Entry on land in exercise of bona fide claim of right to graze cattle—Offence.**

Certain fallow land was let out by the owner (Zamindar) to the complainant who in turn let it out again to B, who sought to bring the land under cultivation and erected ails upon the same. The accused, villagers, who had been using the land for grazing their cattle for over 50 years, went to the plot at about 7 or 9 in the night and cut the ails. They were prosecuted and convicted under Ss. 143, 426 and 427, I. P. Code; their plea of **bona fide** claim of right not being accepted by the Court which held that there could be no question of a **bona fide** claim of right as no right existed. It was found on the evidence and admitted by the prosecution that the accused had been using this land for grazing cattle and that this right of pasturage had been exercised for over fifty years.

**Held :** (1) that the question of **bona fide** claim of right arose only when no right existed; and if the right existed the question of **bona fide** claim of right would not arise;

(2) that it having been found that the accused acted in the exercise of a **bona fide** claim of right, they could not be guilty of the offence of causing wrongful loss or damage, etc.; and they could not have the common object of causing such wrongful loss or damage, which would amount to mischief under S. 425, I. P. Code or S. 143;

(3) that as there was no intention on the part of the accused to commit an offence or to intimidate or insult or annoy, they could not also be convicted of criminal



trespass under S. 447, I. P. Code. 3 A.I.Cr. D. 204 = A.I.R. 1949 Cal. 237 = 50 Cr. L. J. 463.

—Ss. 425 and 426—Removing projection of adjoining house believing it to be a trespass.

Where a person removes by reasonable means a projection erected by the owner of an adjoining house, honestly believing that the projection is a trespass, the person must be deemed to have acted **bona fide** in the exercise of what he believed to be his rights and cannot, therefore, be guilty of an offence of mischief. A.I.R. 1939 Mad. 400 = (1939) 1 M.L.J. 321 = 49 L.W. 322 = 1939 M.W.N. 315 = 40 Cr. L.J. 656 = 182 Ind. Cas. 327.

—S. 425—Bona fide claim of right.

If a person removes an obstruction from property which is not his own, but which he believes to be his own and thereby causes loss, yet as he had not the intention nor the knowledge which are necessary to constitute the offence, he cannot be convicted of mischief. A.I.R. 1932 Mad. 676 = 1932 M.W.N. 645 = 33 Cr. L.J. 655 (2) = 37 L.W. 149 = 138 Ind. Cas. 608.

—S. 426—'Bona fide' dispute.

Where a **bona fide** contest exists as to the title of the property, no offence is committed. 86 Ind. Cas. 36 = 26 Cr. L.J. 660 = 6 L.R.A. (Cr.) 31 = A.I.R. 1925 All. 291.

—S. 426—'Bona fide' claim—Removal of property—No mischief.

Where a servant of the landlord **bona fide** claimed and therefore cut and removed a dead jack fruit tree standing on the homestead of a tenant.

Held, that the offence of mischief was not committed. 83 Ind. Cas. 898 = 28 C.W.N. 736 = 26 Cr. L.J. 194 = A.I.R. 1924 Cal. 805.

—S. 425—'Bona fide' claim—Cutting trees—If offence.

A person who cuts trees which he says to be his own cannot be said to be committing the offence either of theft or of mischief as defined in Chapter 17 of the Indian Penal Code. 71 Ind. Cas. 645 = 21 A.L.J. 213 = 4 L.R.A. (Civ.) 172 = A.I.R. 1923 All. 428.

—S. 425—Cutting tree under bona fide claim of right.

A tenant cutting an ancient tree standing on his holding in the **bona fide** assertion of a customary right but without intending or knowing the likelihood of causing wrongful loss to the Zemindar, cannot be convicted of mischief under S. 426 of the Code. 58 Ind. Cas. 828 = 21 Cr.L.J. 828 (All.).

—S. 425—Mischief—Tenant cutting trees under claim of right.

A tenant cutting trees standing on his holding under a **bona fide** claim of right is not guilty under S. 426 and it is immaterial that the motive in cutting trees was **mala fide**. 5 Pat. L. W. 114 = 19 Cr. L.J. 729 = 46 Ind. Cas. 409.

—S. 425—Bona fide belief as to title.

A person acting under a **bona fide** belief of title to land, possession of which was given to his wife by the Court under an auction purchase, commits no offence under S. 426, I.P.C., if no deterioration to the crop which was grown by the complainant is caused in the act of the accused in cutting and removing ripe paddy from the field. 2 Pat. L.W. 49 = 18 Cr. L.J. 750 = 40 Ind. Cas. 750.

—S. 426—Mischief—Bona fide claim of right—Conviction bad. (1903) 7 C.W.N. 859.

### 3. Easement or customary rights.

—Ss. 425 and 426—Mischief—Interference with right of way.

It is clear from the provisions of S. 425, I. P. Code, that if the property is changed in such a way as to diminish its utility, the person who effects the change commits mischief. The explanation makes it clear that the utility affected need not be to its owner. Hence where a right of way allowed to the complainant over the accused's plots is interfered with by the latter digging a ditch, which makes the passage of carts impossible, the accused is guilty under S. 426, I. P. Code. 1947 O.A. (C.C.) 128 = 1947 A. Cr. C. 158 = 1937 A.W.R. (C.C.) 128 = 1947 O.W.N. 481 = 49 Cr.L.J. 114 = A.I.R. 1948 Oudh 97.

—S. 425—Customary right.

Tenants of a village in District Hajaribagh cut down **Sakhua** saplings from **Rakhawat** jungles and claimed that they had customary right.

Held, that the customary right was with regard to the fuel and would for building purposes and not for wood from the reserved forests. (1938) 19 P.L.T. 656.

—S. 425—Mischief—What does not amount to.

Property under S. 425 means tangible property capable of being forcibly destroyed but does not include an easement.

If the owner of land over which other people have a right of passage throws earth upon that land so that the use of the land by the others becomes disadvantageous or impossible, that does not amount to mischief for the reason that what is affected is not any property or its value but only a right of easement. 1930 M.W.N. 909 = 129 Ind. Cas. 77 = A.I.R. 1930 Mad. 973.

—S. 426—Easement—Injunction to remove obstruction to right of way obtained by accused—Injunction not complied with—Accused removing obstruction—Mischief.

Where the accused obtained an injunction from the Mamlatdar's Court restraining the complainants from obstructing the way of accused by dams and the complainant did not remove the dams which were obstructing his way, he had the dams removed himself.

Held, that he was not justified in taking the law in his own hands and removing the dams, thereby causing damage to the complainants and that the loss caused to the complainants was caused by unlawful means in abetting the nuisance contrary to the provisions of S. 36 of the Easements Act. 101 Ind. Cas. 604 = 51 Bom. 487 = 29 Bom. L. R. 484 = 28 Cr. L.J. 476 = 8 A.I.Cr.R. 72 = A.I.R. 1927 Bom. 363.

—S. 425—Easement—Right to support—No acquisition by prescription—Removal, if offence.

It is not unlawful and therefore not an offence to remove lateral support and cause damage unless the right to support has been acquired by prescription for 20 years. 68 Ind. Cas. 831 = 14 M.L.W. 728 = A.I.R. 1921 Mad. 322.

### 4. Essentials.

—S. 425—Mens rea is essential.

What is compendiously referred to as **mens rea** is one of the essential ingredients of the offence of mischief and if the accused honestly believed in good faith that he had the right to do what he did even if he did not in law have that right, he cannot be said to have had the necessary intention or knowledge that he was likely to cause wrongful loss or damage. In fact, in the absence of any intention or knowledge of this kind, a conviction for mischief cannot be had. A.I.R. 1939



Mad. 400=(1939)-1 M.L.J. 321=49 L.W. 332=1939 M.W.N. 315=40 Cr. L.J. 656=182 Ind. Cas. 327.

—S. 425—Essentials.

To constitute mischief within the meaning of S. 425, Penal Code, it is necessary not only that wrongful loss or damage to the public or to any person be intended or be likely but also that any property should either be destroyed or any such change should occur in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously. A.I.R. 1939 Oudh 38=1938 A.W.R. 126=1938 O.W.N. 1127=40 Cr. L.J. 138=178 Ind. Cas. 665.

—S. 425—Essentials.

Intention to cause wrongful loss or damage is an essential for the offence of mischief. 8 Rang. 13=125 Ind. Cas. 271=A.I.R. 1930 Rang. 158.

—S. 425—Wrongful loss to the public or any person.

If the auction-purchaser destroys the property which he purchased, he does not cause any mischief under Section 425, Penal Code. The principal ingredient of the offence under the section is that there must be an intention to cause wrongful loss or damage to the public or to any person. 66 Ind. Cas. 817=3 Pat. L.T. 335=23 Cr. L.J. 321=A.I.R. 1922 Pat. 197.

—S. 425—Mischief—Intention to cause wrongful loss—A finding that loss was caused.

To sustain a conviction under S. 426, Penal Code, it must be found that the accused had intention to cause wrongful loss or knowledge that he would cause such loss. Mere finding that wrongful loss was caused is not enough. 56 Ind. Cas. 434 (Mad.)=21 Cr. L.J. 450.

5. Injurious affected.

—S. 425—Offence under—Landlord agreeing with tenant to pump water from reservoir—Omission to pump.

Where a landlord who had agreed with the tenants of his flats to pump water from a reservoir in which water supplied by the corporation was collected and for that purpose levied a separate charge stopped pumping water.

**Held**, that the facts did not amount to the offence of mischief as defined in S. 425, I. P. Code. It might be that the landlord would be liable for damages on account of a breach of the agreement to pump the water from the central reservoir, but the omission could not be said to constitute "any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously." It was just possible that if the supply of water to the flats was a part of the tenancy and if the landlord interfered in any way with the supply which was an integral part of the tenancy, the matter might be different. I.L.R. (1948) 1 Cal. 329=51 C.W.N. 751=49 Cr. L.J. 314=A.I.R. 1948 Cal. 197=83 C.L.J. 177.

—S. 425—Persons driving the cattle to pound are not guilty of mischief under S. 425 because getting cattle put into pound is not causing such change in property as would diminish its utility. A.I.R. 1943 Oudh 280=1943 A.W.R. 49=44 Cr. L.J. 640=1943 O.W.N. 202=207 Ind. Cas. 374.

—S. 426—Conviction under.

It was alleged that the accused, along with several others, had trespassed into the graveyard belonging to the complainants and after entering into it, demolished and damaged a portion of the southern boundary wall and two graves. The Magistrate framed a charge against the accused under S. 426 that the accused "broke the wall and damaged two graves of the Moslem kabristan at Hali". The Magistrate came to the conclusion that there was no graveyard near about

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the place where the boundary wall was said to have been cut or the also plants uprooted and no grave was touched.

**Held**, that on the finding arrived at by the Magistrate, no conviction under S. 426 could be maintained inasmuch as the kabristan could not be said to have been affected by the mischievous act of the accused. A.I.R. 1942 Pat. 150=22 P.L.T. 976=43 Cr. L.J. 537=199 Ind. Cas. 218.

—S. 426—Filling up ditch made by complainant.

Filling up of the ditch dugged by the complainant by the accused does not affect any property injuriously so as to diminish its value or utility. In such a case it cannot be said that the accused were guilty under S. 426 because they destroyed the fruits of the complainant's labour in making the ditch. A.I.R. 1939 Oudh 38=1938 A.W.R. 126=1938 O.W.N. 1127=40 Cr. L.J. 138=178 Ind. Cas. 665.

—S. 425.—One of several co-sharers in constructive possession of joint land, digging part of it and appropriating it for his exclusive use.

**Held**, that the digging amounted to mischief as the removal of earth would diminish the value or utility of the land and affect it injuriously within the meaning of S. 425. A.I.R. 1934 All. 829 (2)=35 Cr. L.J. 730=4 A.W.R. 271=1934 A.L.J. 689=148 Ind. Cas. 649.

—S. 426—Change in property—Diminishing value or utility—If sufficient.

Mere omission to give light to the house by failing to switch on the light does not involve change in the property, even though it may diminish its value or utility, and therefore does not constitute the offence of mischief. 105 Ind. Cas. 672=22 S.L.R. 393=9 A.I.Cr. R. 158=28 Cr.L.J. 960=A.I.R. 1928 Sind 49.

6. Intention and knowledge.

—S. 427—Judgment-debtors demolishing vats before confirmation of sale.

Mortgagee decree-holder purchased the mortgaged property, consisting of land and buildings containing vats for manufacturing indigo, in execution. Before the confirmation of the sale, the mortgagors demolished the building and removed the vats and materials. They were acquitted of an offence under S. 427, I.P.C. The Magistrate thought that as manufacture of indigo had been discontinued for some years and the vats had been standing idle, it was not an offence of mischief to destroy them. He was also influenced by the fact that the sale had not yet been confirmed and become final.

**Held**, that the sale proclamation showed that along with the land and the bungalow, the outhouses and vats were also sold, and it was not clear how anyone could imagine that the vats were not property and that demolition and removal of the vats was not destruction of the property within S. 427. It made no difference, therefore, that the sale had not been confirmed and indeed it would have made no difference to the legal position if the sale had not yet taken place. A.I.R. 1937 Pat. 646=4 B.R. 117=39 Cr. L.J. 78=172 Ind. Cas. 175.

—S. 427—Building in accused's plot—Rain water retained in complainant's land and damage done to his building.

Where as a result of the accused constructing a building, rain water was retained in the complainant's plot and after some months the construction in connection with a temple in the complainant's plot cracked and there was no right of easement.

**Held**, that the accused had no intent to cause or knowledge that he was likely to cause wrongful loss to the complainant that he used his land for a certain purpose to which it could be validly put and his action



did not come within the provisions of S. 427. A.I.R. 1934 Pat. 199 (2)=35 Cr.L.J. 430 (2)=147 Ind. Cas. 538.

**—Ss. 426, 425—Cutting away branches of tree overhanging his house.**

Where a person damaged the tree of the District Board knowing that he was likely to cause wrongful loss or damage to the District Board and not only having no right whatever to cut the branches but being quite well aware of the fact, both in respect of the branches which did not overhang his house and also in respect of those under which he had introduced his house on land not in his possession and he took the risk on the offchance of getting away with it and getting rid of the inconvenient tree.

**Held**, that the offence of mischief was committed as a person who causes destruction of property knowing that he is likely to cause wrongful loss or damage to the public or any person commits mischief even if intention to cause that damage is not made out. A.I.R. 1934 Pat. 221=15 P.L.T. 107=35 Cr.L.J. 1304=150 Ind. Cas. 1033.

**—S. 426—Offence under—Branches of complainant's trees cut at accused's instance—Accused knowing that such cutting would cause wrongful loss to complainants—Mischief.**

Where the branches of complainant's trees were cut at the instance of the accused with the knowledge that the cutting of branches was likely to cause wrongful loss or damage to the complainant, the offence of mischief is complete. 8 L.R.A. (Cr.) 103=8 A. I. Cr. R. 60=A.I.R. 1927 All. 610.

**—S. 426—Presumption of intention.**

Where a person cut his own tree and allowed it to fall on another's tree to protect his own trees in spite of his being told not to do so by such another.

**Held**, that he must be presumed to have intended to cause damage to such tree. 98 Ind. Cas. 181=27 Cr. L.J. 1285.

**—S. 427—Absence of intention—Charge under S. 427—If sustainable.**

Where a Magistrate came to the conclusion that no charge could be framed under S. 379, there being no intention of causing wrongful gain to one person or wrongful loss to another person.

**Held**, that a charge under S. 427 cannot be sustained. 86 Ind. Cas. 284=23 A.L.J. 21=6 L.R.A. (Cr.) 60=26 Cr.L.J. 748=A.I.R. 1925 All. 311.

**—S. 426—Intention—Absence of complainant at the time of the act—Intention to annoy—Inference if justifiable.**

Although there is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act knowing at the time that in the natural course of events a certain result will follow he intends to bring about that result.

But where complainant was absent when the act was done.

**Held**, there was not such practical certainty the annoyance being caused at its result as is sufficient to justify an inference of intent to annoy.

Where there was bona fide claim of right by the accused to the wall in dispute and the accused had entered the complainant's house and pulled down the addition in his absence.

**Held**, the offence of mischief or house trespass was not made out against the accused. 84 Ind. Cas. 254=26 Bom. L.R. 978=26 Cr.L.J. 254=A.I.R. 1924 Bom. 436.

**—S. 427—Cattle Trespass Act (1891), S. 26, offence under.**

A person allowing his cattle, habitually and intentionally to graze on the crops of others is guilty under Penal Code, S. 427, for mischief and Cattle Trespass Act, S. 26. 21 Bom. L.R. 247=20 Cr.L.J. 387=50 Ind. Cas. 995.

**—S. 425, Expl.—Throwing heavy stone at a cow.**

After driving a cow which had strayed into his master's field, the accused threw heavy stones at her, and fractured her leg. The accused committed the offence of mischief under S. 425, intention to cause the injury is not necessary; it is sufficient if the person knew that he was likely to cause loss or damage to any person. 12 N.L.R. 188=18 Cr.L.J. 286=38 Ind. Cas. 318.

**—S. 425—Ploughing bona fide on widowed daughter's husband's land—Criminal intent presumed but not based on evidence.**

The father of a widowed daughter ploughed on land belonging to her husband and was prosecuted by the deceased's brother and convicted on the presumption of criminal intent.

**Held**, that the conviction was bad in absence of evidence that the entry on the land was with intent to commit an offence or to intimidate, insult or annoy any person. 8 M.L.T. 246=11 Cr. L. J. 623=8 Ind. Cas. 318.

**—S. 425—Offence under—Damaging one's own property.**

An accused, who knows that serious mental annoyance must be caused to the complainant in breaking open his own house, is presumed to intend the inevitable consequences of his act. 9 Cr. L.R. 196.

**—S. 426—Grazing cattle in a forest under re-settlement—Intention.**

A person grazing cattle in a Government forest land which is under re-settlement cannot be convicted of an offence under S. 426 in the absence of intention to cause wrongful loss or damage. (1906) 8 Bom. L.R. 549=4 Cr. L.J. 93.

**—S. 426—Fishery—Draining off water from a river to the detriment of the fishing rights therein.**

D as lessee of Government, held rights of fishery in a particular stretch of river. C, by diverting the water of that river, converted the bed of the river for a considerable distance into dry land, or land with a very shallow covering of water upon it, and by so doing he was enabled to destroy, and did destroy, very large quantities of fish, both mature and immature.

**Held**, that when C, deliberately changed the course and condition of the river in the manner described to the detriment of D, he was guilty of the offence of mischief mentioned in S. 426. 2 A. L. J. 826=1905 A.W.N. 255=28 A. 204.

**—Ss. 425, 430—Mischief by injury to works of irrigation—Wrongful loss or damage—Intention—Act done to save one's own property.**

Where the accused cut a dam erected by the complainant with a view to save the accused's own crops and not to take a supply of water, and it was not proved that the act of the accused caused a diminution of the supply of water for agricultural purposes or that the accused knew that it was likely to cause such diminution in future.

**Held**, that the accused could not be convicted of an offence under S. 430. (1904) 8 C.W.N. 370.

**7. Interpretation.**

**—S. 425—**The property in S. 425 means tangible property capable of being forcibly destroyed and does not include a right like an easement, etc. A.I.R. 1939 Oudh 38=1938 A.W.R. 126=1938 O.W.N. 1127=40 Cr.L.J. 138=178 Ind. Cas. 655.



—Ss. 426, 425—Accused installing oil-engine on his own property—Damage to another's property caused by working—Liability.

The expression 'wrongful loss or damage' in S. 425, Indian Penal Code, must mean loss or damage by unlawful means. There is nothing unlawful in the accused installing an oil-engine in his own property and working it in any way he chooses, although if his working causes damage to a neighbour's property, the accused would be liable to a civil suit for damages. The damage cannot be said to be caused by unlawful means, the working of the engine on the accused's own property being a lawful act and the accused is not liable to be convicted for mischief. A.I.R. 1935 Bom. 164=37 Bom. L.R. 96=59 B. 177=36 Cr. L.J. 940=156 Ind. Cas. 459.

—S. 425 — Interpretation — 'Destruction' — Change, graziers allowing goats to graze—If mischief.

The expressions "destruction of any property, such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously," contained in S. 425, carry the implication that something should be done to the property contrary to its natural use and serviceableness.

Where graziers, by allowing their goats to graze, did no more than put the grass to its normal use, their act would not amount to mischief. 114 Ind. Cas. 559=52 Mad. 151=28 M.L.W. 759=1 M. Cr. C. 264=30 Cr.L.J. 315=A.I.R. 1929 Mad. 5=55 M.L.J. 767.

—S. 426—Meaning.

The word "change" in S. 426 means physical change in composition or form. 105 Ind. Cas. 672=22 S.L.R. 393=9 A.I.Cr.R. 158=28 Cr.L.J. 960=A. I. R. 1928 Sind 49.

### 8. Jurisdiction.

—S. 427—Jurisdiction—Intentional — Exaggeration of damage for purposes of jurisdiction—Effect.

The jurisdiction of the Court to hear a case depends on the allegations with which its help is sought. It may be that after a trial, it is found that the case has been materially exaggerated; but unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress, the statement of the complainant has to be accepted for the purposes of jurisdiction.

Where the complainant in a case of mischief, alleged the damage to be Rs. 250 and a third class Magistrate tried the offence and found the damage to be Rs. 140 and awarded Rs. 40 as compensation to the complainant.

**Held**, that the trial class Magistrate had no jurisdiction to try the offence. 85 Ind. Cas. 730=26 Cr. L.J. 586=47 All. 64=6 L.R.A. Cr. (1) 39=A.I.R. 1925 All. 290.

—S. 426—Absence of Intention—Intention to annoy absent—No offence.

Where the stoppage or the removal of the water course did not injure complainant in any way, nor criminal intention to annoy him or to harm him was shown by the evidence on the record.

**Held**: this was not a fit case for the prosecution on the criminal side, whatever may have been the rights and duties of the parties on the civil side with regard to the water course in question. 77 Ind. Cas. 989=4 Lah. L.J. 482=53 P.L.R. 1922=25 Cr. L.J. 525=A.I.R. 1923 Lah. 92.

—S. 426—Questions of civil nature—Jurisdiction of Criminal Court.

One H was fined Rs. 10 under S. 426 for having removed some earth from two plots of land, which were in the possession of the zamindar of the village

without his consent. The defence was that the accused was only following the custom of the village and taking earth as everybody also did when they wanted it.

**Held**, that the Criminal Courts are not meant to decide such questions which are really of a civil nature between a landlord and his tenants. 73 Ind. Cas. 805=24 Cr. L.J. 693=A.I.R. 1923 All. 544.

—S. 426—Deterioration—Proof that it was caused by accused—Necessity.

In order to give jurisdiction to the Magistrate to summon the accused under S. 426, it is essential for complainant to make out a *prima facie* case in his petition or in his statement on oath of any deterioration having been caused by the accused in the value or utility of the fruits, and unless such a deterioration was made out, there is no offence disclosed under S. 426 for causing mischief.

A *bona fide* dispute with regard to the right in and possession of the contending parties ousts the jurisdiction of the Magistrate altogether from taking cognizance of a charge of mischief. 68 Ind. Cas. 40=2 P.L.T. 394=23 Cr. L.J. 504.

—S. 425—Mischief—Tenure holder cutting off the tree—*Bona fide* dispute—No offence— B.P. Act, S. 28.

A person having the status of a tenant in the nature of a tenure holder is entitled to cut a tree standing on his land, and the onus of proving that he was precluded by custom from cutting trees was upon the landlord. If the tree was planted by the accused, he had every right to cut it. In the absence of proof that the utility or value of the trees was diminished by reason of the branch having been cut, a conviction under S. 426 could not be sustained. There having been *bona fide* dispute between the parties as to the right to the trees, the Criminal Court ought not to have taken cognizance of the case. Where parties are trying to assert their right over the trees in the village and to drive the opposite party to the Civil Court, the Criminal Court should be careful in giving any advantage to any of the parties over his adversary. 4 Pat. L.W. 291=19 Cr. L.J. 339=44 Ind. Cas. 451.

### 9. Negligent Acts.

—S. 425—Negligent construction.

Where the Committee of a Notified Area negligently constructs a drain in front of a person's house, the act of the Committee does not fall within the definition of mischief as contained in the Indian Penal Code. A.I.R. 1933 Lah. 363 (1)=34 P.L.R. 583=143 Ind. Cas. 494.

—S. 425—Employer's liability for employee's negligence.

The employer is not criminally liable for the damage caused to his neighbour as a result of a contractor's negligence in omitting to prop the neighbour's wall. 17 A.L.J. 343=20 Cr. L.J. 299=50 Ind. Cas. 347.

—S. 427—Mischief—Act done negligently.

Where the accused is only guilty of negligence, he is not liable to be convicted of mischief, for that offence imports that the Act was done wilfully. 9 B. 173, Foll. 5 S.L.R. 263=13 Cr. L.J. 536=15 Ind. Cas. 808.

—S. 426—Spread of fire—Criminal Procedure Code, S. 439 (5)—High Court Reference—Revision—Powers.

The accused set fire to a heap of rubbish in his field which was close to a protected forest. The wind carried the flames to the forest and destroyed a part of it:—**Held**, (by Russel, Ag. C. J. and Heaton, J.—Aston, J. dissenting) that on these facts the accused could not be convicted of the offence of mischief punishable under S. 426 for the facts did not at the outset show more than mere neglect or carelessness on the part of the accused to keep the fire from straying into the Government forest. (1956) 8 Bom. L.R. 851=4 Cr. L.J. 446.



## 10. Own property—Damage to.

## —S. 426—Ownership—Property believed to be one's own—Removal of obstruction—No mischief.

No offence under S. 426, I.P. Code, is committed when a person only removes an obstruction from a well which he believes to be his own, by removing a few bricks from the wall. 99 Ind. Cas. 414=28 Cr. L.J. 158=A.I.R. 1927 Lah. 145.

## —S. 425—Ownership—Removal of one's own property—No mischief.

A got a decree for possession of land with mesne profits and took out execution which was struck off for want of notice under Civil P. C., O. 21, R. 22. He took out a fresh execution, but before it was concluded the judgment-debtor raised a crop on the land which was taken away by servants of the decree-holder. In an action for mischief against the servants.

**Held:** that they were not guilty of mischief as the crop, though raised by the judgment-debtor, really belonged to the decree-holder whose right thereto had been declared by a competent Court. 93 Ind. Cas. 40=7 P.L.T. 79=27 Cr. L.J. 392=A.I.R. 1926 Pat. 244.

## —S. 425—Property exclusively belonging to accused—No mischief.

No person can commit mischief in respect of property which belongs exclusively to himself. This is perfectly clear from Explanation 2 to section 425 which provides that mischief may be committed where the acts affects property belonging to the offender and another jointly. 72 Ind. Cas. 883=24 Cr. L.J. 467=A.I.R. 1924 Oudh 132.

## —S. 425—Mischief—Damage to one's own property.

The accused entered into a vacant *Manai*, broke down a wall and rebuilt it. The wall belonged to one of the accused. There can be no unlawful assembly as the accused were there to build their own wall. **Held**, further, that the accused could not be convicted of mischief. 8 M.L.T. 222=11 Cr. L.J. 533=7 Ind. Cas. 855.

## —S. 426—Owner of land destroying tombs on his land.

The accused was charged with having committed mischief by digging out tombs of the forefathers of the complainant standing on the accused's lands. **Held**, that he could not be convicted of mischief as tombs put upon land which came into the possession of others passed with the land. (1902) 4 Bom. L.R. 463.

## 11. Procedure.

## —Ss. 427, 426—Complaint alleging offence under S. 427—If can be taken on file for offence under S. 426.

Where, there is nothing in the sworn statement of the complainant at variance with the allegations in a complaint which disclosed an offence punishable under S. 427, I.P.C., and the Magistrate was not in a position to judge the extent of the damage caused, (and the only distinction between the offence punishable under S. 426, I.P.C., and one punishable under S. 427, I.P.C., is the extent of the damage done), the complaint cannot be taken on file for an offence under S. 426, and the Magistrate has no jurisdiction to acquit the accused under S. 247, Criminal P. C., which has no application to warrant cases. A.I.R. 1942 Mad. 594=(1942) 1 M.L.J. 594=1942 M.W.N. 373=55 L.W. 372=43 Cr. L.J. 760=201 Ind. Cas. 451.

## —Ss. 426, 425—Judgment.

Where the Magistrate applies his mind to the evidence and in finding that the accused had caused mischief to the complainant, he must have been satisfied that the ingredients of the offence defined in S. 425, were present, the finding is sufficient to warrant a conviction. It is not necessary in a case of this sort to

embody in the judgment the precise expressions which have been used in the section which defines the offence of which the accused person is convicted. A.I.R. 1941 Cal. 185=72 C.L.J. 104=44 C.W.N. 1114=I.L.R. (1941) 1 Cal. 67=42 Cr. L.J. 490=194 Ind. Cas. 38.

## —Ss. 426, 352—Conviction under, if can be altered into one under S. 352, in appeal.

The accused was summoned to answer a charge under S. 426 only, and was convicted and sentenced under that section by the trial Magistrate. There was nothing to show that he was ever informed by the Magistrate that he had to defend himself against the offence of assault as well.

**Held**, that the alteration of the conviction into one under S. 352 in appeal, could not be maintained. A.I.R. 1936 Pat 536=17 P.L.T. 572=3 B.R. 62=37 Cr. L.J. 1156 (1)=165 Ind. Cas. 600.

## —Ss. 426, 430—Complaint under S. 430—Trial for offence under S. 426—Procedure—Validity.

Where, though a complaint was one for an offence under S. 430, I.P.C., which a Bench Court had no jurisdiction to try, the case was treated as a case under S. 426, I.P.C. and sent to the Bench Court for trial and the accused was tried by the Bench Court for the lesser offence under S. 426.

**Held**, that the trial was not void.

Where the accused is not prejudiced, there will be no interference in revision, though the case ended in a conviction, and *a fortiori*, there will be no interference in the case of an acquittal. A.I.R. 1931 Mad. 494=1930 M.W.N. 770=32 Cr. L.J. 971=133 Ind. Cas. 4.

## —S. 427—Security order.

No order under S. 106 can be passed upon conviction of an offence under S. 143 or S. 427, I.P.C. 99 Ind. Cas. 348=8 L.R.A. Cr. 11=28 Cr. L.J. 140=7 A.I. Cr. R. 130=A.I.R. 1927 All. 136.

## —S. 427—Fresh charge on same facts—Trial and acquittal for mischief—Subsequent charge for rioting on same facts—Maintainability.

Where an accused was alleged to have gone with a number of others to a palmyra tope and it was alleged that some of the members in that assembly climbed up the trees and cut the spathes of the palmyra trees and threw down the plots attached to the spathes in which toddy was being collected and the accused was once charged with mischief under S. 427 of the Penal Code and acquitted on the ground that he was not present at the scene of occurrence.

**Held**, he could not subsequently be charged with rioting under S. 147 of the Penal Code on the allegation that he along with the same body of people as on the former occasion went to the tope and that some of them destroyed the spathes in pursuance of the common object, *viz.*, of committing mischief by destroying the spathes and breaking the pots because the two transactions were so closely overlapping that it was open to the prosecution to have framed an alternative charge of mischief and rioting under S. 236. Section 403 is not a section easy of construction but the general principle underlying it is to be borne in mind, namely, that a man should not be put upon his trial twice over on the same facts as it is a great hardship for a man to stand more than one trial for any one offence. 76 Ind. Cas. 708=19 M.L.W. 31=33 M.L.T. 269=1924 M.W.N. 153=25 Cr. L.J. 244=A.I.R. 1924 Mad. 478.

## 12. Theft and Mischief.

—Ss. 425, 378—The element of dishonesty, that is to say, the causing of wrongful loss or wrongful gain to some person is a common element in both these offences. But it cannot be said that simply because the accused has caused wrongful loss to another person by taking away his property without his consent, the subsequent act of destruction of that property would not be an offence because the wrongful loss is already caused by taking



it away from its possession. Wrongful loss to a person can be caused in a variety of ways. The nature of the loss in both cases is different and falls under the definitions of distinct offences. It is, therefore, possible to commit the offence of mischief in respect of the stolen property even though some loss has already been caused to its possessor by the offence of theft.

A person who steals a bull and subsequently kills it for food, is, therefore, guilty of both theft and mischief and a separate sentence can be passed for each offence. A.I.R. 1938 Rang. 138=1938 Rang. L.R. 63=39 Cr. L.J. 607=175 Ind. Cas. 515.

—Ss. 425 and 378—When a calf is stolen and then killed, offences under Ss. 378 and 425 are committed. A.I.R. 1936 Bom. 172=38 Bom. L.R. 164=37 Cr. L.J. 553=162 Ind. Cas. 283.

—S. 426—Mischief—Theft—Separate sentence.

A person who steals a fowl and then kills it cannot be punished separately for both the offences. (1903) 5 Bom. L.R. 460.

### 13. Wrongful loss.

—Ss. 427 and 23—Offence under S. 427—Crops raised by a person on land not belonging to him—Cattle driven to graze on that land by accused—Loss of crop, whether wrongful loss—Accused, if guilty.

Where a person not entitled to a piece of land or to raise any crops on it, raises crops on it and the accused's cattle are alleged to have been driven into the land, and the crop thereby destroyed on the question whether an offence was committed under S. 427, I. P. Code.

Held, that in order to constitute an offence under S. 427, I. P. Code, there should have been an intention to cause "wrongful loss" as defined in S. 23, I. P. Code (i.e.) loss by unlawful means of property to which the person losing it is legally entitled. As the complainant was not legally entitled either to the land or to the crops standing on it, there was no "wrongful loss" to him and hence no offence under S. 427 was committed. 1948 M.W.N. 368 (1)=A.I.R. 1948 Mad. 473=61 L.W. 331 (1)=49 Cr. L.J. 711=(1948) 1 M.L.J. 330.

—S. 425—Wrongful cutting of trees standing on plaintiff's land by defendant amounts to mischief. A.I.R. 1942 Cal. 544=46 C.W.N. 943=202 Ind. Cas. 762.

—S. 426—Passage with kachcha drain over it serving as outlet for excess water from complainant's house—Accused having right of way over it—Drain made pucca—Accused's right of way not impaired—Accused demolishing pucca drain—If guilty.

On the west side of the complainant's plot, there was a passage on a part of which there was a kachcha drain which served as an out-let for the excess water of the complainant's house. The accused had a right of way over this passage for the purpose of reaching their huts. The complainant made the entire drain pucca and connected it with the Municipal drain. The accused's right of way to go to the huts was not in the least impaired by the construction of the pucca drain, and there was no evidence on the record to show that it was impossible for them to exercise their right of way after the drain had been constructed. The accused demolished the pucca drain.

Held, that in the circumstances, the obstruction, even assuming it to be one, did not amount to a nuisance, and did not justify the accused in removing the structure by taking the law in their own hands. They had really employed unlawful means for the purpose of causing loss to the complainant which, in law, he was not bound to suffer. The accused, therefore, could not escape conviction under S. 426, I.P.C.

A.I.R. 1938 Cal. 669=I.L.R. (1938) 1 Cal. 680=40 Cr. L.J. 10=177 Ind. Cas. 1000.

—S. 426—Obstructing right of water course belonging to another.

A person obstructing a right of water course belonging to another commits an act of trespass and the loss caused to him by the persons entitled to the right when they destroy that obstruction in order to exercise their own right of water-course cannot be considered to be wrongful loss within the meaning of S. 426. A.I.R. 1938 Pat. 538=19 P.L.T. 703=40 Cr. L.J. 89=178 Ind. Cas. 502=5 B.R. 112.

—Ss. 427 and 147—Demolition of encroachment by private persons.

Where certain persons gathered and demolished a portion of the terrace and walls which another person had built, on the ground that the construction was an encroachment on a public street and they were charged with offences under Ss. 147 and 427, I.P. Code.

Held, that the accused were guilty of the offence of mischief as their common object in gathering on the scene was for the purpose of causing wrongful loss to the owner of the building and they could properly be held guilty of rioting also. A.I.R. 1934 Mad. 95=1933 M.W.N. 905=35 Cr. L.J. 437=66 M.L.J. 31=38 L.W. 996=57 Mad. 351=147 Ind. Cas. 553.

—S. 425—Offence under—Hindu god over a chabutra mosque surrounded by a wall belonging to Muhammadans—Breaking the wall for widening the doorway—Mischief.

Over the chabutra of a mosque there was an image of Hindu god, which was surrounded by a wall, the wall being the property of Muhammadans. The accused who is a Hindu widened the doorway in the south wall of the compound round the image of the idol by demolishing part of the wall on both sides of the doorway.

Held, by breaking the wall and taking out the bricks the accused caused wrongful loss to the Muhammadan public and, therefore, an offence under S. 425 was committed. 96 Ind. Cas. 210=27 Cr. L.J. 898=A.I.R. 1926 All. 704.

### 14. Miscellaneous.

—Ss. 426, 147, 149, 447—Complainant digging well on his land—Accused No. 1 with four others thinking without enquiry, land to be his, entering upon it and destroying well—All held guilty under Ss. 426, 147 and 447.

The complainant had dug a well in the land which belonged to him. Accused No. 1, along with four others, thinking without proper enquiry and without proper information that the land belonged to him went recklessly upon the land and damaged the well by throwing stones and earth into it. Accused No. 1 generally directed the operations, accused No. 2 helped in holding the horses, while the three other accused Nos. 3, 4 and 5 did the actual work of destroying the well.

Held, that even if accused No. 1 believed in good faith that the well was in his land and the complainant was a trespasser, he had no right whatever to damage the complainant's property in the way he did.

Section 147, I.P. Code, applied to all five accused, their common intention and purpose being to cause the offence of mischief and all of them were guilty of the offence of mischief by reason of S. 149.

Held, further that all the accused could have been held guilty of criminal trespass under S. 447. A.I.R. 1943 Sind 127=I.L.R. (1943) Kar. 7=44 Cr. L.J. 654=207 Ind. Cas. 544.

—S. 426—Grazing cattle on complainant's bund.

A person can be convicted under S. 426 for sending his cattle to graze on the bund of a tank belonging to



to the complainant. A.I.R. 1942 Mad. 724 (1)=55 L.W. 695=(1942) 2 M.L.J. 545=1942 M.W.N. 756 (2)=44 Cr. L.J. 140=204 Ind. Cas. 67.

—Ss. 425, 379, 295, 144, 143—Hut on agricultural land used as a mosque without knowledge of landlord—Putting down of such hut by persons other than landlord—Charges under Ss. 295, 379, 425, 144, 143.

**Held**, that charges under Ss. 295 and 379 could not be sustained but offence, held, was committed under S. 425 read with Ss. 144, 143. A.I.R. 1941 Pat. 492=42 Cr. L.J. 579=23 P.L.T. 81=7 B.R. 785=194 Ind. Cas. 476.

—Ss. 427, 143—Person put in possession of land and crops by Civil Court—Right to cut crops accrues to him—Conviction under Ss. 427 and 143 is illegal. A.I.R. 1936 Cal. 157=37 Cr.L.J. 524 (1)=161 Ind. Cas. 974 (2).

—Ss. 427—Ownership of property—Proof by complainant—If necessary.

Possession is *prima facie* proof of title and for a conviction for mischief the complainant need not prove his ownership in the property in respect of which mischief is done. 25 A.L.J. 1010=8 A.I. Cr. R. 337=8 L.R.A. Cr. 135=A.I.R. 1927 All. 724.

—S. 425—Mischief—Breach in field bund—No damage to crops, etc.—Offence.

The accused fearing that the water in his tank would overflow, caused a breach in the bank of the complainant's field so as to let the surplus water on the complainant's land. There were no crops in the field and apart from the damage done to the bank, no other damage was caused to the complainant.

**Held**, that the accused was guilty of mischief. 20 Cr. L.J. 237=49 Ind. Cas. 161 (Pat.).

—Ss. 426 and 447—Pulling down obstruction to public road.

It is no offence for a member of the public to pull down an obstruction created by a trespasser to a public road and then to exercise his right of way, because the trespasser cannot obtain possession by a mere act of entry or by the continuance of that act, so long as this act is disputed and resisted. 39 Mad. 57=1 L.W. 911=15 Cr. L.J. 723=26 Ind. Cas. 171.

—S. 425—Mortgagee cutting trees to repair another part of the premises mortgaged—Whether mischief.

A mortgagee cutting a few trees on the mortgaged property to repair another portion thereof is not guilty of mischief. 1 L.W. 274=15 Cr. L.J. 290=23 Ind. Cas. 498.

—Ss. 425, 426—Definition—Mischief—U. P. and Oudh Municipalities Act, S. 167.

Certain cattle belonging to one M.H. upon various occasions when in charge of a servant of M.H. strayed or were driven, into the Government gardens at Saharanpur, and there caused damage.

**Held** that M.H. could not on these facts be convicted of the offence of mischief. 4 W. R. 31; 7 B. 126, foll.

**Held** also, that S. 167 of the Municipalities Act, 1900, did not apply, that section being one dealing with offences against the person. 1907 A.W.N. 170=29 A. 565.

—S. 425—Trespasser—Destruction of trespasser's property by owner found on his premises.

Where the owner of land finds a trespasser on his land using the owner's tools, the owner would commit no mischief in destroying or removing these tools, even though by doing so he might deprive the trespasser of the means of benefitting by his trespass. But the owner of the land would have no right merely because of the trespass to destroy whatever property of the trespasser he found upon the premises, and such an act of his would amount to mischief. (1904) 7 Bom. L.R. 86=2 Cr. L.J. 55.

—Ss. 426, 143—Cutting a channel across one's own land into a Jhil in possession of another—Defect in charge—Prejudice.

The accused who were servants of S. were convicted by a Magistrate under Ss. 426 and 143 for having cut a channel from a Jhil which was in the possession of B and by so doing let out water and fish from the Jhil. The Magistrate had found that the land adjoining the Jhil, across which the channel had been cut had been in the possession of S. On appeal it was contended that the accused had a perfect right to make the cutting in their master's land. **Held**, that though they had that right it did not follow that they had a right to extend the cutting beyond and though the bank of the Jhil which with the Jhil itself and the land underneath the water were in the possession of B and the conviction could not be set aside on that ground. 7 C.W.N. 663.

—S. 426—Cutting ripe paddy—Theft.

A person could not be convicted of the offence of mischief under S. 426, for cutting paddy which the Court found to belong to the complainant, when it was not found that the paddy was not in a fit state to be cut. (1903) 7 C.W.N. 713.

—Ss. 426, 429—Maiming—Injury to animal.

A hurt to an animal inflicted with a spear which disabled the animal for few days, but did not cause any permanent injury falls under S. 426 and not under S. 429. (1901) 3 Bom. L.R. 503.

—S. 428—Cutting ears of an ass.

Cutting the ears of the asses clean off their base so as to affect their hearing, is 'maiming of animals' within S. 428, I.P. Code. 22 M.L.T. 68=18 Cr. L.J. 620=39 Ind. Cas. 988.

—S. 429—Horse—If includes mare.

In the same way as the words elephant, camel and buffalo have been used to indicate both the male and female of the species, the word "horse" has also been used to indicate both the male and the female. Thus a mare is covered by the use of the word "horse". 23 Luck. 1=1947 O.W.N. 494=1947 A.Cr.C. 168=1947 O.A. (C.C.) 352=A.I.R. 1948 Oudh 113=49 Cr.L.J. 112=1947 A.W.R. (C.C.) 352.

—S. 429—Intention to maim animal—Inference—Keeping on striking the animal for length of time.

Even if only dandas are used to strike a mare if the striking is kept on for some time, the persons so striking the mare must be deemed to have knowledge of the possible consequence of their act and, if the dandas, striking the leg of the mare fractured the bone, it cannot be said that there was no intention to maim the animal and they would be clearly guilty of an offence under S. 429, I.P. Code. 23 Luck. 1=49 Cr. L.J. 112=A.I.R. 1948 Oudh 113=1947 O.W.N. 494=1947 A. Cr. C. 158=1947 O.A. (C.C.) 352=1947 A. W.R. (C.C.) 352.

—S. 429—"Maiming"—Meaning of.

The expression "maiming" in S. 429, I.P. Code, refers to injuries permanently affecting the use of a limb or other member of the body. I.L.R. (1946) Kar. 437=231 Ind. Cas. 107=A.I.R. 1947 Sind 66=48 Cr. L.J. 700.

—S. 429—Causing death of buffalo dedicated to deity.

The legal conception of an animal branded and let loose on the occasion of the funeral or the obsequies of a Hindu differs widely from that of a dedication to a particular deity. In the case of one it is renunciation of all proprietary right; in the case of the other, it is transfer of the proprietary right from the individual to the deity. In the latter case, the animal is not a *res nullius*.



Consequently, beating to death a buffalo dedicated to a diety is an offence under S. 429. A.I.R. 1945 All. 430=1945 A.W.R. (H.C.) 233=1945 O.W.N. (H.C.) 287=1946 A.L.J. 27.

—S. 429—Killing of bull.

A bull branded as bull on the occasion of the *shradh* of the complainant's deceased father and which used to be fed and kept at the complainant's own place does not cease to be the property of the complainant and a person killing it is guilty of the offence under S. 429. A.I.R. 1937 Pat. 406=3 B. R. 299=38 Cr. L.J. 407=18 P.L.T. 229=167 Ind. Cas. 511.

—S. 429—Skinning dead body of stolen animal.—If mischief.

Where after a thief has stolen and slaughtered an animal, another person joins him in skinning the dead body, the latter is not guilty either under S. 379 or S. 429. 84 Ind. Cas. 341=7 P.L.T. 36=3 Pat. 804=26 Cr. L.J. 277=A.I.R. 1925 Pat. 34.

—S. 429—Mischief and theft—Killing stolen animal—If mischief.

Where theft of an animal has been committed, the mere killing of it afterwards by the person who stole it for the purpose of eating it himself cannot add another offence. 84 Ind. Cas. 341=3 Pat. 804=7 P.L.T. 36=26 Cr. L.J. 277=A.I.R. 1925 Pat. 34.

—S. 429—'Maiming'—Half an ear cut off.

The word 'maiming' in Sec. 429 involves the deprivation of the use of some limb or member involving a permanent injury and not a mere disfigurement. Where nearly one-half of one ear of an animal is cut off without impairing its sense of hearing it is not 'maiming'. 18 Bom. L.R. 289=17 Cr. L.J. 253=34 Ind. Cas. 973.

—S. 429—Maiming—Cutting off a horse's ears whether amounts to.

Cutting off the ears of a horse is maiming, within S. 429 as it is permanent injury to one of the members of the body. 35 Mad. 594=10 M.L.T. 192=21 M.L.J. 843=(1911) 2 M.W.N. 141=12 Cr.L.J. 482=12 Ind. Cas. 90.

—S. 430.

Synopsis.

1. Civil matter.
2. Diminution of water supply.
3. Essentials and scope.
4. Intention to cause wrongful loss.
5. Interpretation.
6. Miscellaneous.

1. Civil Matter.

—S. 430—Civil matter—Jurisdiction of criminal Court.

In a complaint under S. 430 regarding cutting off of a supply of water by the accused.

**Held**, that the matter being pre-eminently for a civil Court, Criminal Court should not convict the accused. 98 Ind. Cas. 474=27 Cr.L.J. 1354=A.I.R. 1927 All. 112.

—S. 430—Blocking up a channel—Tort.

The accused blocked up a channel and thus caused the surplus water to flow direct on to the complainant's land damaging his crop. The site of the channel was the common property of all the accused.

**Held**, that the act of the accused did not constitute mischief and that the complainant should sue for damages in the Civil Court. 8 M.L.T. 385=11 Cr. L.J. 566=8 Ind. Cas. 128.

2. Diminution of water supply.

—S. 430—Act of accused need not be of wanton waste.

It is no part of the definition of the offence of causing a diminution of water supply for agricultural purposes

that the act of the accused should be an act of wanton waste. It is sufficient for the purposes of S. 430 that the supply of water available for a particular person or class of persons should be diminished by the act of the accused.

**Held**, that the accused did commit mischief by putting a *bund* across the channel which resulted in diminishing the supply of water which would otherwise have been available to the complainant for agricultural purposes and that all the requirements of the offence under S. 430 were present. A.I.R. 1939 Mad. 794=49 L.W. 298=1939 M.W.N. 121=(1939) 1 M.L.J. 445=41 Cr.L.J. 88=184 Ind. Cas. 654.

—Ss. 430, 143, 144—Where the accused were charged under S. 430 for committing mischief by cutting the *bandh* of a river causing thereby diminution of water supply for agricultural purposes and they were also charged for being members of an unlawful assembly with the common object of cutting the *bandh* and the Magistrate did not convict them on the ground that no diminution in water supply was caused.

**Held**, that the accused were entitled to be acquitted under Ss. 143 and 144. A.I.R. 1934 Pat. 505=36 Cr.L.J. 416=1 B.R. 227=153 Ind. Cas. 767.

—S. 430.

Accused knowingly diminishing supply of water without a *bona fide* claim are guilty. 84 Ind. Cas. 322=2 Pat. L.R. (Cr.) 194=26 Cr.L.J. 258=A. I. R. 1924 Pat. 704.

—S. 430—Cutting open bund—Mischief—Diver'sion of water.

Accused was alleged to have cut open a bund and caused a diminution of water supply to the complainant's fields. The bund was not proved to belong to the complainant. There was evidence that the accused has been in the habit of obtaining a permit for diverting the water in previous years and he did the act anticipating the permit he had applied for.

**Held**, the action of the accused did not amount to mischief under Ss. 425 and 430, I.P.Code. 11 L.W. 148=(1920) M.W.N. 131=54 Ind. Cas. 617.

—S. 430—Diminishing supply of water from a canal—Canal Act (7 of 1873), S. 70—Interfering with banks of a canal.

If the act of a person has the effect of, or but for prompt intervention, would have the effect of diminishing the supply of water from a canal for agricultural purposes, the person is guilty of mischief. Mere interference with the banks of canal would render him guilty of an offence under S. 70 of the Canal Act. 41 All. 599=17 A.L.J. 686=20 Cr.L.J. 425=51 Ind. Cas. 201.

—S. 430—Mischief—Diminishing supply of water—Cutting bund.

The cutting of a bund erected on a channel whereby a person is wrongfully deprived of the use of water, is an offence under S. 430 of the Code. Neither the prevention of the water from running waste nor the intention of storing it for sale to other landowners makes the act of taking water anyhow an offence when a person legally entitled to the water is deprived of it. 16 A.L.J. 210=19 Cr.L.J. 358=44 Ind. Cas. 582.

—S. 430—Taking more water than authorised.

Taking more water than one is entitled to, against an order as to turns, and to cause diminution of supply to others is punishable under S. 430. (1911) 2 M.W.N. 349=12 Cr. L.J. 551=12 Ind. Cas. 527.

—S. 430—Act No (12 of 1870) (Canal Act), S. 70—Mischief—Definition.

Certain persons having been found to have cut through the bank of a canal distributary and irrigated their own fields therefrom, it was held, that they would



be more properly convicted of an offence under S. 70 of Act No. (8 of 1870) than of an offence under S. 430 of the Indian Penal Code, in the absence of evidence that by the act done a diminution of the supply of water for agricultural purposes had been caused. 1908 A.W.N. 55=5 A.L.J. 159.

### 3. Essentials and scope.

#### —S. 430—Interference with distribution of water.

Where the **Amin** had opened the middle sluice of a tank to irrigate certain lands registered as wet and it was closed by the accused, unless it can be said that the opening of the middle sluice was according to custom, it cannot be said that the closing of it was with the intention of causing any wrongful loss or wrongful gain. Where the closure was animated by the object of protecting the lands of the accused themselves which had been jeopardised by the opening of the middle sluice, it can hardly be said that the act of closing the middle sluice was "mischief" as defined in the I.P.C. An act like this which is done as it were to protect their own property and in the reasonable belief that no unlawful harm or damage was going to be caused cannot be regarded as an act constituting a criminal offence. The dispute between the parties is really one of a civil nature. That fact that the **Amin** interfered and exercised his own authority in the matter of the distribution of water which was reasonably regarded as an interference with existing rights will not change the aspect of the case into a criminal one.

In such a case, the Courts should decide whether any unlawful or dishonest intention has been established. It is not every interference with the distribution of water that constitutes mischief under the I.P. Code. It is only interference which cannot be justified by the assertion of **bona fide** right that would constitute mischief. A.I.R. 1940 Mad. 306=41 Cr. L.J. 930=190 Ind. Cas. 515.

#### —S. 430—Essentials for conviction under.

In order to make S. 430 applicable mischief within the meaning of S. 425 must be committed by a person before he can be convicted under S. 430. Where the accused persons have not caused destruction of any property by damaging the canal or any of its banks or openings in any manner but only continued to take water from the canal even after the end of their turn, no offence under S. 430 is committed and the accused are only liable to be dealt with under the provisions of the Canal Act. A.I.R. 1937 Lah. 196 (1)=38 P.L.R. 1035=38 Cr. L.J. 430=167 Ind. Cas. 560.

#### —Ss. 430, 425—Forcibly opening canal distributory and diverting the flow of water—Northern India Canal and Drainage Act (8 of 1873), S. 70.

In order to prove an offence under S. 430, I.P. Code, it is necessary to prove mischief as defined in S. 425 and it is also necessary to prove that the act committed is likely to cause a diminution of the supply of water for the various purposes enumerated in the section.

Where it was proved that the applicants forcibly opened the distributory, and apparently diverted the flow of the water but there was nothing to show that they permanently diminished the utility of the distributory or affected it injuriously or that they practically diminished the supply of the water.

**Held**, that the proper section under which they should be convicted is S. 70, Northern India Canal and Drainage Act. A.I.R. 1934 All. 687 (2)=35 Cr.L.J. 1250=150 Ind. Cas. 1048.

#### —S. 430—Essentials of the offence.

Where the accused cut a **bandh** belonging to the complainant and containing water which the complainant required for the irrigation of his fields and let out some of the water.

**Held**, that the act of the accused would amount to an offence under S. 430, even though there was evidence

to show that if the dam had not been cut, the crops of the accused would have been destroyed.

To fall within S. 430, the act need not be an act of wanton waste. A.I.R. 1932 Pat. 224=13 P.L.T. 162=39 Cr. L.J. 313=136 Ind. Cas. 592.

#### —S. 430—Elements of mischief—Wrongful loss.

Offence under S. 430 is particularly a grave form of the offence of committing mischief as defined in S. 425. It is necessary to prove in such cases the elements that constitute mischief under S. 425. No doubt a person who takes water from a tank causes loss but it should be shown that whether he has caused a diminution of the supply of water for agricultural purposes. A.I.R. 1930 Cal. 289=124 Ind. Cas. 829.

#### —S. 430—Essentials—Intention to cause wrongful loss.

To constitute an offence punishable under S. 430 it is not sufficient to show that loss has been caused to the complainant but it is necessary to show that the loss was a wrongful loss and the accused had the intention to cause or had knowledge that their act was likely to cause loss to the complainant. 88 Ind. Cas. 188=26 Cr. L.J. 1100=21 M.L.W. 641=1925 M.W.N. 45=A.I.R. 1925 Mad. 577.

#### —S. 430—Mischief—Guilty knowledge.

Guilty knowledge is essential to a conviction for the offence of mischief. In the absence of any consideration or discussion of the circumstances and the reasonableness or otherwise of the acts of an accused person, it is impossible to uphold a conviction for that offence. 20 Cr. L.J. 612=52 Ind. Cas. 276 (Pat.).

#### —S. 430—Infringement of rights of complainant.

To substantiate an offence under S. 430 of the Penal Code, the prosecution must prove that there has been unlawful and intentional interference by the accused with the admitted or proved rights of the complainant. 61 Ind. Cas. 655=22 Cr. L.J. 415=32 C.L.J. 476.

#### —430—Mischief—Necessary elements—Water supply.

The act of the accused must cause wrongful loss or damage to some person and he must have done it knowing it to be likely to cause damage. The damage or wrongful loss must be proved. Mere diminution of water supply for agricultural purposes is not sufficient. 11 Cr. L.J. 168=5 Ind. Cas. 560 (All.).

### 4. Intention to cause wrongful loss.

#### —430—Offence under—Intentionally obstructing a channel for supply of water.

If a supply channel is filled up or is obstructed by a dam put up or by raising a dam already existing, there is a change made in the channel which diminishes its value or utility and which, if it was done with intention to cause or with knowledge that it was likely to cause and if it does cause, wrongful loss to any person, would constitute the offence of mischief. 74 Ind. Cas. 862=1923 M.W.N. 634=24 Cr. L.J. 830=A.I.R. 1924 Mad. 176.

#### —430—Intention to cause wrongful loss.

Where the accused banded up a channel carrying water to the complainant's land.

**Held**, No offence under S. 430 is committed, unless the complainant showed that he had some right to carry water to his fields through the channel and there was an intention on the part of the accused to cause wrongful loss. 69 Ind. Cas. 95=16 M.L.W. 793=31 M.L.T. 421=1922 M.W.N. 839=23 Cr. L.J. 655=A.I.R. 1923 Mad. 141=44 M.L.J. 234.



**—S. 430—Intention to cause wrongful loss—Essential—Irregularity.**

Under S. 430, the fact whether the accused had an intention to cause wrongful loss is the essential element to be considered. Where a Sessions Judge dismissed an appeal against a conviction under S. 430, by referring to the reasons given in the judgment in a connected case, convicting under S. 379, the Sessions Judge acted irregularly in not taking into consideration the intention requisite for an offence under S. 430. 16 Cr. L.J. 542=29 Ind. Cas. 670 (Mad.).

**5. Interpretation.****—S. 430—Interpretation—‘Diminution of supply for agricultural purposes’—Meaning.**

The “words” diminution of the supply of water for agricultural purposes” in S. 430 cannot be limited to those cases only where the water has been allowed either to go waste or has been diverted for non-agricultural purposes. The section read as a whole also refers to case where the water is intended for use by particular persons for particular purposes and is diverted by an accused persons for his own purposes though of a like nature. 98 Ind. Cas. 49=21 S.L.R. 107=27 Cr.L.J. 1233=A.I.R. 1927 Sind 39.

**6. Miscellaneous.****—S. 430—Person cannot commit mischief against himself.**

A person cannot commit mischief upon himself. Hence, where the accused on a particular day, closed the regulator of the canal and thereby rendered it dry without the permission of the P.W.D. at the instance of some of the *zamindar*’s and it is not shown that any *zamindar* other than those at whose instance the regulator was closed, had any turn of water on the day the closure was made it cannot be said that any wrongful loss or damage was caused to any person by the closure of the regulator and hence no offence of mischief can be said to have been committed. A.I.R. 1943 Sind 130=I.L.R. (1943) Kar. 3=44 Cr.L.J. 607=207 Ind. Cas. 446.

**—S. 430—Sluice.**

Preventing a person from opening a sluice which had been closed some days before the date of occurrence would not amount to an offence under S. 430. A.I.R. 1940 Mad. 144=1939 M.W.N. 1224 (1)=41 Cr. L. J. 558=188 Ind. Cas. 195.

**—430—Throwing a bund.**

To throw a bund across a supply channel is to destroy its utility and is *prima facie* the act of mischief. 1933 M.W.N. 427.

**—S. 430—Landlord and tenant—Interference with Water—Proof of absence of right.**

Before a landlord or his agent can be convicted under S. 430 on a complaint by tenants, for interfering with water supply of tenants, it is absolutely necessary to prove that there was intentional inflicting of loss and that the landlord had no such right to interfere in any way and the tenants had a right to the supply or preservation of water. 50 C.L.J. 589=34 C.W.N. 86=A.I.R. 1930 Cal. 318.

**—S. 430—Damage—Act done on another’s property affecting it injuriously—Proof of actual damage—Necessity.**

Every person has a perfect right to do a particular act upon his own land, and if a person breaks open his bund or opens his own sluice, no one can complain of it, until some injuries consequence follows from it. As soon as such a consequence follows, the injury and not the original act, becomes a cause of action. In such a case the mischief would consist, not in breaking the bund, or in opening the sluice but in flooding or withering up the complainant’s crops.

But where the property was not of the accused but Government property (*kotwah*) and the mischief complained of as giving a cause of action to the Crown was the change in the *kotwah* which diminished its utility and affected it injuriously.

**Held**, it was not necessary for the Crown to rely on the injury caused to the lands of other persons who were receiving water as giving a cause of action and to prove actual damage resulting therefrom. 98 Ind. Cas. 49=21 S.L.R. 107=27 Cr.L.J. 1233=A.I.R. 1927 Sind 39.

**—S. 430—Accused wrongfully damming channel and opening diverting channel.**

Where the accused not only dams up a supply channel wrongfully but also opens a diverting channel, he is guilty under S. 450. [1 Mad. 262 (F.B.) and 10 Bom. 183, Foll.] 60 Ind. Cas. 670=13 M.L.W. 266=22 Cr.L.J. 270=A.I.R. 1921 Mad. 536.

**—S. 430—Cutting bund and storing water—No right to water.**

A person taking water without any right to which another has a right and is deprived of its full supply is liable under S. 430. Such taking shows an intention to cause wrongful loss unless *bona fide* right exists.

Prevention of the water from being wasted or storing it in order to sell it to other land-holders does not exonerate a person when another had a right to it.

Cutting a bund on a channel wrongfully depriving a person of the use of water, is punishable under S. 430. 34 M.L.J. 206=23 M.L.T. 248=19 Cr. L. J. 356=44 Ind. Cas. 580.

**—S. 430—Mischief.**

Where certain persons who wanted water for sowing their fields stole it by breaking through the wall of a canal.

**Held**, that they were guilty of having committed mischief. 34 All. 210=9 A.L.J. 162=13 Cr.L.J. 141=13 Ind. Cas. 829.

**—S. 430—Taking excess quantity of water from Government canal.**

For a conviction under S. 430, I.P.C., the accused must have committed mischief as defined in S. 425. Until that is proved, the intention or knowledge of the accused need not be considered. The mere fact that he has irrigated his land from a Government canal for a period exceeding that allotted to him and he consequently prevented others from irrigating to the extent to which they were entitled on that occasion does not constitute an offence under S. 430. 11 Cr. L.J. 65=14 P.R. 1909 Cr.=25 P.L.R. 1910=34 P.W.R. 1909 Cr.=4 Ind. Cas. 863.

**—S. 430—Cutting embankment and diverting running water.**

Per Geidt, J. (Woodroffe, J. dubitante).—The cutting of an embankment and diverting running water useful for irrigation purposes constitute ‘mischief’ under S. 430, provided that the accused is not entitled to the water and he knew he was not entitled to use it. (1908) 12 C.W.N. 534=35 C. 437.

**—S. 430—Wrongful loss or damage—Act done to save one’s own property. See S. 425. (1904) 8 C.W.N. 370.**

**—S. 434—Removal of boundry marks ordered to be erected in exercise of jurisdiction under S. 145, Cr.P.C., is not an offence:—See Cr. P.C., S. 145. 1904 A.W.N. 264=1 A.L.J. 619=27 A. 300.**

**—S. 435—Breach of R. 56 (4) of Defence of India Rules—Breach forming part of Acts constituting offence under S. 435, I.P.C.—Accused convicted under S. 435:**

**Held**, that a separate sentence for offence under R. 56 (4) is not necessary. A.I.R. 1943 Pat. 446 = 22



Pat. 614 = 24 P.L.T. 424 = 45 Cr.L.J. 557 = 212  
Ind. Cas. 197 = 10 B.R. 469.

—S. 436—"Any building"—If covers any neighbouring building.

The words "any building" in S. 436, I.P. Code, may not necessarily refer to the building primarily destroyed by the accused. They may cover any other building close by in regard to which there might have been an intention in the mind of the accused to destroy the same. But apart from any question of intention, if the accused knew that he was likely, by his act, to destroy any neighbouring houses, an offence under the section would be complete. A.I.R. 1949 All. 620 = 50 Cr.L.J. 944 = 1949 A.W.R. 555.

—S. 436—Setting fire.

Accused with kerosene oil setting fire to furniture in a room at railway station—Charge under S. 436—Defence was that the *pucca* building could not be destroyed by fire and that no charge could be sustained:

Held, that the contention was unsound and that conviction was legal. A.I.R. 1944 All. 167 = 45 Cr.L.J. 728 = 1944 A.W.R. (H.C.) 121 = 214 Ind. Cas. 83.

—Ss. 436, 149—Unlawful assembly—Common object becoming unlawful at particular stage—Arson and looting—All members are guilty under Ss. 436/149. A.I.R. 1942 Oudh 60 = 1941 O.W.N. 1166 = 1941 A.W.R. 322 = 43 Cr.L.J. 115 = 197 Ind. Cas. 121.

—Ss. 436, 149—Where no common intention to burn the house is proved all the accused cannot be convicted under S. 436/149. A.I.R. 1941 Oudh 487 = 42 Cr.L.J. 595 = 1941 O.W.N. 852 = 1941 A.W.R.C.C. 211 = 194 Ind. Cas. 557.

—S. 436—A person whose property is lost by fire soon after he had effected a fire insurance cannot be suspected of arson. A.I.R. 1941 Rang. 324 = 1941 Rang. L.R. 566 = 43 Cr.L.J. 373 = 198 Ind. Cas. 455.

—S. 436—Offence under S. 436, whether triable by jury—Criminal Circular No. 1-25.

Offence under S. 436, I.P.C., is according to column S, Sch. II, Criminal P.C., triable in the Court of Session. As the offence is punishable with transportation for life or imprisonment up to 10 years, it is according to the schedule appended to para. 10 of Criminal Circular No. 1-25, triable by jury. It is true that if it is not combined with the offences under S. 307, I.P.C., it would be disposed of by a Magistrate with S. 30 powers under Criminal Circular No. 1-4 (6); but where it had been committed to Sessions, the trial ought to be entirely by jury. Where, however, no objection was taken to the procedure adopted, the legality of the trial is saved by S. 536 (2), Criminal P.C. A.I.R. 1937 Nag. 50 = 19 N.L.J. 320 = 38 Cr.L.J. 330 = 1 L.R. (1937) Nag. 277 = 167 Ind. Cas. 61.

—S. 436—Sentence.

Burning another's home to satisfy grudge is a serious act for which one year's imprisonment is inadequate. 1934 M.W.N. 245.

—S. 436—"Building" includes 'grass or mat hut.' 1934 M.W.N. 687.

—S. 436—Arson in village—Sentence.

Arson in an Indian village is a very serious offence and should be severely punished. It is right to pass a substantial sentence of imprisonment in such cases. A.I.R. 1931 Oudh 116 = 8 O.W.N. 101 = 32 Cr.L.J. 694 = 6 Luck. 539 = 131 Ind. Cas. 436.

—S. 436—Sentence—Whipping.

An additional punishment of whipping cannot be passed on a person who has received an adequate substantive sentence for an offence under S. 436,

Penal Code. 110 Ind. Cas. 218 = 1 L.C. 668 = 29 Cr.L.J. 666 = A.I.R. 1928 Oudh 111.

—S. 436—Essentials—Proof that the building destroyed came within one of the classes mentioned in the section.

It is absolutely necessary in order to convict an accused under S. 436 to prove that the building which he destroyed came within one of the classes mentioned in the section and the words "ordinarily used" do not mean that other buildings are from time to time used for such purposes but they mean that that particular building is itself used. 82 Ind. Cas. 54 = 5 L.R.A. Cr. 140 = 25 Cr.L.J. 1190 = A.I.R. 1924 All. 781.

—S. 436—Disproportionate sentence.

A sentence of ten years' imprisonment is wholly disproportionate to any possible aspect of the crime from a moral point of view provided that that part of their misconduct, namely, the setting of fire is reasonably included in and taken to aggravate the general lawless conduct of which the accused have been convicted under Ss. 147 and 325. 82 Ind. Cas. 54 = 5 L.R.A. Cr. 140 = 25 Cr.L.J. 1190 = A.I.R. 1924 All. 781.

—Ss. 436 and 149—Proof of common motive.

It is necessary to prove a charge of arson under Ss. 436 and 149, that the accused were, from the inception or at any stage of the offence, actuated by common motive to set fire to the house or knew that the act would probably be committed. Mere presence does not raise a presumption against them. 60 Ind. Cas. 667 = 22 Cr.L.J. 267 = 3 U.P.L.R. (Pat.) 29.

—S. 436—Evidence for conviction.

Conviction under S. 436 on an evidence of previous chain of events wherein the accused was not shown to have been convicted' is bad. 20 C.W.N. 1267 = 17 Cr.L.J. 421 = 35 Ind. Cas. 981.

—S. 440—To cut ripe crops which are grown to be cut is not to destroy them or affect them injuriously. It is the essence of the offence of mischief that the perpetrator must cause the destruction of property or such change in it or in its situation as destroys or diminishes its value or utility or affects it injuriously. To cut a crop that is grown to be cut is not to destroy it or affect it injuriously. The taking may cause wrongful loss to the grower, and if it be dishonest, a conviction may be had for the theft. But the offence is not mischief.

Consequently, a person cannot be convicted of an offence under S. 440, I.P.C., for allowing his *zamindar* and his labourers to cut the ripened crops in the field of the complainant. A.I.R. 1934 Oudh. 182 = 35 Cr.L.J. 797 = 10 Luck. 1 = 11 O.W.N. 508 = 148 Ind. Cas. 937.

—S. 442. See S. 374. 26 M. 481 = 13 M.L.J. 123.

—S. 442. See S. 104. 27 M. 52 = 13 M.L.J. 285.

—Ss. 441—449.

#### Synopsis.

1. Applicability.
2. Bona fide claim of right.
3. Building—What is.
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**1. Applicability.**

—**S. 441—Applicability—Accused convicted for unlawfully entering property in the possession of another—If can be convicted for continuing to remain there after entry.**

Where a person has been convicted for unlawfully entering unto or upon property in the possession of another he cannot be convicted for continuing to remain after that unlawfully. The offence is complete as soon as there was unlawful entry and it falls with S. 441, Penal Code. The accused cannot be proceeded against for remaining there. The plea of *autrefois convict* will be open to the accused in such a case. His continuing to remain unlawfully will be an offence only if it falls under the second part of S. 411 of the Indian Penal Code and for the second part it will be an offence only if he having lawful entry unlawfully remains on the property. 63 L.W. 1152 = 1950 M.W.N. 875 (2) = (1950) 2 M.L.J. 668 = A.I.R. 1951 Mad. 397.

—**S. 447—Applicability—Intention necessary—Ingredients—Bona fide claim of right to pasturage—Offence.** See PENAL CODE, SS. 426 AND 447. A.I.R. 1949 Cal. 238.

—**S. 441—Applicability—Unlawful entry without necessary intent followed by unlawful remaining with necessary intent—Offence.**

S. 441, I.P.C., is not inapplicable to a case where there is an unlawful entry without the necessary intent required for criminal trespass, followed by an unlawful remaining with that intent. A.I.R. 1948 Cal. 291 = 49 Cr. L.J. 528.

—**S. 441—Applicability—Essentials of offence—Intention—Proof—Necessity—Master and servant—Liability of servant for acting under orders of master.** See PENAL CODE, SS. 341 AND 441. A.I.R. 1949 Cal. 85.

—**S. 441—Remaining over in possession.**

Second part of S. 441, I.P.C. comes into operation when the entry is lawful, but subsequently the trespasser insists on remaining in possession with intent thereby to intimidate, insult or annoy the person in possession of the property. A.I.R. 1945 All. 26 = 1944 A.W.R. 280 = 1944 A.L.J. 432 = 1944 O.W.N. 228 = 46 Cr.L.J. 211 = I.L.R. (1944) All. 754 = 217 Ind. Cas. 170.

—**S. 441—'Trespass'—Meaning.**

S. 441 cannot be read into S. 297 with any intelligible result. The term "trespass" in S. 207 appears to mean any violent or injurious act committed in such place and with such knowledge or intention as is defined in that section. 81 Ind. Cas. 41 = 1 Rang. 690 = 25 C.L.J. 553 = A.I.R. 1924 Rang. 106.

—**S. 447—Trespass by servant.**

When a person who trespasses upon the property of another is a servant and acts in so doing under the orders of his master for the purpose of his employment, S. 447, I.P.C. does not apply. 81 Ind. Cas. 172 = 1 Bur. L.J. 276 = 25 Cr.L.J. 684 = A.I.R. 1923 Rang. 135.

**2. Bona fide claim of right.**

—**S. 441—Bona fide claim—Entry into property and removal of movables from peaceful possession of another—Offence.**

The mere fact that a person having a rival claim to the property of a deceased believed in his claim *bona fide* would not justify his entry into the property of another and removal of movable properties belonging to the deceased and in the peaceful possession of another. It will be criminal trespass. A.I. Cr.D. 505 = 51 Cr.L.J. 1167 = A.I.R. 1950 A. 653.

—**S. 447—Applicability—Criminal intent—Necessity—Entry in exercise of bona fide claim**

**of right—Offence—Mere assertion of claim of right—Sufficiency.**

A person who enters upon land in the possession of another in the exercise of a *bona fide* claim of right cannot be convicted of criminal trespass under S. 447, I.P.C., as the entry is not made with any such intent as to constitute an offence, although the mere assertion of a claim of right in itself will not be a sufficient defence to the charge of criminal trespass. 4 A.I.Cr.D. 761 = A.L.R. 1950 Pat. 564 = 51 Cr.L.J. 1565.

—**S. 441—Gist of offence—Landlord entering premises believing them to have been abandoned by tenant—Offence, if committed.**

Under S. 441, I.P.C., intent is of the very essence of the offence. Mere entry on another's property is not criminal trespass unless such entry is with intent either to commit an offence, to intimidate, insult or annoy. A landlord entering premises honestly believing them to have been abandoned by the tenant, does not commit an offence under the section. 1948 Cal. 130, foll. A.I.R. 1949 Cal. 558 = 50 Cr.L.J. 946.

—**S. 441—Bona fides—Criminal trespass, what is.**

There is a difference between a civil trespass and a criminal trespass. Where the accused encloses a portion of the complainant's land in his own in the *bona fide* belief in the exercise of his right, no criminal trespass can be said to have been committed. 1937 M.W.N. 390.

—**S. 441—Lessee believing in good faith that he had right of entering land and ploughing it.**

Held, there was no criminal trespass. A.I.R. 3197 Rang. 132 = 38 Cr.L.J. 759 = 169 Ind. Cas. 250.

—**S. 441—Act of trespass done only with intention of asserting supposed legal right :**

Held, that the act did not amount to criminal trespass within the meaning of S. 441. A.I.R. 1936 Bom. 15 = 37 Bom. L.R. 880 = 59 B. 738 = 37 Cr. L.J. 309 (2) = 160 Ind. Cas. 515.

—**Ss. 441 and 447—Entry in honest belief as to right.**

Where there are circumstances which clearly lead to the inference that the applicants did not make an entry into the grove in dispute with any such intention as is referred to in S. 441, but in the honest, though possibly mistaken belief, that they had a right to cultivate the grove, and they have also produced a mortgage executed long ago and a *khatauni*, it will be for the Civil Court to pronounce definitely as to whether the mortgage deed relied upon by the applicants is valid and enforceable; but all a Criminal Court has to see is whether the mortgage deed is relied on in good faith and it cannot be held that the applicants attempted to cultivate the land in dispute with intent to intimidate, insult or annoy the complainant, or with intent to commit an offence and hence conviction under S. 447 cannot be sustained. A.I.R. 1936 All. 146 = 1936 A.W.R. 114 = 37 Cr.L.J. 244 = 1936 A.L.J. 203 = 160 Ind. Cas. 167.

—**Ss. 441 and 447—The essence of criminal trespass is the intention to do one or the other of the acts specifically referred to in the section. If such is not the intention of the person accused of the offence of criminal trespass but his entry into or upon the property in dispute was with intent to assert or exercise a *bona fide* claim of right, such entry may or may not amount to civil trespass but will certainly not amount to criminal trespass punishable under S. 447, I.P.C. A.I.R. 1936 All. 146 = 1936 A.W.R. 114 = 37 Cr.L.J. 244 = 1936 A.L.J. 203 = 160 Ind. Cas. 167.**

—**S. 447—Bona fide claim—No offence.**

When a person who has an ostensible title sells land to another and that man goes and ploughs it, it



cannot be said that he commits criminal trespass, and it is a *bona fide* of civil right on the part of the accused and their act in ploughing the field is not an offence under S. 447; nor is it an assault if the person objects to an assault in maintaining possession of the land. 91 Ind. Cas. 392 = 23 M.L.W. 426 = 27 Cr.L.J. 88 = A.I.R. 1926 Mad. 349.

—S. 448—'Bona fide' claim—Intent to assert title and gain possession against complainant—No offence.

The words of the section must be closely adhered to and there must be found an intent to cause intimidation, insult or annoyance. A conviction cannot follow merely because one can pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance. 38 All. 517, Foll.

Where accused's intention in doing the act complained of was to assert his title and gain and hold possession of the premises as against the complainant.

Held, that he was not guilty. 88 Ind. Cas. 1049 = 47 All. 855 = 23 A.L.J. 679 = 26 Cr.L.J. 1273 = 6 L.R.A. Cr. 132 = A.I.R. 1925 All. 540.

—S. 441—Bona fide claim—No trespass.

Without criminal intention there can be no criminal trespass; therefore even where the property is in the possession of another, if a person *bona fide* goes upon it to assert his right and not intimidate, insult or annoy the person in possession, no offence is committed. 81 Ind. Cas. 888 = 25 Cr.L.J. 1064 = A.I.R. 1925 Nag. 36.

—S. 441—No offence.

Entering a house under a claim of right is no offence provided the claim is a *bona fide* one. 81 Ind. Cas. 823 = 25 Cr.L.J. 1047 = A.I.R. 1925 Pat. 167.

—S. 448—Acting under—No offence.

Where coins were unearthed from field and taken possession of by several individuals, without the landlord's consent, and then the landlord's manager exacted by force the coins from many persons by house searches and other means and took the man who had actually unearthed the coins, to the police station to get a statement from him.

Held, that the manager was acting under a *bona fide* claim of right and his offence fell under S. 448 and not S. 380. 84 Ind. Cas. 346 = 2 Pat. L.R. Cr. 205 = 26 Cr.L.J. 282 = A.I.R. 1924 Pat. 665.

—S. 441—Trespass—Ingredients.

Where a person enters on land in the possession of another in the exercise of a *bona fide* claim of right without intending to intimidate, insult or annoy the person in possession or to commit an offence then although he has no right to the land, he cannot be convicted of criminal trespass. 43 Cal. 1143 = 20 C.W.N. 1071 = 17 Cr.L.J. 339 = 35 Ind. Cas. 515.

—S. 441—Entry on land in assertion of a right—Intention to intimidate.

An entry on land in another man's possession, solely in order to assert a right in the land does not constitute criminal trespass within S. 447, I.P.C.

The intention to intimidate, insult or annoy, or to commit an offence must be distinctly found. (1912) M.W.N. 395 = 13 Cr.L.J. 477 = 15 Ind. Cas. 317.

—Ss. 441 and 447—Entry on land in exercise of *bona fide* right—If amounts to trespass.

Mere entry by a person on the land of another in the exercise of a *bona fide* right without any intention to intimidate, insult or annoy does not amount to criminal trespass. 5 S.L.R. 135 = 13 Cr.L.J. 27 = 13 Ind. Cas. 219.

—S. 441—Entry by person having right to property.

Entry upon land by a person having a claim of right thereto, is not criminal trespass. If a sufficient number of persons is present, it may amount to unlawful assembly or rioting. 5 N.L.R. 69 = 9 Cr.L.J. 561 = 2 Ind. Cas. 240.

—S. 447—Claim of right.

Where the accused acts on a belief of his own right, he cannot be held guilty of criminal trespass. (1907) 7 C.L.J. 238.

—S. 441—Intent—Dispossession of tenant under a false pretext.

When a Zamindar under the pretext that one of the tenants had left the village and abandoned his holding wrongfully, took possession of the land, it was held that in the absence of evidence of one of the objects specified in S. 441, the Zamindar could not properly be convicted of criminal trespass, his intention apparently being merely to get possession of the land. 26 A. 194 = 1903 A.W.N. 230.

### 3. Building—What is.

—Ss. 442, 441 and 444—Word "building" in S. 442—Meaning of—House trespass is aggravated form of criminal trespass.

What is a building must always be a question of degree and circumstances, and it is, therefore, impossible to lay down a general definition. Ordinary and usual meaning of a building is a block of bricks or stonework covered by a roof. If an open piece of land is surrounded by a wall, it would probably be impossible to call it a building. In Indian houses, generally there is a courtyard which is not covered. It may be a matter of some difficulty in such cases to say that when a man commits criminal trespass and enters the courtyard of the house, he is not guilty of 'house trespass.' Moreover, there may be cases where a man may be living in a house the roof of which has fallen down, but he has put up some sort of a shelter inside within the boundaries. In such cases too, it may be difficult to say that the man has not been guilty of 'house trespass' simply because the roof of the house has fallen down. It would depend on the facts of each case whether the trespass has been committed of a building used for human dwelling so as to come within the definition of the word 'house trespass.'

'House trespass' is only an aggravated form of 'criminal trespass' inasmuch as the Legislature considered it proper to impose more severe penalty for 'house trespass' than for ordinary 'criminal trespass.' House-breaking is a more aggravated form of 'criminal trespass' and the punishment under it is severer still. A.I.R. 1945 All. 81 = 1945 A.W.R. (H.C.) 156 = 1945 O.W.N. (H.C.) 227 = I.L.R. (1945) All. 558 = 46 Cr.L.J. 750 = 220 Ind. Cas. 432.

—S. 442—Building.

Erection of an awning over a shop does not constitute the shop a building within the meaning of S. 442. A.I.R. 1938 Oudh 263 = 1938 O.W.N. 960 = 39 Cr.L.J. 937 = 177 Ind. Cas. 616.

—S. 442—Building, what is—Open space adjoining a house, surrounded by thorns—Enclosure not having door or any means to prevent entry—Entry in the enclosure—If house trespass.

The appellants went to an enclosure of P and beat him. P had a thatched house, and he was sitting outside this house. Some thorny bushes were placed round about. Except for a few thorns the place was open. There was no roof above. The thorns were merely put down to indicate the extent of the courtyard, and not to prevent entry. There was no door or gateway, even of thorns, which had to be opened before making entry to this enclosure:

Held, that the place was not a building within S. 442. 110 Ind. Cas. 798 = 26 A.L.J. 855 = 19



L.R.A. (Rev.) 129 = 10 A.I.Cr.R. 387 = 29 Cr.L.J. 766 = A.I.R. 1928 All. 607.

—S. 442—Wara.

Where the *Wara* of which the small gate was locked, adjoined the room in which the accused lived and was for practical purposes one of the rooms of the house, and an integral part of the building.

Held, that though the *wara* was unroofed it was a "building" within the meaning of S. 442, Penal Code. 35 P.R. (Cr.) 1879, Foll. 91 Ind. Cas. 70 = 6 Lah. 463 = 27 Cr.L.J. 38 = 26 P.L.R. 719 = A.I.R. 1926 Lah. 28.

—S. 442—Wohra.

A wohra used for the custody of property is a building. 86 Ind. Cas. 337 = 6 L.L.J. 385 = 26 Cr.L.J. 753 = A.I.R. 1925 Lah. 117.

—S. 442—Building—Yard enclosed on three sides is not building—Courtyard.

A courtyard enclosed by low walls on three sides only, is not a building. 84 Ind. Cas. 863 = 6 L.L.J. 578 = 26 Cr.L.J. 383 = A.I.R. 1925 Lah. 279.

—S. 442—Courtyard.

A walled courtyard which is not provided with a door is not a building. 77 Ind. Cas. 809 = 25 Cr.L.J. 457 = 6 L.L.J. 571 = A.I.R. 1924 Lah. 623.

—Ss. 442 and 451—Trespass on courtyard.

A courtyard partly surrounded on the front by a mud wall with no roof over it, nor any door or gateway, is not a building or house within S. 442, I.P.C. 20 Cr.L.J. 240 = 11 P.W.R. (Cr.) 1919 = 49 Ind. Cas. 864.

—S. 442—House trespass—Building—Thatch hut.

A thatch hut built for residence is a building used as a human dwelling within the meaning of S. 442. 30 L.J. 493 = 17 Cr.L.J. 536 = 36 Ind. Cas. 584.

4. Essentials and Scope.

—S. 441—Ingredients of offence—Criminal intent—Absence of—Mere knowledge of likelihood of annoyance, etc., being caused—Sufficiency.

In order to amount to an offence of "Criminal trespass" as defined by S. 441, I.P.C., the act must be done with the necessary intent, namely, intent to commit an offence, or to intimidate, insult or annoy the person in possession of the property entered upon; the intent has of course to be gathered from the circumstances of each case. The necessary intent has essentially to be proved. The section does not embrace the case of an act done with knowledge of the likelihood of a given consequence. The mere knowledge therefore that by such conduct on the part of the accused the trespass is likely to cause annoyance to the owner or occupier in possession would not be sufficient to impute criminal intent to the trespasser so as to make him guilty of the offence. 56 All. 33; 19 Mad. 240; 41 Mad. 156, foll. 4 A.I.Cr.D. 326 = 51 Cr.L.J. 821 = A.I.R. 1950 Pat. 295.

—Ss. 441 and 448—Proof of offence—Landlord breaking open lock and taking possession of premises unoccupied by tenant.

The mere taking of unlawful possession will not amount to either criminal trespass or house trespass. Under S. 441, I.P.C., there can be no criminal trespass unless the "intent" specified therein is present. Intent is something different from mere knowledge. Further the intent to annoy and intimidate must be with respect to a person in actual possession of the property. A person in constructive possession is not contemplated by the section. Accordingly, a landlord who breaks open the lock and takes possession of the premises deserted and unoccupied by his tenant, is not guilty of house trespass. It cannot be said that

he intended to annoy a person in possession of the house, as there was really no one in possession. 41 M. 156 (F.B.); 40 A. 221; 4 C. 837; 26 A. 194 and 49 C.L.J. 120, relied on. 53 C.W.N. 402 = A.I.R. 1949 Cal. 107 = 50 Cr.L.J. 161 = 3 A.I.Cr.D. 154.

—Ss. 448 and 341—Offences under—Complaint by sub-tenant against landlord—Landlord not aware of its existence.

A sub-tenant charging the landlord with an offence under S. 441, I.P.C., has to show that the landlord entered upon property in his possession with intent to commit an offence or to intimidate, insult or annoy him. If the landlord was ignorant of the existence of the sub-tenant and genuinely believed that on the death of the tenant there was no one in existence who could inherit the tenancy and entered under that belief, he certainly did not enter with intent to commit an offence or with intent to annoy the sub-tenant. Before any offence under S. 441 can be made out the Court has to be satisfied that the existence of the sub-tenant was known to the landlord.

Similarly in the above circumstances the landlord cannot be charged with an offence under S. 341, I.P.C. To be guilty of wrongful restraint a person must voluntarily obstruct any person so as to prevent that person from proceeding in any direction in which the person has a right to proceed. A man cannot be guilty of restraining a person of whose existence he is wholly unaware. There must be *mens rea* to establish such a charge. 53 C.W.N. 822.

—S. 441—Primary ingredient of an offence under.

"Intention" is the *sine qua non* for an offence under S. 441 of the Penal Code. Though annoyance or intimidation might result from a certain conduct it might never have been intended and conversely, though intended, there may be no annoyance or intimidation. "Intention" is, therefore, the pivot and not the result. I.L.R. (1947) All. 152 = 228 Ind. Cas. 322 = 48 Cr.L.J. 196 = 1947 A.L.J. 273 = A.I.R. 1947 All. 61 = 1946 A.L.W. 486 = 1946 A.W.R. (H.C.) 547 = 1946 A.Cr.C. 142.

—S. 448—Intention.

For an offence of criminal trespass, a mere knowledge that the action of the accused will annoy the owner of the house is not sufficient. It must be shown that the intention of the accused was to intimidate, insult or annoy any person in possession. A.I.R. 1942 Mad. 532 = (1942) 1 M.L.J. 585 = 1942 M.W.N. 371 = 55 L.W. 367 = 43 Cr.L.J. 755 = 201 Ind. Cas. 654.

—S. 441—No offence of criminal trespass as defined in S. 441, takes place unless there is a criminal intent or '*mens rea*'. A.I.R. 1937 Oudh 273 = 38 Cr.L.J. 188 = 1937 O.W.N. 30 = 13 Luck. 92 = 166 Ind. Cas. 291.

—Ss. 441 and 447—Necessity of.

It may be that the action of the accused in building a structure necessarily resulted in annoyance to the owner of the land and indeed caused damage to him by preventing him from cultivating the land but that is not sufficient to constitute criminal trespass in the absence of anything to show that in building the structure, the intention was to cause annoyance as that ingredient is essential in criminal trespass. A.I.R. 1936 Pat. 170 = 16 P.L.T. 913 = 37 Cr.L.J. 468 = 161 Ind. Cas. 705 = 2 B.R. 361.

—Ss. 441 and 447—Mere intention to squat, if sufficient.

Under S. 441, mere knowledge on the part of the accused that his act is likely to annoy, insult or intimidate is not sufficient. The required intention must exist. Such knowledge, coupled with other facts, may legitimately give rise to an inference that the accused had the requisite intention, but there must



always be an express finding regarding the intention and a conviction is not sustainable in the absence of such a finding. The only intention of "making the complainant's property his own", in other words, an intention to squat, does not fall within the purview of S. 441. A.I.R. 1935 Sind. 20 = 36 Cr.L.J. 577 = 154 Ind. Cas. 552.

—S. 441—Proof of actual intent to commit offence or to intimidate—Necessity of—Knowledge that act is likely to intimidate—Whether sufficient.

In order to make out an offence under S. 441, the actual intention to commit an offence or to intimidate must be shown and the mere fact that the act was likely to cause annoyance is not sufficient. Where a specific intent is laid as necessary ingredient in a charge under the Penal Code, the question of volition enters into the matter, and the specific intent becomes a question of fact; it must not be treated as a mere presumption of law. A.I.R. 1934 Pat. 158 = 15 P.L.T. 392 = 13 Pat. 268 = 35 Cr.L.J. 1421 = 151 Ind. Cas. 844.

—Ss. 441 and 447—Re-entry by owner.

To constitute criminal trespass as defined in S. 441 there must either be entry upon property in the possession of another or unlawful continuance thereon after a lawful entry. A lawful owner who merely goes to the land as he dares cannot be said to have re-entered upon the land, though if the true owner enters upon the land while the trespasser remains there, it may amount to re-entry. A.I.R. 1932 Nag. 112 = 28 N.L.R. 57 = 33 Cr.L.J. 861 = 139 Ind. Cas. 609.

—S. 448—Ingredients—Intention—Nature of claim.

For an offence under S. 448 intention is one of the most important ingredients and in order to determine the intent it is necessary to consider the circumstances under which the act was done by the accused as also the *bona fide* nature or otherwise of the claim which the accused may have in respect of the property itself. A.I.R. 1923 Cal. 263.

—S. 448—Essentials—Actual possession by complainant.

Actual possession, by the person alleged to be intended to be annoyed, insulted or intimidated, is essential for an offence under S. 448. 2 All. 465 and 12 A.L.J. R. 151, foll. 88 Ind. Cas. 1049 = 47 All. 855 = 23 A.L.J. 679 = 26 Cr.L.J. 1273 = 6 L.R.A.Cr. 132 = A.I.R. 1925 All. 540.

—S. 448—Finding—Intention of accused—Necessity.

The Court is justified in inferring an intent to insult or annoy on the part of a trespasser who knows that it is practically certain that in the natural course of events his trespass is likely to cause insult and annoyance to the owner of the property. But the trespasser cannot be convicted under S. 448 unless there is a clear finding as to his intentions though the antecedent circumstances and the conduct of the parties may be and must be considered in determining the intention of the accused. 81 Ind. Cas. 716 = 25 Cr.L.J. 1004 = A.I.R. 1925 Nag. 50.

—S. 441—Essentials.

In order to constitute criminal trespass under S. 441 the entry into the house or property in the possession of another must be with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property and in order to sustain a conviction under S. 456, it must be proved that there was in the first instance criminal trespass as defined in S. 441. 87 Ind. Cas. 106 = 4 Pat. 459 = 6 P.L.T. 588 = 26 Cr.L.J. 954 = A.I.R. 1925 Pat. 713.

—S. 447—Essentials.

The main ingredient of section 447 is that the trespass must be with the intention of annoying or

insulting some one, or with the intention of committing an offence, without which the conviction for criminal trespass is an impossibility. 65 Ind. Cas. 446 = 3 P.L.T. 499 = 23 Cr.L.J. 94 = A.I.R. 1923 Pat. 56.

—Ss. 441 and 511—Criminal trespass Intention—Adultery—Complaint by husband—Cr. P.Code, S. 199—Intention and attempt.

Where the object of a trespass is to commit an offence, such offence must be possible on the part of the person to be convicted of the trespass. An intention to commit an offence punishable with imprisonment is not the same thing as an attempt to commit such an offence. It exists before the attempt is begun. A mere intent is not by itself an offence; therefore where it is used as essential to bring a particular act within the category of criminal offence, and proof has been given that such an act accompanied by such an intent has been committed or even attempted the offence is complete though the further act may not have been attempted or committed. The complaint of the husband is not necessary for proceedings in respect of house trespass to commit adultery. 19 Cr.L.J. 881 = 47 Ind. Cas. 77 (Nag.).

—S. 448—Essence of offence.

The essence of an offence under S. 448, I.P.C., is that there should be an intention to insult, annoy or intimidate the owner of the property or such person as was acting on behalf of the owner. (1917) P.H.C.C. 333 = 6 Pat. L.J. 147 = 19 Cr.L.J. 249 = 4 Pat. L.W. 359 = 44 Ind. Cas. 41.

—S. 441—Intention to create annoyance.

In order to constitute the offence of criminal trespass there must be an intention to create annoyance. 16 C.W.N. 1007 = 13 Cr.L.J. 783 = 17 Ind. Cas. 415.

—S. 448—Essentials for conviction.

For a conviction under S. 448 an express finding as to criminal intention to cause annoyance is necessary. 5 S.L.R. 29 = 12 Cr.L.J. 148 = 9 Ind. Cas. 895.

—S. 441—Ingredients—Criminal force.

Use of criminal force is not an essential element of the offence of criminal trespass. 11 Cr.L.J. 594 = 8 Ind. Cas. 219 (All.).

—S. 441—Criminal trespass—Essential—Intention to annoy.

For an offence under S. 447, I.P.C. it must be found that the accused intended to commit an offence, or to intimidate, insult or annoy, the complainant. The fact that the result of the accused's act was annoyance will not render it an offence unless the intention of the accused was to annoy. 6 M.L.T. 262 = 10 Cr.L.J. 384 = 3 Ind. Cas. 828.

—S. 448—Criminal intention, sufficient.

For an offence under S. 448 it is sufficient to show the criminal intention of the accused. 3 S.L.R. 86 = 10 Cr.L.J. 410 = 3 Ind. Cas. 895.

—S. 447—Criminal force, use of.

The use of criminal force is not a necessary ingredient of an offence under S. 447. 12 M.L.J. 447 = 26 M. 49.

#### 5. Evidence and Proof.

—S. 441—Offence—Proof of intent specified in section—Necessity—Form of charge.

In order to constitute the offence of criminal trespass the prosecution must prove that the trespass was made with one of the intents specified in S. 441, I.P.C. The charge should specifically state the intent which was alleged and if that intent was to intimidate, insult or annoy any person in possession of the property, the name of that person should also have been stated. I.L.R. (1950) All. 163.

—S. 441—Offence under—Landlord refusing to leave premises after persuading tenant to vacate for purposes of repairs.

In order to establish the offence described in the second portion of S. 441, I.P.C., the prosecution must



prove that the accused remained in the premises into which he has lawfully entered with the intention of intimidating, insulting or annoying the person in possession of the property or with intent to commit an offence. Where a landlord enters into the premises of the tenant after persuading him to vacate them temporarily for the purpose of repairs but subsequently refuses to leave them, his intention at worst is to remain in the premises unlawfully but that by itself does not constitute an offence of trespass unless he remains in the premises with one of the criminal intents mentioned in the section. 51 Cr.L.J. 407 = 4 A.I.Cr. D. 87 = A.I.R. 1950 Cal. 80.

—**S. 448—Applicability—Tenant leaving premises locked up and going away—Non-payment of rent and non-communication with landlord for long time—Re-entry by landlord on ground of abandonment by tenant—Offence—Absence of necessary intent—Effect.**

Where a Mahomedan tenant of premises, situate in a Hindu locality, locks up his premises and goes away during a period of serious communal riots and does not communicate with the landlord nor pays rent to the landlord for a long period, and the landlord, believing that the tenant has abandoned the premises, takes possession of the premises, it cannot be said that he commits the offence of criminal trespass under S. 448, I.P.C. In the absence of evidence of any of the intents necessary to constitute the offence of criminal trespass, the landlord is not liable to conviction under S. 448, though his re-entry on the premises might be contrary to law. 49 Cr.L.J. 120 = A.I.R. 1948 Cal. 130.

—**S. 441—Applicability—Essentials of offence—Intention to annoy—Proof—Necessity.**

To establish the offence of criminal trespass, the prosecution must prove that the intention of the trespasser was to annoy. The fact that the person in possession is annoyed is not enough. Every unauthorised entry is not criminal trespass. A trespass is criminal unless one or other of the intention specified in the definition is not proved. 231 Ind. Cas. 398 = 48 Cr.L.J. 785.

—**Ss. 441 and 447—Evidence.**

Before a conviction can be based under S. 447, I.P.C., it must be shown that the trespass was one mentioned in S. 441, I.P.C. A.I.R. 1942 Pat. 150 = 22 P.L.T. 976 = 43 Cr.L.J. 537 = 199 Ind. Cas. 218. = 8 B.R. 534.

—**S. 441—Duty of prosecution—Entry in another's house—When presumed criminal.**

When criminal intention is an ingredient of an offence, it is on the prosecution to prove that intention just as much as any other ingredient. The entry of one person into the house of another will not be presumed criminal at all unless there are circumstances from which an inference of criminality can be drawn. A.I.R. 1940 Pat. 14 = 20 P.L.T. 879 = 40 Cr.L.J. 833 (2) = 5 B.R. 978 = 183 Ind. Cas. 660.

—**S. 448—Accused found in complainant's room at night—Allegation of mistake—Absence of evidence of intent to commit offence.**

Held, that offence under S. 448 was not established. A.I.R. 1935 Pat. 523 = 36 Cr.L.J. 1351 = 158 Ind. Cas. 279 = 1 B.R. 870.

—**S. 445—Accused entering by a passage known to them to have been fastened—No direct evidence that every one individually lifted the door—Proper charge under S. 445 (6). 1931 M.W.N. 129.**

—**S. 441—Proof of intention.**

Intention cannot be inferred from the actual or probable results. It is necessary to show the actual intention to insult or annoy before the acts were complete, to constitute the offence under S. 441. 316 Ind. Cas. 783 = 30 Cr.L.J. 684 = 11 P.L.T. 80 = 11 A. I.Cr.R. 108 = A.I.R. 1929 Pat. 111.

—**S. 441—Tenant not vacating—Tenant at will refusing to vacate property—If offence.**

Where the accused was a tenant on sufferance who had come upon the property by right but had continued to remain by wrong.

Held, that this would not, without proof of intent, require to constitute the offence under S. 441, make his wrongful stay punishable as criminal trespass. Mere knowledge on his part that he was likely to cause annoyance would not by itself be sufficient. 100 Ind. Cas. 829 = 21 S.L.R. 263 = 28 Cr.L.J. 349 = 7 A.I.Cr.R. 541 = A.I.R. 1927 Sind 159.

—**S. 447—Intention—Proof.**

An intention to commit an offence or to intimidate, insult or annoy must be proved before a conviction is recorded under S. 447. 109 Ind. Cas. 506 = 50 All. 637 = 26 A.L.J. 421 = 9 L.R.A.Cr. 67 = 29 Cr.L.J. 570 = 9 A.I.Cr.R. 441 = A.I.R. 1928 All. 671.

—**S. 447—Trespass on land of third person and beating complainant—Right of complainant to charge for trespass.**

One B trespassed into the fields of the accused. The accused remonstrated upon which B ran into an adjoining field belonging to one S. The accused went in pursuit, overtook him there and gave him a slight beating.

Held, that no case under S. 447 has been established. First because the field into which the petitioner is alleged to have trespassed did not belong to the complainant B. And secondly there is no evidence of any interest on the part of the accused to commit an offence or to intimidate, insult or annoy any person. 74 Ind. Cas. 534 = 24 Cr. L.J. 790 = A.I.R. 1924 Lah. 252.

## 6. Intention and Knowledge.

(a) Absence of intention.

(b) Intention.

(c) Presumption of intention.

### 6. (a) Absence of Intention.

—**S. 441—Ingredients of offence—Land used by public as cart-track without objection by owner—Effect—Entry upon track without intent to commit act mentioned in section—offence.**

For the offence of criminal trespass as defined in S. 441, I.P.C., two essential ingredients have to be proved: (1) that the property trespassed upon should be in the possession of some specific or particular individual; (2) that the trespasser should enter upon the property with the requisite intent, i.e., with intent to commit an offence or to intimidate, insult or annoy any person in possession of that property. Both these requisites must be present. Where the owner in possession of property has permitted the use of a part of it by the public as a cart-track for a long time, he must be taken to have parted with the possession of the part forming the track, and the intention of the trespasser, is not to commit any of the acts mentioned in the section, there can be no conviction for criminal trespass. 48 Cr.L.J. 522 = 230 Ind. Cas. 124 = A.I.R. 1947 Lah. 221.

—**Ss. 441 and 447—Absence of Intention.**

Accused cultivating the land of the proprietor—Intention while cultivating not to intimidate, insult or annoy the proprietor.

Held, his cultivation will not amount to criminal trespass. 1939 O.W.N. 224 = 1939 A.W.R. 58.

—**S. 441—Accused entering at night in complainant's house with intent to have intercourse with his sui juris daughter, by invitation.**

It must depend on the facts of each case as to whether an intent to annoy the person in possession of the property entered upon can, in the circumstances, be reasonably inferred. Where, at night, an accused



enters upon invitation the house of the complainant with intent to have sexual intercourse with his daughter who is *sui juris*, the accused cannot be said to have the 'primary' or even the 'subsidiary' or 'secondary' intent to annoy the person in possession, from whom he had taken all possible precautions to keep his entry secret. The mere fact that he knew or ought to have known, that, if discovered, his presence in the house might cause annoyance to the owner or other inmates of the house, is by itself not sufficient to bring his case within S. 441, Penal Code. A.I.R. 1938 Lah. 534 = 39 Cr.L.J. 756 = 40 P.L.R. 806 = 176 Ind. Cas. 497 (F.B.) (*Overrules* 1908 Pun. Re. No. 17 (Cr.) = 8 Cr.L.J. 488.)

—S. 447—Held, on facts that the intention of accused was not to intimidate or insult or annoy.

Held, that the act of the accused by remaining standing on the *chabutra* with a view to prevent the Congress flag from falling down, was not actuated with an intent to insult, intimidate or annoy the Chairman of the Municipal Board who had come there to dig up the *chabutra*. The feelings of the Chairman may have been hurt by the refusal of the accused to leave the spot, but the intention of the accused was not to hurt the feelings of the Chairman of the Municipal Board, but merely to preserve their flag from falling down. A.I.R. 1937 Oudh 207 = 38 Cr.L.J. 147 = 1937 O.W.N. 34 = 13 Luck. 89 = 166 Ind. Cas. 219.

—S. 441—Holding condolence meeting in defiance of orders in a particular place does not show intention to intimidate, insult or annoy.

Where the only intention of the applicants was to hold a condolence meeting in respect of the death of a person in a particular place in defiance of an order of the Chairman of the Municipal Board :

Held, that such an intention on their part could not possibly amount to an intention to commit an offence, nor could their primary intention be said to be to intimidate, insult or annoy the Chairman of the Municipal Board. It was at most a civil trespass and that the Criminal Court could not go into the question of civil rights of the parties. A.I.R. 1937 Oudh 273 = 38 Cr.L.J. 188 = 1937 O.W.N. 30 = 13 Luck. 92 = 166 Ind. Cas. 291.

—Ss. 441 and 447—Absence of Intention—No finding as to intention to intimidate, insult or annoy persons in possession—Offence not committed.

Where the trial Court held that the intention of the accused was primarily to take possession of the field in dispute and there was no finding of the first Appellate Court to the effect that the accused committed trespass with intent to intimidate, insult or annoy the person in possession :

Held, that the act of the accused only amounted to a civil trespass for which substantial damages could be claimed in the civil Court, and that no offence under S. 447, I.P.C., was committed by the accused. A.I.R. 1933 Oudh 179 = 10 O.W.N. 266 = 34 Cr.L.J. 1014 = 145 Ind. Cas. 625.

—Ss. 441 and 447—Deciding factor.

It is the intention of the accused that is the deciding factor under S. 441, to constitute the offence of trespass.

Where the accused first took a settlement of certain *khass mahal* land for grazing cattle, but at the end of the lease, they remained on the land and proceeded to cultivate it :

Held, that the accused did not commit an offence under S. 441 inasmuch as their intention was only to cultivate the land and not to annoy the Government. A.I.R. 1931 Cal. 264 = 32 Cr.L.J. 568 = 130 Ind. Cas. 500.

—S. 448—Search by excise officer—Excise officer searching house—Excise Act, S. 53 infringed—No criminal intention present—No offence.

A Sub-Inspector searched the applicant's house for cocaine. He omitted to record his reasons as required by S. 53 of the Excise Act for not first obtaining a search warrant from a Magistrate. He had no intention of any of the types mentioned in Penal Code. S. 448.

Held, the Sub-Inspector had not committed an offence under Penal Code, S. 448. 88 Ind. Cas. 725 = 2 O.W.N. 463 = 26 Cr.L.J. 1205 = A.I.R. 1925 Oudh 505.

—S. 441—Trespass without the specified intent—If offence.

A girl shortly before she was to be married disappeared from the house of her parents. The accused went to the house of complainant with whom she was said to be living after her disappearance. They also removed the girl who was not lawfully married to the complainant from that place.

Held, that no offence was committed as there was no criminal intent as defined in S. 441, I.P.C. Every trespass is not criminal trespass. There must be an intent specified in S. 441. Although the Act may be unlawful and may be one which the civil law will restrain or which the Civil Court will compensate the injured party in damages still it does not necessarily constitute an offence under S. 441. 81 Ind. Cas. 351 = 5 Lah. 20 = 25 Cr. L.J. 815 = A.I.R. 1924 Lah. 449.

—S. 441—Guilty intention of the nature described in the section.

The offence of trespass is not complete unless there is an intent to commit an offence or to intimidate, insult or annoy some one in possession of property. It is not enough that the accused should know that his act is likely to have such an effect.

Where an acting *taliari* with two others learnt that there was in the house of the complainant a pot of toddy in excess of the quantity which one might possess without licence and went inside the house brought the toddy pot to the verandah outside and remained there waiting for the arrival of the Revenue Officials.

Held, that though the *taliari* had no authority to enter into the house, he was not liable for criminal trespass. 82 Ind. Cas. 149 = 20 M.L.W. 239 = 25 Cr.L.J. 1221 = A.I.R. 1924 Mad. 816.

—S. 448—Intention to annoy.

In an action for trespass, the trial Court found that the accused's object in dismantling the building in question was to break down the building which would have the effect of compelling complainant to leave, and he treated that result as intended.

Held, it is quite true that such result may have the effect of annoying the complainant, but there are authorities that such a result and consequent annoying is not sufficient for the offence, unless there was in fact the intent to annoy, etc. 75 Ind. Cas. 353 = 2 Bur. L.J. 55 = 24 Cr.L.J. 929 = A.I.R. 1923 Rang. 157.

—S. 441—Criminal trespass—Intention.

An unlawful entry upon property does not amount to criminal trespass unless one of the intents mentioned in S. 441, I.P.C., is made out. 54 Ind. Cas. 620 (Nag.).

—S. 448—Intention—Entry into house on the invitation.

A person who has no intention of causing annoyance to any one and who further takes measures to avoid it, cannot be convicted of an offence under S. 448, I.P.C., even though a feeling of such annoyance be the inevitable consequence of his being found out. 19 M. 240 = 38 All. 517, 22 Cal. 391, Foll. 22 O.C. 121 = 20 Cr.L.J. 610 = 52 Ind. Cas. 274.



—S. 441—*Mala fides*—Criminal intention.

In the absence of *Mala fides* and the intention to commit an offence or to intimidate, insult or annoy the owner of the property, there can be no offence under S. 441 of the Code. 16 A.L.J. 501 = 19 Cr.L.J. 704 = 46 Ind. Cas. 160.

—Ss. 441 and 448—Trespass—Knowledge that act is likely to cause annoyance or insult—Intent to intimidate, insult or annoy person in possession.

A person who enters into property in possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit an offence but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession is not guilty of an offence under S. 448 of the Penal Code. 19 M. 240, Foll: 35 M. 186, not Foll. Per *Ayling, J.*—A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent to insult or annoy within the meaning of S. 441, I.P.C., but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property it is open to Court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass. 41 Mad. 156 = 33 M.L.J. 729 = 6 L.W. 794 = (1918) M.W.N. 81 = 19 Cr.L.J. 162 = 43 Ind. Cas. 578 (F.B.).

—S. 441—Driving cart on Government waste land—Municipality prohibiting cart traffic.

Since Government waste land does not vest in the Municipality under S. 78 of the Burma Municipality Act, driving a cart over the same in defiance of notices put up by the Municipality prohibiting cart traffic, is not an offence under S. 441 of the Penal Code even if the notices were good. The accused could hardly be said to have had the necessary criminal intent unless it was proved that he was aware of the prohibition. 4 Ind. Cas. 826 (U. Burma), 11 Cr.L.J. 57.

—S. 448—House trespass—Intention.

A person who enters the house of another secretly in order to carry on an intrigue with a widow in the house is not guilty of criminal trespass as his intention was not to commit an offence punishable under the Penal Code, or to cause insult or annoyance to the inmates of the house. (1906) 4 Cr. L.J. 169 = 4 Cr. L.J. 144.

—S. 441—Criminal trespass—Occupation by zemindar of house left by deceased tenant.

Where a person enters into possession of a deceased tenant's house in the assertion of a right to it, whether he was right or wrong in doing so, and with no intent to commit an offence, etc., he cannot be convicted under S. 441. 27 A. 298 = 1904 A.W.N. 235.

6. (b) Intention.

—S. 441—Accused one night passing through court-yard of one house to commit adultery in another.

Where an accused, in order to commit an adultery in a certain house, one night passes stealthily through the courtyard of the adjoining house, he is not guilty

12—F. Y. D. 34.

of trespass in respect of the latter house under second alternative of S. 441, Penal Code, as it cannot be held that the accused had any intention to insult or to annoy the persons living in that house. Even if he can be supposed to have known, that if discovered, his presence might cause annoyance to any person living there, this would not make him guilty of committing criminal trespass in that house.

The act, however, clearly falls within the first part of S. 441 and the accused is guilty of trespass under the first alternative of the section which as worded, means that if a person enters upon property with intent to commit an offence on that property, or on any other property or with respect to a person who is or is not in possession of the property entered upon, he is guilty under it. A.I.R. 1938 Lah. 514 = 39 Cr.L.J. 734 = 40 P.L.R. 813 = I.L.R. (1938) Lah. 462 = 176 Ind. Cas. 410 (F.B.).

—Ss. 441 and 447—Accused taking forcible possession of complainant's house during his absence.

The complainant wanted to purchase a house and a sale-deed in respect of the house was duly registered in his favour. When the accused heard that the sale deed was going to be registered, they forcibly entered the house in question and broke a portion of a wall and forced open the lock which had been put upon the outer door of the house and thus having forcibly effected entry into the house, they made their women-folk occupy the house. When the complainant returned to the house after getting the sale deed registered, he found that his house had been forcibly taken possession of by the accused who began to abuse him and wanted to assault him if he came near them. Complainant thereupon filed a complaint charging these four persons with offence under Ss. 448, 352 and 506 of the Penal Code. It was found as a fact that the complainant was in actual physical possession of the house:

Held, that although it may be that the primary intention of the accused was to secure possession of the house, but in doing so by means of force and violence, they were certainly causing annoyance and insult to the complainant and the conduct of the accused in breaking a portion of the wall of the house and in smashing the lock which was put on the outer door of the house was such as to cause insult and annoyance to the complainant. It may be that the applicants believed in good faith that they had a genuine title to the house in dispute, but the fact that they believed that they had a legal title to the house would not justify them in taking the law in their own hands.

Held, further that the fact that the house was temporarily vacant did not make the offence of taking forcible possession of the house anytheless an offence of criminal trespass. A.I.R. 1934 Oudh 281 = 35 Cr.L.J. 964 = 11 O.W.N. 733 = 149 Ind. Cas. 368.

—Ss. 441 and 447—Where the complainant who was in possession of a land claimed occupancy rights and the accused landlords entered upon the land with intent to intimidate him and thereby to compel him to give up possession of the land:

Held, that an offence under S. 441 was committed by the accused. A.I.R. 1934 Pat. 158 = 15 P.L.T. 92 = 13 Pat. 268 = 35 Cr.L.J. 1421 = 151 Ind. Cas. 344.



—**Ss. 441 and 447—Slaughter house abolished by the Municipality—Accused slaughtering animals therein without the permission of the Municipality and with the intention of annoying the Municipal Committee is punishable under S. 447, I.P.C.** (1933) 141 Ind. Cas. 543 = 15 N.L.J. 89 = 34 Cr.L.J. 224 (2).

—**S. 447—Applicability—Entering cattle pound.**

Entering the cattle pound with intent to commit an offence under S. 24, Cattle Trespass Act, amounts to criminal trespass within the meaning of S. 447 and entering the pound with intent to intimidate the person in charge of the pound amounts to an offence under S. 447. 103 Ind. Cas. 201 = 8 Lah. 331 = 9 L.L.J. 354 = 28 Cr.L.J. 665 = 28 P.L.R. 519 = 8 A.I.Cr.R. 293 = A.I.R. 1927 Lah. 495.

—**S. 441—Entry by Income-tax officer—Inspection of accounts—Legality.**

Although an Income-tax officer is empowered under S. 22 (4) of the Income-Tax Act to serve the proprietors of a firm with a notice to produce their accounts there is no provision of law by which he can insist on their producing the accounts if they decline to comply with the notice. He has no authority under the Act to enter the firm's premises in order to inspect the account or to remain on the premises for that purpose against the will of the proprietors and if he does so he commits criminal trespass and the proprietors have a right to forcibly turn him out as S. 99, Penal Code, would not deprive them of their right of private defence. 95 Ind. Cas. 308 = 7 Lah. 104 = 27 P.L.R. 298 = 27 Cr.L.J. 772 = A.I.R. 1926 Lah. 326.

—**Ss. 441 and 456—Entry for sexual intercourse—Mere entry with intent to have sexual intercourse with a woman—No offence—Inmates unknown and startled at entry—Offence.**

A mere entry into a house occupied by another with intent to carry on an intrigue or to have sexual intercourse with a woman living in that house will not in itself be a criminal trespass. In such a case it is supposed that the entry has been with the consent or connivance of the woman living in the house. However if she along with other inmates is in possession of the house, as in the case of a joint Hindu family, the trespass in the house must cause an insult and annoyance to the other members in the house. If the object is to force an intrigue upon a woman in the house and to have a forcible intercourse with her, the intention of the entry will necessarily be to insult and annoy that woman.

Where there was no pre-arrangement between the accused and any lady in the house and all the ladies in the house were startled at the bold attempt on the part of the accused to force himself into the house.

Held, that the intention of the accused was not to carry on a peaceful intrigue and intercourse with any of the ladies in the house and with the consent or connivance of any of one them, but the intention of the accused was to commit a criminal trespass into the house and an indecent and unjustifiable trespass upon the persons of the occupants of the house. 87 Ind. Cas. 106 = 4 Pat. 459 = 6 P.L.T. 588 = 26 Cr.L.J. 954 = A.I.R. 1925 Pat. 713.

—**S. 441—Intention to cause annoyance.**

To constitute criminal trespass as distinguished from a civil trespass there must be an intention by the

trespasser to cause annoyance. Where a decree-holder under colour of enforcing his decree invades the privacy of the judgment debtor's household, he is guilty of an offence under S. 441, I.P.C. 73 Ind. Cas. 527 = 24 Cr.L.J. 639 = 4 Lah. L.J. 532.

—**S. 441—Co-sharers.**

A joint owner entering on the land intending or knowing that he is to commit an act wrongful to his fellow-owner is guilty of trespass. 33 All. 773 = 8 A.L.J. 927 = 12 Cr.L.J. 532 = 12 Ind. Cas. 300.

—**Ss. 446 and 448—House trespass—Intention to commit specific offence—Proof of.**

For a conviction under S. 448, it is not necessary to decide which of several offences the accused intended to commit. It is enough if the accused intended to commit an offence. 1 Weir 533, Foll. 21 M.L.J. 781 = 10 M.L.T. 118 = (1911) 2 M.W.N. 71 = 12 Cr.L.J. 453 = 11 Ind. Cas. 797.

—**S. 447—Trespass upon agricultural land from which the trespassers had been ejected by due process of law.**

Held, that a person who after having been ejected by due process of law from certain agricultural land, wilfully persisted in trespassing upon such land, was properly tried for and convicted of criminal trespass under S. 447. 1902 A.W.N. 6.

#### 6. (c) Presumption of Intention.

—**S. 447—Offence under—Proof of intention—Inference from circumstances.**

It is no doubt true that nobody can be guilty of criminal trespass unless he committed the trespass with the particular intention. It would be almost impossible to produce direct evidence of the intention, and the intention has in most cases to be inferred from the circumstances.

Where persons having absolutely no interest in or connection with the land in the possession of others forcibly plough it in spite of the protests of the latter the probable consequence of their act is to cause annoyance to those in possession of the land and it will be presumed that they committed the trespass with that intention. 1949 A.L.J. 535 = 1950 A.W.R. 19 = 51 Cr.L.J. 496 = A.I.R. 1950 A. 157.

—**Ss. 441 and 447—Presumption of Intention.**

Accused intending to take possession of land in Zamindar's possession in high-handed manner—Trespass must have been with intent to annoy or insult Zamindar—Absence of Zamindar makes no difference. A.I.R. 1944 Mad. 473 = 1944 M.W.N. 436 = (1944) 2 M.L.J. 380.

—**Ss. 441 and 447—Intention to annoy, if can be presumed.**

A person who enters a house about which there is a dispute, in the absence of a person who is in possession of the house and take possession of it in assertion of his claim, must be deemed to have known that his conduct was bound to annoy the person in possession and legally he must be presumed to have the intention to 'annoy' at any rate. A.I.R. 1938 Lah. 848 = 40 P.L.R. 757 = 40 Cr.L.J. 180 = 178 Ind. Cas. 911.



—**S. 441—Insult or annoyance inevitable consequence of trespass—Presumption.**

Where insult or annoyance is the inevitable consequence of the trespass committed by any accused, then he must be presumed to have intended to insult or annoy but where the insult or annoyance is only a remote consequence of the trespass and the accused has done everything in his power to avoid his presence being known to the person in possession, it cannot be said that he had an intention to insult or annoy the person in possession. A.I.R. 1937 Pesh. 92 = 39 Cr. L.J. 357 = 171 Ind. Cas. 346.

—**S. 441**—Section 441 is not to be construed in the sense that although there is no presumption that a person intends what is merely a possible result of his action or a result which, though reasonably certain, is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result. A.I.R. 1936 Bom. 15 = 37 Bom. L.R. 880 = 59 Bom. 738 = 37 Cr.L.J. 309 (2) = 160 Ind. Cas. 515.

—**Ss. 441 and 447—Intention to annoy—Presumption.**

It is only when the predominant intention of the trespasser is to annoy the landlord and not to secure some advantage for himself, that presumption of trespass being with the intent to annoy the owner can be drawn. 1936 M.W.N. 523.

—**Ss. 441 and 447—Presumption.**

Re-entry of ejected tenants after execution of decree without the written consent would raise a presumption that they have done so with intent to intimidate or annoy within the meaning of S. 441. A.I.R. 1935 All. 938 = 1935 A.W.R. 1067 = 1935 A.L.J. 1108 = 37 Cr.L.J. 56 = 159 Ind. Cas. 306 = 1935 R. D. 491.

—**Ss. 441 and 447—Knowledge that act must cause annoyance.**

There must, in all cases, be found an intent to cause intimidation, insult or annoyance. A conviction cannot follow merely because one can pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance. Each case must be dealt with on its own facts and on its own merits and where there is a dispute with regard to a wall and there is a false attempt to bolster up title and there is an entry upon the land and actual demolition of the wall, there is no reason whatever to interfere with the conviction under S. 447, because there was quite certainly an intention to commit mischief. A.I.R. 1935 Sind 203 = 37 Cr.L.J. 106 = 29 S.L.R. 424 = 159 Ind. Cas. 466.

—**S. 447—Necessity of proof of intention to annoy, etc.**

When a person commits trespass for the purpose of committing an offence, even then he would be guilty under S. 447, Penal Code. An intention to annoy, insult or intimidate may be proved by direct evidence and may be inferred from circumstances. The intention of the accused must be present before a conviction under S. 447, Penal Code, can follow. The mere fact that an accused might have the knowledge that his act would annoy, insult or intimidate the person in

possession would not be sufficient. A.I.R. 1934 All. 1025 = 1934 A.L.J. 1061 = 36 Cr.L.J. 328 = 4 A.W.R. 794 = 153 Ind. Cas. 407.

—**Ss. 441, 447 and 448—Person committing trespass with knowledge that his action will cause annoyance.**

The word 'intent' does not mean ultimate aim and object. Nor is it used as a synonym for motive.

Where a person commits trespass with the knowledge that his action will certainly cause annoyance, he must be held to have intended to cause annoyance although he may also have had other intentions and he is guilty of an offence under S. 448, I.P.C. A.I.R. 1933 Oudh 436 = 34 Cr.L.J. 1055 = 10 O.W.N. 1075 = 145 Ind. Cas. 626.

—**Ss. 441 and 447—Knowledge that annoyance will be caused by seizing a part of an area by force.**

Where a person must have known that he would constantly cause annoyance by seizing a part of a land by force, he can be held to have committed the offence of criminal trespass. A.I.R. 1933 Oudh 469 = 10 O.W.N. 1078 = 35 Cr.L.J. 124 = 146 Ind. Cas. 630 (1).

—**S. 441—Criminal intention—Alienor trying to take possession by force without legal justification—Inference of criminal intention—If justifiable.**

Where the alienor had transferred possession for good consideration to the alienee and then tried to take it back by force without any legal justification.

Held, that the presence of criminal intention may be rightly inferred: 12 P. R. 1906 Cr. (F.B.), Foll. 11 Lah. 238 = 31 P.L.R. 499 = A.I.R. 1930 Lah. 666.

—**S. 441—Obstruction in cultivation—Accused obstructing tenant having title in cultivation of field—Offence.**

Where the accused wishes to obstruct the person who has the title, not by legitimate means but by going upon the land and obstructing his tenants in cultivation of the field, it is clearly a case where the natural consequences of the accused's act would be to annoy the tenant and the landlord and the claim cannot be said to be a *bona fide* one: 26 Bom. 558, Foll.; 35 Mad. 186, not Foll. 112 Ind. Cas. 97 = 30 Bom. L.R. 631 = 29 Cr.L.J. 977 = 11 A.I.Cr.R. 233 = A.I.R. 1928 Bom. 221.

—**S. 441—Absence of Intention—Entering stealthily—No intent to annoy.**

A person entering another's house after having taken all precautions to avoid discovery cannot be said to have entered with intent to cause annoyance to the persons in possession. 96 Ind. Cas. 871 = 27 P.L.R. 385 = 27 Cr.L.J. 1015 = A.I.R. 1926 Lah. 600.

—**S. 447—Intention—Civil and criminal trespass—Distinction—Inference of intention—Circumstances of the case.**

The essence of the offence for which a man can be convicted under S. 447 of the Indian Penal Code lies in the intent of the accused to commit an offence or



to intimidate, insult or annoy any person in possession of the property with reference to which the trespass is made. A trespass as an actionable wrong giving rise to a cause of action for a claim in a Civil Court must be distinguished from criminal trespass and it is only criminal trespass which is punishable by S. 447 of the Indian Penal Code. There may be an intent to annoy without any primary desire to annoy. A man is presumed to intend the natural consequences of his acts, and if annoyance must inevitably attend his acts, and he does those acts without any reasonable justification he must be held to intend to annoy, even though he has no desire to do so, and his only desire is to obtain some advantage for himself. Whether a man should be presumed to have intended the natural consequences of his acts, when the intention impelling the commission of the act is stated to be one by the prosecution and another by the accused, is a question of inference to be drawn from all the circumstances of the case, and to do that, is the primary duty of the Trial Court. When either of the two explanations of the act of the accused is equally or more or less reasonable the finding must be one of doubt as to the intention of the accused. 75 Ind. Cas. 292 = A.I.R. 1924 Oudh 297 = 24 Cr.L.J. 916.

—S. 441—Intention of the nature described in the section.

Trespass is an offence under S. 441 only if it is committed with one of the intents specified in the section and proof that a trespass committed with some other object known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction. Where the servant of a landlord illegally takes possession of tenant's land with the main object of illegally ejecting the tenant an intention to annoy cannot be presumed; at the same time there may be circumstances which may raise a direct inference of an intention to annoy the tenant. 26 A. 194; 41 M. 156; 40 A. 221, Foll. 76 Ind. Cas. 1033 = 25 Cr.L.J. 313 = A.I.R. 1924 Oudh 342.

—Ss. 441, 443, 448 and 509—House trespass—Intention to annoy—Inference—Onus.

Where it is proved that a person has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the inference of a guilty intention under S. 441, I.P.C., can be drawn. The entry must presumably have been with intent to commit some offence and if the accused pleads that his intention was neither to commit an offence nor to intimidate any person in possession of the house, the onus is on him to prove that particular intent. If it is proved that the accused entered so as to carry on a secret intrigue with a certain woman in intrigue with the trespasser in the house, then it is difficult to say whether there is intention to annoy a third person but if the third person shuts his door against him and the intruder enters against the prohibition, then there is an intention to annoy. 40 All. 221 = 16 A.L.J. 153 = 20 Cr.L.J. 119 = 49 Ind. Cas. 103.

—S. 441—Intent to annoy—Breaking open house.

An intent to annoy is essential to constitute an offence under S. 441 but it is not negatived by the existence of some other intention also. 35 Mad. 186, Foll. A person breaking open a house which has been delivered through Court to the complainant, must know that serious mental annoyance will be caused by

his acts and is guilty of an offence under S. 441. 19 Cr.L.J. 117 = 43 Ind. Cas. 405 (Mad.).

—Ss. 441 and 457—Intention to annoy—Inference.

The accused broke open into a house during the owner's absence, assaulted the servants and took forcible possession with the object of establishing his title.

Held (Per Benson, J.) that as the natural consequence of his act was to annoy the owner and as a man must be deemed to intend the natural though not the probable consequence of his act, he must be deemed to have intended to annoy the owner and so his conviction under S. 457 was right. (Per Sankara Nair, J.) though there was no intention to annoy the complainant the conviction was right as there was an intention to commit an offence by using criminal force to the servants. 35 Mad. 186 = 21 M.L.J. 161 = 9 M.L.T. 283 = 12 Cr.L.J. 30 = 9 Ind. Cas. 152.

—S. 441—Trespass—'Intent', meaning of—Innocent entry—Absence of intention—Presumption—Consequences.

A decree-holder when proceeding to execute his decree found the house of the judgment-debtor shut. He, therefore, effected an entry into the latter's compound by passing through the complainant's house without his consent and notwithstanding his protest. The complainant thereupon charged him with criminal trespass with intent to annoy the complainant.

Held, that the accused was guilty of trespass, because when he trespassed on the complainant's house notwithstanding his protest, he must as a reasonable man have known that he would annoy the complainant. Mere knowledge of the possibility of annoyance resulting from an act of trespass is not sufficient to bring the case within the definition of trespass as contained in S. 441. The word intend in the section is not to be taken as identical with 'wish' or 'desire'. Although there is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act knowing at the time that in the natural course of events a certain result will follow he intends to bring about that result. (1902) 4 Bom. L.R. 280 = 26 B. 558.

—S. 441—Annoyance—Natural consequences—Intention.

If the inevitable consequence of the act of the accused in breaking open a house of the accused be serious mental annoyance to the complainant, then the intention to cause such annoyance follows the knowledge of the accused and such annoyance must be caused by their act; 35 Mad. 186, Foll. 9 Cr.L.R. 196 (Mad.).

## 7. Jurisdiction.

—S. 447—Charge of carrying away usufruct of tamarind tree belonging to complainant—Declaration of title to the tree by the Civil Court—Duty of Criminal Court to have regard to.

A Criminal Court is not entitled to disregard the decree of a Civil Court declaring rights to the identical property in dispute in a case before it.



Where a person is charged with having carried away the usufruct of a tamarind tree in the possession and enjoyment of the complainant and there is a decree of a Civil Court declaring the right and title of the complainant to the said tamarind tree, the Magistrate is not entitled to disregard the decree and acquit the accused. 1948 M.W.N. 62 (2) = A.I.R. 1948 Mad. 49 = 48 Cr.L.J. 1002 (1) = 60 L. W. 499 (1) = (1947) 2 M.L.J. 179.

**—Ss. 441 and 447—Trespass over disputed land—Question of disputed rights, if to be decided by Criminal Court.**

In a case of alleged criminal trespass, it is not the function of the Criminal Court to decide any question of disputed rights. All that it has to consider is whether the act of the accused amounted to criminal trespass within the meaning of S. 441, I.P.C. A.I.R. 1936 All. 146 = 1936 A.W.R. 114 = 37 Cr.L.J. 244 = 1936 A.L.J. 203 = 160 Ind. Cas. 167.

**—Ss. 441 and 447—**Where the order of Civil Court has determined the rights as between the parties, it is not open to the Criminal Court to adjudicate upon them again. A.I.R. 1936 Cal. 124 = 61 C.L.J. 586 = 37 Cr.L.J. 495 = 161 Ind. Cas. 647.

**—S. 441—Courts should not accept it as criminal trespass.**

Magistrates should not readily accept as complaints of criminal trespass what are at most civil trespasses arising out of disputes regarding the right to possession of agricultural land. A.I.R. 1936 Rang. 116 = 37 Cr.L.J. 527 = 161 Ind. Cas. 993.

**—S. 447—Absence of intention—Jurisdiction of Criminal Court.**

Where the stoppage or the removal of the water course did not injure complainant in any way, nor criminal intention to annoy him or to harm him was shown by the evidence on the record.

**Held,** this was not a fit case for the prosecution on the criminal side, whatever may have been the rights and duties of the parties on the civil side with regard to the water course in question. 77 Ind. Cas. 989 = 25 Cr.L.J. 525 = 53 P.L.R. 1922 = 4 L.L.J. 482 = A.I.R. 1923 Lah. 92.

**—S. 448—House trespass—Cr.P.C., S. 522—Entry into a house on a bona fide claim not criminal—House trespass is—Restoration of articles not identified and where no conviction for theft, illegal—Where house trespass not attended by criminal force—Restoration of house to complainant—Possession illegal.**

When in the absence of the complainant, certain persons took possession of her house and established there a boy, alleged to be the adopted son of the complainant's father, and the complainant thereafter lodged a complaint of criminal house-trespasser and theft and the Deputy Magistrate convicted the accused of criminal house trespass but not of theft, holding that the articles taken away could not be satisfactorily identified, and although the accused claimed the articles as their own, ordered to make over the articles as well as possession of the house to the complainant.

**Held,** that the case is one not of criminal but of civil trespass, that the Deputy Magistrate should not have ordered the articles to be delivered to the com-

plainant, and further that the provisions of S. 522, Cr.P.C., do not warrant the passing of an order delivering possession of the house to the complainant because the accused were not convicted of any offence attended by criminal force. (1906) 7 C.L.J. 175 = 12 C.W.N. 269.

**—Ss. 447, 426—Criminal trespass and mischief.**

Where it was found that the complainant was all along in possession of a plot of land which he had sowed with paddy and the accused had failed in certain previous proceedings before the Assistant-Superintendent of Survey to get this plot included in his holdings:

**Held,** that the accused's going upon the land with a body of men and ploughing up the paddy seedlings in spite of the remonstrances of the complainant's servants constituted offences under Ss. 447 and 426, even though he did so under a claim of title to the land. That under the circumstances the fact that the accused set up a title to the land did not make the case against him one of a civil nature and take it outside the jurisdiction of a criminal court. (1906) 11 C.W.N. 467 = 5 Cr.L.J. 278.

**8. Offence under.**

(a) When an offence.

(b) When does not amount to.

**8. (a) When an offence.**

**—Ss. 442 and 448—House trespass, what is.**

Where the accused having broken the lock enters into a *kothri* which is not in his possession but is in possession of the complainant and does so behind the back of the latter, he is guilty of criminal trespass. A.I.R. 1945 All. 26 = 1944 A.L.J. 432 = 1944 A.W.R. 280 = 46 Cr.L.J. 211 = I.L.R. (1944) All. 754 = 1944 O.W.N. 228 = 217 Ind. Cas. 170.

**—Ss. 447, 426 and 147—**Complainant digging well on his land—Accused No. 1 with four others thinking without enquiry, land to be his, entering upon it and destroying well—All held guilty under Ss. 426, 147 and 447. A.I.R. 1943 Sind 127 = I.L.R. (1943) Kar. 7 = 44 Cr.L.J. 654 = 207 Ind. Cas. 544.

**—Ss. 441 and 447—**Wrongful cutting of trees standing on plaintiff's land by defendant amounts to criminal trespass. A.I.R. 1942 Cal. 544 = 46 C.W.N. 943 = 202 Ind. Cas. 762.

**—S. 447—Trespass by decree-holder.**

A decree-holder trying to get possession of the land of the judgment-debtor by arbitrary means instead of resorting to the civil Courts, commits criminal trespass. 105 Ind. Cas. 664 = 28 Cr.L.J. 952 = 9 A.I.Cr.R. 157 = A.I.R. 1928 Nag. 79.

**—S. 447—Abetment.**

Where a person inciting others to commit an offence under S. 447 is himself present when the offence is committed, he is guilty under S. 447: A.I.R. 1925 P.C. 1, Foll. 97 Ind. Cas. 737 = 28 Bom.L.R. 1029 = 27 Cr.L.J. 1153 = A.I.R. 1926 Bom. 512.

**—S. 447—Trespass by landlord.**

The owner is not entitled to re-enter without the tenancy being determined and if he does so he commits an offence under S. 447. 81 Ind. Cas. 187 = 2 Bur. L.J. 37 = 25 Cr.L.J. 699 = A.I.R. 1923 Rang. 245.



**—S. 441—Building on another's land.**

Where a person does not personally set foot on the land of another but gets people to build on it in spite of the protests of that other, the person is guilty of criminal trespass since his agents do the acts under his orders. 39 All. 722 = 15 A.L.J. 793 = 14 Cr.L.J. 46 = 42 Ind. Cas. 1006.

**—Ss. 441 and 447—Landlord and tenant.**

Dispossession of a tenant on the part of the landlord by forceable re-entry when the tenant holds over is an offence under S. 447, I.P.C., even though lease permits such re-entry after termination. 18 Cr.L.J. 402 = 38 Ind. Cas. 962 (Pat.).

**—S. 441—Criminal trespass—Use of force, in preventing harvest.**

A trespass on the land of the complainant to forcibly prevent the latter from harvesting the crops sown and cultivated by the accused is not an offence within S. 447, I.P.C. Mere use of force is not by itself a criminal act. (1915) M.W.N. 275 = 16 Cr.L.J. 271 = 28 Ind. Cas. 159.

**8. (b) When does not amount to.****—S. 441—Right to enter—Owner going into vacant land—Whether commits trespass.**

When a person who is the owner of the land goes on it armed with weapons and takes possession of the same when no one else was there at the time and refuses to vacate it when called upon to do so by another person who has no right to the land, the former cannot be said to remain on the land unlawfully and is not guilty of criminal trespass within the meaning of S. 441. A.I.R. 1945 Pat. 492 = 24 Pat. 519.

**—S. 442—Traders.**

Customer suspecting that trader had false measures entering trader's shop :

**Held**, that the customer does not commit criminal trespass. A.I.R. 1944 Mad. 445 = 57 L.W. 394 (1) = (1944) 1 M.L.J. 455 = 1944 M.W.N. 498 (1) = 45 Cr.L.J. 805 = 215 Ind. Cas. 41.

**—Ss. 441 and 447—When continuing offence.**

The offence of criminal trespass is complete as soon as there is unlawful entry. It is a continuing offence only when the entry is lawful and the subsequent possession becomes unlawful. Where the original entry is unlawful, the possession must be presumed to have commenced with the unlawful entry. There is, therefore, no fresh act of criminal trespass on a subsequent date. The conviction of the person in possession of the offence under S. 447, I.P.C., is therefore bad. A.I.R. 1940 Nag. 117 = 1939 N.L.J. 564 = 41 Cr.L.J. 315 = 186 Ind. Cas. 469.

**—S. 441—Person merely entering on land of another and doing nothing.**

Where a person merely enters on the land of another under orders of his employers and does nothing, none of the intents mentioned in S. 441, Penal Code, should be attributed to him and he cannot be convicted for criminal trespass. A.I.R. 1937 Rang. 201 = 38 Cr.L.J. 776 = 169 Ind. Cas. 415.

**—Ss. 447 and 379—Accused purchasing share in land and structures jointly owned by co-sharers in**

execution of decree against one of them—Accused utilizing material of old huts and building new huts on same land—No offence under S. 447 is committed. A.I.R. 1936 Cal. 261 = 37 Cr.L.J. 747 = 162 Ind. Cas. 660.

**—Ss. 441 and 447—Ingredients of offence—Unlawful entry followed by unlawful continuance.**

An unlawful entry followed by unlawful continuance of occupation is also punishable under S. 441. Every unlawful act is not necessarily an offence and an intention to commit an unlawful act not being one of the acts mentioned in S. 440, the mere entry does not render the accompanying trespass a criminal trespass. A.I.R. 1933 All. 816 = 35 Cr.L.J. 347 = 56 All. 33 = 147 Ind. Cas. 119.

**—Ss. 441 and 447—Where the complainant who was a tenant of the accused and living in his house, left the premises when the house fell down and the accused took possession of the vacant site :**

**Held**, that the accused committed no offence as he was entitled to enter as owner. A.I.R. 1933 Lab. 734 = 35 Cr.L.J. 77 = 34 P.L.R. 953 = 146 Ind. Cas. 359 (2).

**—S. 448—Entry to execute decree—Entry into house in order to execute Civil Court decree—Accused accompanied by Civil Court officers—No offence.**

Where the accused were proved to have gone to a house with Civil Court officers and entered the same in order to execute a Civil Court decree which they had obtained against one of the inmates of the house,

**Held**, that they were not liable to be convicted for criminal trespass. 34 C.W.N. 583 = A.I.R. 1930 Cal. 720 = 127 Ind. Cas. 551.

**—S. 448—Entry in Court—Rightful entry into—No offence.**

The accused entered the Court-room where a case was being conducted. The presiding officer asked him to leave the room, and, on his disobeying, pushed him out. No abusive language was used by accused.

**Held**, he cannot be convicted under S. 448 though the Court-room was a part of the presiding officer's house. 81 Ind. Cas. 141 = 2 Bur. L.J. 17 = 25 Cr.L.J. 653 = A.I.R. 1923 Rang. 145.

**—Ss. 441 and 447—Entry by person having right to enter—No offence.**

A person who has a right of entry into a building cannot be held to become a trespasser by reason of his failure to obtain the consent or permission of the other party, or by reason of anything which he does in such building unless it is shown that the thing so done was an offence or was otherwise of such a nature as to bring entire proceedings within the definition of criminal trespass in S. 441, I.P.C. 75 Ind. Cas. 353 = 2 Bur. L.J. 55 = 24 Cr.L.J. 929 = A.I.R. 1923 Rang. 157.

**—Ss. 441 and 447—Offence under—Exposure of goods for sale on public road.**

The exposure of goods for sale on a public road belonging to a District Board, the collection of the tolls leviable on which is leased to another, is not an offence under S. 447, I.P.C. 21 Cr.L.J. 353 = 55 Ind. Cas. 721 (All.)



—S. 448—Criminal trespass—What constitutes.

A mortgage of a house locking it against a lessee of it, is not guilty of criminal trespass. 20 Cr.L.J. 354 = 50 Ind. Cas. 834 (Lah.).

—S. 441—Amin executing delivery warrant—Warrant in excess of decree—Effect.

The amin executing a delivery warrant issued to him, cannot be convicted of criminal trespass, even though the delivery warrant was in excess of the decree in the suit and the amin was shown the decree. 10 L.W. 12 = 20 Cr.L.J. 559 = 51 Ind. Cas. 847.

—S. 448—Seizure under attachment.

It is not criminal trespass to seize property for attachment in pursuance of a decree of Civil Court. 15 A.L.J. 808 = 19 Cr.L.J. 46 = 42 Ind. Cas. 1006.

—Ss. 448 and 511—Entry on a verandah—Lookers on—Using abusive language—Whether liable.

Mere entry on a verandah may not amount to house trespass but such entry coupled with an attempt to push open the door does amount to an attempt to commit the offence. People who accompany the accused and keep looking on while he commits criminal trespass but who do not themselves enter on the complainant's property are not guilty of criminal trespass even though they use abusive language. 8 Bur. L.T. 17 = 16 Cr. L.J. 2 = 26 Ind. Cas. 306.

—S. 441—Co-sharer, building—Refusal of others to consent.

A co-sharer building upon common waste land despite the refusal of consent by the others is not guilty of an offence under S. 447. The asking of consent would not operate as an admission of the ownership of the person whose consent was asked for. 36 All. 474 = 15 Cr. L.J. 584 = 12 A.L.J. 790 = 25 Ind. Cas. 336.

9. Possession.

- (a) Person in possession—Absence of
- (b) Possession—Nature of.
- (c) Person in possession—Who is.
- (d) Under decree of Court.
- (e) Miscellaneous.

9. (a) Person in possession—Absence of.

—S. 441—Offence under—Breaking open padlocks of a room during owner's absence and refusing to vacate.

A person who breaks open the padlocks of a room during the absence of the owner and when asked by the owner to vacate refuses to do so and threatens to assault him, commits the offence of criminal trespass under S. 441, I.P. Code. 85 C.L.J. 200 = A.I.R. 1950 Cal. 410 = 51 Cr. L.J. 1496.

—S. 447—Trespass during absence of owner.

It is unnecessary for a possessor to be always present upon his property in order that he may be annoyed by a trespasser. A.I.R. 1931 Mad. 231 = 60 M.L.J. 336 = 33 L.W. 291 = 1931 M.W.N. 182 = 32 Cr.L.J. 749 = 54 M 515 = 131 Ind. Cas. 455.

—Ss. 441 and 447—Party in possession absent.

Constructive possession is included in the word 'possession' in S. 441 and a trespasser cannot be heard to

say he could not have caused annoyance merely because the party in possession of the trespassed premises was absent at the time of the trespass. A.I.R. 1931 Mad. 560 = 1931 M.W.N. 328 = 34 L.W. 527 = 33 Cr.L.J. 145 (1) = 135 Ind. Cas. 542.

9. (b) Possession—Nature of.

—S. 441—Possession—If should be actual.

Possession within the meaning of S. 441, I.P. Code, means actual possession and not constructive possession. So when a house is vacant, though the owner may be in constructive possession of it in as much as the owner had the legal right to possession, he is not in actual possession of it and if a stranger enters into possession of it, he cannot be said to be guilty of house-trespass. I.L.R. (1950) All. 163.

—Ss. 441 and 447—Constructive possession—Sufficiency of.

Possession referred to in S. 441 is physical and not merely constructive possession as the act intended to be done which makes the trespass criminal must be done to the person in possession and on the property. A.I.R. 1933 Sind 396 = 35 Cr.L.J. 270 = 28 S.L.R. 22 = 147 Ind. Cas. 66.

—S. 447—Possession.

The offence of criminal trespass can only be committed against a person who is in actual physical possession of the land in question. 110 Ind. Cas. 681 = 3 Luck. 661 = 11 A.I.Cr.R. 39 = 29 Cr.L.J. 745 = 5 O.W.N. 598 = 1929 Cr.C. 345 = A.I.R. 1929 Oudh 369.

—S. 441—Possession.

Section 441 does not require the land to be in the actual possession of the complainant: 21 Bom. 536, Foll. 112 Ind. Cas. 97 = 30 Bom. L.R. 631 = 29 Cr.L.J. 977 = 11 A.I.Cr. R. 233 = A.I.R. 1928 Bom. 221.

—S. 448—Entry after formal possession—No offence.

Where a *dakhalnama* only gave formal possession of the house to the complainant against the accused,

**Held:** that the accused by entering or remaining on the land was not liable to be convicted: 2 All. 465 Foll. 88 Ind. Cas. 357 = 26 Cr.L.J. 1125 = 6 L.R.A.Cr. 104 = A.I.R. 1925 All. 592.

—Ss. 441 and 447—Actual and formal possession—Offence.

The bare defence "I have not given up and I will not give up actual possession though I have been legally ejected" is tantamount to and should be treated as a plea of guilty when the complaint is one of trespass. 83 Ind. Cas. 719 = 5 L.R.A.Cr. 147 = 26 Cr.L.J. 159 = A.I.R. 1924 All. 762.

—S. 448—Trespass—Building not in possession of complainant—Accused starting a school—Conviction.

A school was built by public subscription and put in charge of a teacher. He went away having locked the building. The accused, the managers of the school, took possession of the building and started certain classes.

**Held:** that they could not be convicted of trespass as the building was not in possession of the complainant and the accused had no intention of annoy-



ing him. 17 A.L.J. 334 = 20 Cr.L.J. 463 = 51 Ind. Cas. 351.

—S. 441—Disobedience to notice of ejectment.

Physical and not judicial or constructive possession of the complainant is necessary to criminal trespass and any disobedience to notice of ejectment is not a criminal trespass. 17 Cr.L.J. 378 = 8 L.B.R. 425 = 10 Bur. L.T. 77 = 35 Ind. Cas. 810.

—S. 441—Possession—Nature of.

Possession within S. 441 must be actual possession. 12 A.L.J. 151 = 14 Cr.L.J. 633 = 21 Ind. Cas. 681.

—S. 447—Possession, what is—Possession, actual and peaceful—Trespass, criminal—C.P. Code (Act 14 of 1882), S. 318—Delivery of possession—Acquiescence.

A forcible entry upon land, which had been sold in execution of a money decree and of which actual possession had been given to the purchaser under S. 318 of the Code of Civil Procedure, without resistance or opposition and over which the purchaser had thereafter exercised acts of possession, by subtenants claiming under a lease of an antecedent date from the judgment-debtor, constitutes criminal trespass. (1904) 1 C.L.J. 104.

9. (c) Person in possession—Who is.

—Ss. 448, 379—Removal of cattle belonging to deceased by his heir and servant from the possession of the concubine of deceased—Conviction under Ss. 379 and 448 is illegal. A.I.R. 1941 Mad. 674 = 1941 M.W.N. 463 (2) = 42 Cr.L.J. 896 = 196 Ind. Cas. 541.

—S. 448—Accused put in possession of shop after riot—Complainant's possession ending before possession of accused.

Held, offence of criminal trespass not made out. A.I.R. 1936 Pat. 248 = 16 P.L.T. 847 = 37 Cr.L.J. 513 = 102 Ind. Cas. 22 = 2 B.R. 402.

—Ss. 441 and 447—Where the business was in possession of managing partner and he has died, remaining partner must be presumed to be in possession. 1935 M.W.N. 48.

—S. 441—Possession of property.

In a prosecution for criminal trespass, it is necessary to determine in whose possession the property was at the date of the alleged trespass. 19 Cr.L.J. 761 = 41 Ind. Cas. 137 (Mad.).

—S. 441—Person claiming to be heir—Taking property by force.

A person claiming to be heir of the deceased person is not justified in taking the law into his own hands and taking possession of his property by force from a person who is actually in possession of it. 11 P.L.R. 1910 = 11 Cr.L.J. 364 = 41 P.W.R. 1910 Cr. = 6 Ind. Cas. 490.

9. (d) Under decree of Court.

—Ss. 441 and 447—Inhabited house—Delivery of possession—How to be made—Actual possession not delivered to purchaser—Forcible entry by him—Whether criminal trespass.

In order to effect delivery of possession of an inhabited house, it is necessary to eject the former occupier, delivery of possession of the house not being a mere formal act effected by beating a drum and putting up a notice. Where the certificate-debtor makes a forcible entry into the house, possession whereof has not actually been delivered to the purchaser, the former cannot be treated as having committed an act of criminal trespass. A.I.R. 1935 Pat. 355 = 16 P.L.T. 361 = 36 Cr. L.J. 860 (1) = 1 B.R. 520 = 155 Ind. Cas. 908.

—S. 447—Delivery of formal possession, effect of.

When the complainant has exhausted the resources of the civil tribunals by obtaining formal possession, it is highly desirable that he should receive assistance from the Criminal Courts and an interference with an order of acquittal passed on a mistaken view of the law is proper and justifiable in such a case.

When a person knows that possession has been delivered in execution of a warrant obtained against him, his possession is at an end. The object of the formal delivery of possession is that, after such delivery, the decree-holder may have possession, interference with which is prohibited by the criminal law. A.I.R. 1933 Nag. 36 = 28 N.L.R. 298 = 34 Cr.L.J. 145 = 141 Ind. Cas. 273.

—Ss. 441 and 447—Possession given under Civil Court's decree binds party to suit in possession—Absence of judgment-debtor at the time of giving possession—Effect.

If possession is given under a Court's decree or order that possession binds a party to the suit, who was formerly in possession. This rule applies to symbolical possession also, and there is no authority for the proposition that the mere absence of the judgment-debtor at the time of giving possession affects the validity of such possession; nor does prior possession of the land by the accused, and his predecessor-in-title: 1 Bom. L.R. 48: A.I.R. 1917 P.C. 197 and A.I.R. 1922 Bom. 27, Foll. 112 Ind. Cas. 97 = 30 Bom. L.R. 631 = 29 Cr.L.J. 977 = 11 A.L.Cr.R. 233 = A.I.R. 1928 Bom. 221.

—S. 441—Agra Tenancy Act, S. 95—Tenant re-entering—Decree for ejectment—Execution before the time prescribed by S. 94—Re-entry by tenant—Tenant if guilty.

Where a decree for ejectment of the tenant was executed before the time fixed by S. 94 of the A.T. Act but the tenant subsequently re-entered upon the land,

Held, that the ejectment being illegal, the tenant must be considered to have been legally in possession and cannot be convicted of criminal trespass. 112 Ind. Cas. 680 = 1927 A.L.J. 92 = 29 Cr.L.J. 1096.

—S. 441—Criminal trespass—Joint owner—Possession.

A joint owner of property is entitled to have joint possession restored to him in a Civil Court, but he is not justified to take the law into his own hands to recover the possession and if he does so he becomes liable for criminal trespass. (1908) 10 Bom. L.R. 285 = 7 Cr.L.J. 309.

9. (e) Miscellaneous.

—S. 447—Trespassers coming into possession—Possession of rightful owner, whether lost.



Possession is not lost because trespassers come without licence and plough the land. It would put the rightful owner of land in an almost impossible position if after getting possession of the land through a civil Court, a single act of trespass is deemed sufficient to take away his possession and to deprive him of recourse to the Criminal Courts. Consequently, the rightful owner can file a complaint for the second act of trespass even though at the time he was deprived of the possession by the trespassers. (1936) 162 I.C. 813 = 18 N.L.J. 307 = 37 Cr.L.J. 720.

—Ss. 441 and 447—Possession with applicant—Distribution of land among villagers—Applicant out of possession—Respondent in possession—Applicant returning to possession—Complaint for criminal trespass, if maintainable—Remedy of respondent—Specific Relief Act (1 of 1877), S. 9.

For eight years, the first applicant had been cultivating an area of alluvial land. When the first applicant had been in possession of this area of land for a period of eight years, and a certain co-operative society had, through him, obtained some rights in this land, then, under the orders of the Sub-Divisional Officer, a body of *thamadis* distributed these alluvial lands among certain villagers, with the result that they purported to dispossess the first applicant of the land of which he had been in possession for eight years. The respondent was granted this area of land by the *lugyis*, and apparently, one year after this distribution he managed to get possession of it and to cultivate it. The next year, the first applicant, with his servants, the second and third applicants, returned to possession of it again and for this, they were convicted of the offence of criminal trespass:

**Held**, that the prosecution was quite unsustainable, for it is clear that the first applicant entered into possession again, after having been in possession for a period of eight years and having been dispossessed for only one year, in exercise of a *bona fide* claim of right to possession of this land. What the respondent should have done when he was dispossessed by the applicants re-entering into possession was to have brought a suit under S. 9, Specific Relief Act, and it was not open to him to bring a prosecution in the Criminal Courts. A.I.R. 1936 Rang. 116 = 37 Cr.L.J. 527 = 161 Ind. Cas. 993.

—Ss. 441 and 447—The Commissioners for the Port of Rangoon are not the absolute owners of the property vested in them, but are in possession thereof subject to the provisions of the Rangoon Port Act and consequently, the Port Commissioners have no right, apart from the provisions of the Act and of the bye-laws, to exclude any member of the public from using public landing places. A.I.R. 1936 Rang. 232 = 37 Cr.L.J. 829 = 163 Ind. Cas. 235.

—S. 441—Trespasser—Right of true owner to re-enter—Use of limited force.

A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself possession against the person whom he ejects, and drive him to produce his title, if he can, without delay reinstate himself in his former possession. The owner may, if he does not acquiesce, re-enter upon the land and reinstate himself provided he does not use more force than is necessary. He must not commit a breach of the peace. His entry will be viewed as a resistance to an intrusion upon a possession which

he had never lost. If he takes the risk of a forcible entry and uses more violence than is necessary he will not be able to plead the right of private defence: but he cannot be sued by the trespasser who has entered by force or fraud either for recovery of possession under S. 9, Specific Relief Act, or for ejectment upon the strength of his temporary prior possession. Therefore, possession being still with the owner, he can prosecute the intruder for committing trespass within the meaning of S. 441. 106 Ind. Cas. 691 = 6 Pat. 794 = 29 Cr.L.J. 99 = 9 A.I.Cr.R. 258 = A.I.R. 1928 Pat. 124.

—S. 441—Entry with consent of person asserting claim to property.

To enter upon a vacant piece of land with the consent of a person who asserts his title thereto as against a rival claimant, and to put up a water-pandal do not amount to the offence of criminal trespass, though the land may not be in the possession of the person permitting the act but in that of the complainant. 83 Ind. Cas. 1003 = 1924 M.W.N. 546 = 26 Cr.L.J. 219 = A.I.R. 1924 Mad. 862 = 47 M.L.J. 437.

—S. 441—Trespass—Possession—Right to—Determination of.

The essence of the offence under S. 447, I.P.C., is unlawful entry into land in the possession of a person other than the accused. Where the accused is found to be in possession, no offence is committed. Mere assertion by a person of his right to be in possession is no offence. 19 Cr.L.J. 629 = 45 Ind. Cas. 677 (Pat.).

—Ss. 441 and 429—Order regarding possession of immovable property.

The accused were tried for offences under Ss. 447 and 426, I.P.C., for cutting and removing some bamboos from a bamboo clump belonging to the complainant. The trying Magistrate acquitted the accused but directed that the complainant should retain possession of the bamboo clump until ousted by Civil Court. The order was illegal. 20 C.W.N. 1302 = 18 Cr. L.J. 442 = 38 Ind. Cas. 1002.

—S. 441—Order prohibiting possession being taken by complainant—Trespass impossible.

A trespass on the property in the possession of the complainant cannot be sustained in face of an order prohibiting him from taking possession. 8 M.L.T. 289 = 11 Cr.L.J. 644 = 8 Ind. Cas. 397.

—S. 447—Forcible ouster of mortgagee in possession on pretext of want of title in the mortgagor.

Where the complainant, the purchaser of the rights of a mortgagee in possession, and his predecessor in title had been peacefully in possession of certain agricultural land for some years, and a relation of the mortgagor forcibly ousted the complainant on the plea that he was under the Hindu Law entitled to a share in the land, and the mortgagor had no title to make a mortgage thereof with possession.

**Held**, that the action of the dispossessor amounted to criminal trespass and of a somewhat aggravated kind likely to lead to breach of the peace and rioting. 1902 A.W.N. 42.

#### 10. Procedure.

—Ss. 441 and 447—Summary trial.



Where in a case under S. 447, the only point of law that has been hinted at is that the trespass, if any, was committed, not on Railway land but on land belonging to the P.W.D., then a contest on this point, even assuming that it has an important bearing on the merits of the case does not make the case one which should not be tried summarily. A.I.R. 1939 Lah. 467 = I.L.R. (1939) Lah. 221 = 41 P.L.R. 743 = 41 Cr.L.J. 19 = 184 Ind. Cas. 458.

—S. 447—Doubt expressed as to such cases being tried by Bench Courts.

It is doubtful if disposal of cases coming under S. 447 can be entrusted to Bench Courts as there is difficulty felt by Bench Courts in distinguishing between cases of civil trespass and cases of criminal trespass. A.I.R. 1937 Mad. 480 = 1937 M.W.N. 323 = 45 L.W. 471 = 38 Cr.L.J. 581 (1) = 168 Ind. Cas. 703.

—S. 442—Substitution of conviction under S. 442 for one under S. 441—Legality of.

The offence described in S. 442 of the Penal Code is more serious than that described in S. 441. It is indeed an aggravation of the offence described in S. 441 for the reason that there is likely to be a greater degree of annoyance and inconvenience involved by the invasion of the amenities or privacy of persons dwelling in any building, or tent or vessel of the kind contemplated by S. 442. As this offence is more serious than the offence under S. 441, it is not open to the Sessions Judge to make a substitution of conviction under S. 442 for one under S. 441. A.I.R. 1934 Cal. 480 = 35 Cr.L.J. 949 = 38 C.W.N. 665 = 149 Ind. Cas. 431.

—Ss. 448 and 341—Accused convicted under S. 448—Accused putting forward every fact required for conviction under S. 341—Alteration of conviction to one under S. 341 :

Held, that if the charge were altered from one under S. 448 to one under S. 341, Penal Code, the accused could not be prejudiced. A.I.R. 1937 Rang. 256 = 38 Cr.L.J. 989 = 170 Ind. Cas. 909.

—S. 448—Procedure—Intention to cause annoyance not expressly found—Procedure under S. 256, Cr.P.C., not followed—Effect.

Where in a case under S. 448 the Magistrate did not expressly find that the accused intended to cause annoyance and further omitted to follow the requirements of S. 256, Cr.P.C., in that the accused was not called upon to enter upon his defence and produce his evidence, the proceedings were quashed: 5 S.L.R. 29, Rel. on, 101 Ind. Cas. 457 = 8 A.I.Cr.R. 50 = 28 Cr.L.J. 425 = A.I.R. 1927 Sind 261.

—S. 442—Conviction without charge.

Accused committed house trespass or even house-breaking because they broke into the house of the deceased in order to give her a beating, but they were not tried for house-breaking and therefore they might be prejudiced if they were convicted of that offence. 75 Ind. Cas. 733 = 6 L.L.J. 486 = 25 Cr. L. J. 45 = A.I.R. 1923 Lah. 436.

#### 11. Sentence.

—S. 445—Sentence—House breaking to commit adultery—Whipping.

The offence of outraging a woman's modesty not being punishable with whipping, house-breaking in order to commit that offence cannot be so punished. 89 Ind. Cas. 146 = 6 L.R.A.Cr. 135 = 23 A.L.J. 894 = 26 Cr.L.J. 1282 = A.I.R. 1925 All. 591.

—Ss. 448 and 297—Quaere.

It is very doubtful whether those accused who are guilty of an offence under S. 297 can be convicted under S. 448 as well and awarded a separate sentence on a charge of trespass so framed. A.I.R. 1940 Pat. 414 = 21 P.L.T. 121 = 6 B.R. 874 = 41 Cr.L.J. 810 = 189 Ind. Cas. 867.

—S. 447—Sentence—Consecutive sentences—If proper.

When the accused enter into a Hindu Temple and damage its property, the offence under S. 447 is inseparable from that under S. 295 and it is improper to pass consecutive sentences for each of the offences under sections, for both really are one and same offence. 82 Ind. Cas. 37 = 25 Cr.L.J. 1173 = A.I.R. 1925 Oudh 50.

—Ss. 447 and 147—Sentences separate—"Intention" and "common object" identical. See CR.P.CODE., S. 35, ILL. 8 C.W.N. 305.

#### 12. Trespass to commit offence.

—S. 441—Accused entering house of woman with deadly weapon to commit cognizable offence—Woman not known to be of low character.

Where there is nothing to suggest that the woman into whose house the accused had entered was of low character and where it could reasonably be suspected that the offender had entered the house either to commit theft or rape or any other offence, any person is justified in trying to arrest the accused and if he is armed with a dagger they would be justified in causing his death, if necessary. A.I.R. 1937 Pesh. 92 = 39 Cr.L.J. 35 = 171 Ind. Cas. 346.

—Ss. 441 and 447—Entry lawful—Offence committed is independent of entry or remaining there—Where entry is lawful and whatever offence may be committed, it is independent of the question of the entry into the house or remaining there, there is no *mens rea* in respect of such remaining. If on a person entering a house at the invitation of another, a quarrel breaks out between them in the house, the offence of trespass is not committed. A.I.R. 1936 Nag. 176 = 1936 Cr.C. 718.

—S. 447—Offence within court compound—Wrongful restraint—No trespass—Nature of offence.

Where the accused wrongfully restrained the complainant, an arrack renter, from going and bidding at the arrack sales held in the Sub-Magistrate's office and abused him :

Held, that the facts constitute the offences defined in Ss. 341 and 504 but no offence under S. 447 is made out on these facts. 74 Ind. Cas. 856 = 18 M.L.W. 181 = 1923 M.W.N. 451 = 33 M.L.T. 184 = 24 Cr.L.J. 824 = A.I.R. 1924 Mad. 40.

—S. 448—Trespass for assault—Trespass for purpose of assaulting complainant—Offence.



Trespass into the shop of the complainant for the purpose of assaulting the complainants is not sufficient to support a conviction under Section 452, though it might be for a conviction under Section 448. 76 Ind. Cas. 392 = 38 C.L.J. 161 = 25 Cr.L.J. 168 = A.I.R. 1921 Cal. 556.

—S. 441—Mischief after entering on land.

Trespass includes the mischief which the trespasser commits after entering on the land. 23 M.L.J. 618 = 12 M.L.T. 538 = (1912) M.W.N. 1229 = 17 Ind. Cas. 605.

—S. 448—Breach of peace—Whether a necessary result.

An offence under S. 448 of the Penal Code is not an offence of which breach of peace is a necessary ingredient, and so it is not an offence causing a breach of peace, within the meaning of S. 106, I.P.C. 19 M.L.J. 66 = 9 Cr.L.J. 88 = 4 M.L.T. 468 = 4 Ind. Cas. 616.

—S. 447—Public nuisance—Criminal trespass—Conviction on charge not framed—See S. 290. 5 C.W.N. 567.

13. Who can complain.

—S. 441—Who can complain—Proprietor through his licensee or through tenant.

A proprietor may be in physical possession of the property or he may be in possession within the meaning of S. 441, I.P.C. through his licensee or tenant. Where the accused trespasses on the land which is in possession of the proprietor through his licensee or tenant, with intent to cause annoyance to the proprietor, the accused is guilty under S. 441, I.P.C. A.I.R. 1942 Oudh 104 = 1941 O.W.N. 1300 = 1941 A.W.R. 393 = 43 Cr.L.J. 162 = 197 Ind. Cas. 401.

—S. 447—Offences in respect of land in possession of sub-tenants—Mortgagee entitled to possession.

The complainant was entitled to the possession of the plots under a mortgage which was subsisting but he had let out the plots to certain sub-tenants who were ejected by the accused after committing offence under S. 447:

Held, that the person entitled to possession and indeed anybody was entitled to file complaint. A.I.R. 1934 All. 1025 = 1934 A.L.J. 1961 = 36 Cr.L.J. 328 = 4 A.W.R. 794 = 153 Ind. Cas. 407.

—S. 447—Who can complain—Trespass on land in tenant's possession—Complaint by landlord—Maintainability.

Where accused has entered upon property in the possession of a tenant with intent to commit an offence or to intimidate, insult or annoy that tenant,

Held, that he is clearly guilty of an offence of criminal trespass and a complaint by the landlord is sufficient to set the law in motion just as much as a complaint by the tenant. 69 Ind. Cas. 379 = A.I.R. 1924 Lab. 286. 23 Cr.L.J. 699

—S. 441—Who can complain—Possession with tenant—Landlord if can complain.

"Any person in possession" in Section 441 does not mean only "a complainant in possession", there being no authority for taking the offences of mischief and criminal trespass out of the general rule which allows any person to complain of a criminal act. Hence a landlord can file the complaint although that property was in the possession of a tenant. 22 Cal. 123, Expl. 62 Ind. Cas. 190 = 33 C.L.J. 118 = 25 C.W.N. 425 = 22 Cr.L.J. 494 = A.I.R. 1921 Cal. 627.

—S. 441—Criminal trespass—Complainant not in actual possession.

It is competent to a person not in possession to make a complaint to a Magistrate in respect of the offence of trespass, even though that offence is alleged to have been committed against a third person. S. 441, I.P.C., does not restrict the offence to cases where the person in actual physical possession is insulted, intimidated or annoyed. 3 U.B.R. (1918) 111 = 20 Cr. L.J. 115 = 49 Ind. Cas. 99.

14. Miscellaneous.

—S. 447—Accused lawfully ejected from plot but still retaining physical possession—His possession is illegal—Rightful owner taking possession when plot found empty—Accused forcibly ousting him is guilty under S. 447—Primary intent in such cases is to intimidate and secondary object to enforce possession. A.I.R. 1939 Oudh 45 = 1938 O.W.N. 1361 = 40 Cr.L.J. 183 = 1939 A.W.R. 11 = 14 Luck. 360 = 179 Ind. Cas. 269.

—Ss. 441 and 447—District Magistrate rescinding order passed under S. 144, Cr.P.C.—It is not a licence to commit trespass or riot. A.I.R. 1939 Pat. 314 = 40 Cr.L.J. 337 = 180 Ind. Cas. 335.

—S. 447—Previous order under S. 144, Criminal P.C.

Where, by an order under S. 144, Criminal P.C., a person was restrained for doing a particular act on a particular land, it is relevant to consider that order in a trial under S. 447, I.P.C., for an offence alleged to have been committed by that person for the purpose of testing *bona fides* of the person against whom that order was made, although that order may not be taken into consideration for establishing the possession of the complainant. A.I.R. 1938 Pat. 131 = 4 B.R. 330 = 39 Cr.L.J. 361 = 173 Ind. Cas. 747.

—Ss. 441 and 447—Property—Ferry boat, if property.

The definition given in S. 441 is wide enough to cover a ferry boat which is 'property' within the meaning of that section. Consequently, there can be a criminal trespass within the meaning of S. 447 to a boat. A.I.R. 1934 Cal. 480 = 38 C.W.N. 665 = 35 Cr.L.J. 949 = 149 Ind. Cas. 431.

—S. 442—Use covered by section—Question of fact.

Whether any particular structure or any part of it was intended as a human dwelling or as a place of worship or for custody of property must necessarily depend on the facts of each case. 111 Ind. Cas. 459 = 22 S.L.R. 46 = 29 Cr.L.J. 875 = A.I.R. 1929 Sind. 17.



—S. 441—Continuing offence—Unlawful entry on property and remaining there—Nature of offence.

The continuance in possession of a trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares to make a claim to it. There is a fresh cause of action each time he is resisted and the persons entering subsequently with the permission of the first trespassers and resisting the entry of the owner are equally guilty. 106 Ind. Cas. 691 = 6 Pat. 784 = 29 Cr. L.J. 99 = 9 A.I. Cr. 258 = A.I.R. 1928 Pat. 124.

—S. 442—Entry—Meaning.

The mere putting of a hand into a hole in the wall without putting it through the hole is not an entry into the house within the meaning of S. 442. 77 Ind. Cas. 446 = 4 Lah. 399 = 25 Cr.L.J. 398 = A.I.R. 1923 Lah. 509.

—S. 447—Attempt and preparation—Distinction between—Scaling roof—Theft—Offence.

Where the accused was detected on the roof of a bazaar with an open clasp knife in his hands and two gunny bags and it was found that he had come there with the intention of committing theft.

Held, that the matter had not proceeded beyond the stage of preparation, the accused could not be convicted under Ss. 457 and 511, I.P.C. but under S. 447 only. 20 Cr.L.J. 571 = 12 Bur. L.T. 222 = 10 L.B.R. 51 = 52 Ind. Cas. 59.

—S. 441—Private defence—Right how long exercisable.

In the case of criminal trespass, the right of private defence continues so long as the trespass continues, and is controlled by S. 99, Penal Code. It extends to causing death in case the act of trespasser causes a reasonable apprehension that death or grievous hurt may result. 60 Ind. Cas. 33 = 22 Cr.L.J. 177 (Pat.).

—S. 447—Trespass upon land used as a pathway—Question of title to the land.

In a case brought against the accused for trespass upon land used by the complainant as a pathway, when a question of title to the land is raised between the parties, the accused cannot be convicted under S. 447, merely on the finding that the complainant has been using the pathway for more than six months, the question of title being left undecided. (1906) 11 C.W.N. 171 = 5 Cr.L.J. 14.

—S. 451. See also PENAL CODE, S. 457.

—Ss. 451 and 40—Criminal trespass—Commission of offence under Penal Code punishable with less than six months, imprisonment—Conviction under S. 451, legality of.

For the purposes of S. 451, I.P.C., any offence punishable under the I.P.C. is an 'offence' even though it is not punishable with imprisonment for more than six months. It is only an offence which is punishable under a special or a local law that must be punishable with imprisonment of six months or more before it can be considered to be an offence within the

meaning of S. 451. A.I.R. 1931 Lah. 405 = 32 Cr.L.J. 732 = 131 Ind. Cas. 381.

—S. 451—Human dwelling—Meaning.

Where the question is whether a courtyard forming an integral and indivisible part of a house and surrounded by walls on all sides is a "building used as a human dwelling" within the meaning of S. 451, the determining factor is not the existence of the shutters, or the fact that the door was shut or open, at the time of entry by the accused, but the nature of the structure as a whole, and the purpose for which it was intended to be and was being used. 121 Ind. Cas. 427 = 31 Cr.L.J. 268 = A.I.R. 1930 Lah. 414.

—S. 451—Entry for adultery—House trespass with intent to commit offence of adultery—Absence of husband on business—Presumption of consent—If justifiable.

A man who enters the house of another at night with intent to commit adultery with his wife is guilty of an offence under S. 451, and if in such a case it is shown that the husband was at the time of the occurrence absent from the house in the legitimate pursuit of his occupation, it may safely be presumed that he neither consented to nor connived at any adultery or immorality on the part of his wife: 22 Cr.L.J. 266 Foll. 89 Ind. Cas. 319 = 26 Cr.L.J. 1343 = A.I.R. 1925 Lah. 635.

—S. 451—Absence of husband on business—Presumption of consent—If justifiable.

Where a person enters the house of another at night to commit adultery with his wife he is guilty under S. 451 and if it is found that the husband was in the legitimate pursuit of his occupation, he cannot be presumed to have connived at or consented to, the immorality. 60 Ind. Cas. 666 = 22 Cr.L.J. 266 = 3 U.P.L.R. (Lah.) 18.

—S. 451—Absence of husband—Offence.

Where in K's absence from home the accused entered the house with his wife's consent in order to commit adultery with her.

Held, that he was guilty of an offence under S. 451 of the Code. 59 Ind. Cas. 550 = 22 Cr.L.J. 118 = 8 P.W.R. 1921 (Cr.).

—S. 451—Entry made with consent—Husband neither complainant nor witness—Whether offence.

Entry in a house with the consent of owner and possessor is no offence under S. 451, so that a charge under that section cannot be sustained, where the husband appeared neither as a complainant nor as witness and it was not shown that the house was in his possession or that he had not connived at the entry. 1 O.L.J. 48 = 15 Cr.L.J. 351 = 23 Ind. Cas. 703.

—S. 451—Intention—Absence of complainant at the time of offence—Inference.

"Although there is no presumption that a person intends what is merely a possible result of his action, or a result which though reasonably certain is not known to him to be so, still it must be presumed that



when a man voluntarily does an act knowing at the time that in the natural course of events a certain result will follow he intends to bring about that result."

But where complainant was absent when the act was done.

Held, there was not such practical certainty of annoyance being caused at its result as is sufficient to justify an inference of intent to annoy.

Where there was *bona fide* claim of right by the accused to the wall in dispute and the accused had entered the complainant's house and pulled down the addition in his absence,

Held, the offence of mischief or house trespass was not made out against the accused. 84 Ind. Cas. 254 = 26 Bom. L.R. 978 = 26 Cr.L.J. 254 = A.I.R. 1924 Bom. 486.

—S. 451—Unlocked door—Entering house by merely pushing in shutters of door which was not chained or locked—Nature of offence.

Where the accused was found inside a house at night with the intention of committing theft, but the evidence showed that the door of the house entered was neither chained nor locked, and there was no evidence that accused entered by any other passage,

Held, that, as entry into the house by merely pushing in the shutters of the door does not come under any of the six clauses of S. 445 of the Penal Code which defines, "house-breaking" the accused's conviction under S. 457 cannot stand. The act falls under S. 451, I.P.C. 66 Ind. Cas. 422 = 6 N.L.J. 37 = 23 Cr.L.J. 278 = A.I.R. 1922 Nag. 26.

—Ss. 451 and 448—House trespass—Essentials of.

To constitute an offence under S. 451, an offence under S. 448 must be proved first. It must be further shown that the house trespass was committed in order to commit an offence punishable with imprisonment, etc. 17 A.L.J. 800 = 20 Cr.L.J. 347 = 1 U.P.L.R. (H.C.) 45 = 50 Ind. Cas. 827.

—Ss. 451 and 457—Essentials.

Active step of the accused to conceal his presence from person having a right to exclude him, must be proved for an offence of lurking house trespass. Mere trespass by night is not enough. 21 P.R. 1916 (Cr.) = 123 P.L.R. 1916 = 44 P.W.R. 1916 (Cr.) = 17 Cr.L.J. 304 = 35 Ind. Cas. 176.

—S. 451—Necessary ingredient for offence under the section.

Conviction under S. 451, I.P.C., requires express finding as to the nature of offence which the accused intended to commit. 3 S.L.R. 86 = 10 Cr.L.J. 410 = 3 Ind. Cas. 895.

—S. 452—Proof of intention—Collection of lathis and brickbats on the property unlawfully entered.

The collection, by the trespassers, of lathis and brickbats on the property is clear evidence of their threatening behaviour and indicates an intention to annoy and intimidate. 106 Ind. Cas. 691 = 6 Pat. 794 = 29 Cr.L.J. 99 = 9 A.I. Cr.R. 258 = A.I.R. 1928 Pat. 124.

—S. 452—Trespass for purpose of assaulting complainant—Nature of offence.

Trespass into the shop of the complainant for the purpose of assaulting the complainant is not sufficient to support a conviction under Section 452, though it might be for a conviction under Section 448. 76 Ind. Cas. 392 = 38 C.L.J. 161 = 25 Cr.L.J. 168 = A.I.R. 1921 Cal. 556.

—S. 452—Accused charged of having committed dacoity—If can be convicted under Ss. 452 and 323.

An accused charged merely in general term of "having committed dacoity" should not be convicted under Ss. 452 and 323 as the latter offences are not necessarily cognate offences and in committing dacoity, one does not necessarily commit house trespass or simple hurt. A.I.R. 1945 All. 87 = 1945 A.L.J. 141 = 46 Cr.L.J. 495 = 1945 O.W.N. (H.C.) 138 = I.L.R. (1945) All. 432 = 1945 A.W.R. (H.C.) 145 = 218 Ind. Cas. 372.

—S. 452—Charge under S. 452, I.P.C.—Conviction under S. 19 (e), Arms Act—Legality.

An accused charged under Penal Code, S. 452 for house trespass with preparation to cause hurt cannot be convicted under Arms Act, S. 19 (e) without a specific charge under the latter and with no opportunity to the accused to meet the altered charge. 98 Ind. Cas. 480 = 4 Rang. 355 = 27 Cr.L.J. 1360 = A.I.R. 1927 Rang. 32.

—S. 452—Conviction both under Ss. 323 and 452—Offences committed on same occasion—Separate sentence can be passed for each offence. A.I.R. 1938 Rang. 114 = 39 Cr.L.J. 487 = 174 Ind. Cas. 952.

—S. 452—An interference with religion by preventing a person from employing another as his priest by forcibly entering the former's house to overawe him, is not to be treated lightly. A fine of Rs. 50 is not excessive. A.I.R. 1935 All. 647 = 1935 A.W.R. 333 = 1935 A.L.J. 423 = 36 Cr.L.J. 763 = 155 Ind. Cas. 541.

—S. 454—Applicability—Breaking open lock of another's room and removing his property without his consent—Offence—Plea of *bona fide* claim of right—Validity. See PENAL CODE, Ss. 380 AND 454. I.L.R. 1950 Nag. 526 = A.I.R. 1950 Nag. 92.

—S. 454—Building.—Owner of cattle rescuing them from cattle-pound, consisting of only a fencing, by opening its door—Nature of offence.

The expression "building" must be regarded as indicating some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Any structure which does not afford any such protection by itself but merely serves as a fencing or other means of merely preventing ingress or egress cannot make the place a building or a house within the meaning of either of those two sections. Therefore, an owner of a cattle who rescues the cattle from such a cattle-pound by opening its door, does not commit an offence either under S. 380 or S. 454. He is guilty under Ss. 378 and 441, Penal Code, in addition to the offence under S. 24, Cattle Trespass Act. 100 Ind. Cas. 120 = 38 M.L.T. 163 = 28 Cr.L.J. 248 = 7 A.I. Cr.R. 410 = A.I.R. 1927 Mad. 343 = 52 M.L.J. 143.



—S. 456—Person entering house of unmarried woman who is in possession of it by invitation to commit adultery with her and actually committing adultery—Case, held did not fall under S. 456. A.I.R. 1941 Pesh. 79 = 43 Cr.L.J. 96 = 196 Ind. Cas. 870.

—S. 456—Entry to intrigue with a woman in the house.

A person entering another's house to carry on criminal intimacy with the man's widowed sister of age cannot be punished under S. 456. 38 All. 517 = 14 A.L.J. 719 = 17 Cr.L.J. 419 = 35 Ind. Cas. 979.

—S. 456—House trespass—Entering widow's house for intrigue.

In the absence of a finding as to the intention of the accused charged under S. 456, I.P.C., his conviction cannot be maintained. To enter the house of widow for the purpose of carrying on an intrigue with her is no offence. 50 P.L.R. 1919.

—Ss. 456 and 509—Lurking house trespass—Evidence—Intention—Presumption.

Where a person is found lurking at night inside another's house, a perfect stranger to him, without any apparent business, the Court can infer a guilty intention under S. 441, I.P.C. In a case of this sort the Court should not overlook S. 509, I.P.C. 16 A.L.J. 157 (foot note) = 19 Cr.L.J. 243 = 44 Ind. Cas. 35.

—S. 456—Criminal intent—Onus.

The accused, a stranger, was found in complainant's house at 2 a.m. having entered it by a door duly fastened. The accused pleaded that he went there in connection with an illegal intimacy with a widow therein, the aunt of the complainant,

Held, that the accused was guilty of lurking house trespass under S. 456 and that the burden of proving an honest intention was on him as it was a matter within his knowledge. 37 All. 395 = 16 Cr.L.J. 435 = 13 A.L.J. 625 = 29 Ind. Cas. 67.

—S. 456—Lurking house trespass by night—Intention—Onus.

In a prosecution for lurking house trespass by night under S. 456, the burden of proving what his intent was lies upon the accused: 22 C. 391, foll. 1906 A.W.N. 279 = 3 A.L.J. 652 = 29 A. 46.

—S. 456—Non-production of owner.

A mere non-production of the owner or person in actual possession of house does not vitiate conviction under S. 456. 5 L.R.A. (Cr.) 127 = A.I.R. 1924 All. 764.

—Ss. 456 and 457—Conviction under S. 457—Appellate Court, if can convict under S. 456.

The accused was tried and convicted for an offence under S. 457, I.P.C., but the Appellate Court having found that the object was not to commit theft, but to insult or annoy a woman, convicted him under S. 456, I.P.C.

Held, that the conviction by the Appellate Court for an offence under S. 456, I.P.C., for which he was not tried was illegal. 1 Pat. L.T. 221 = 56 Ind. Cas. 592 = 21 Cr.L.J. 496.

—Ss. 456 and 457—Charge under S. 457—Conviction under S. 456—Practice.

No inflexible rule exists that a person charged under S. 457 can never be convicted under S. 456. No specific criminal intention need be proved for S. 456. Guilty intention as in S. 441 is enough. An accused can be convicted under S. 456 though the specific offence in S. 457 is not proved against him, under S. 238, Cr. P. Code if he is not prejudiced at the trial. 44 Cal. 358 = 20 C.W.N. 1075 = 17 Cr.L.J. 424 = 35 Ind. Cas. 984.

—Ss. 456 and 457—Lurking house trespass—Charge of theft.

Where a person is being tried on a specific charge of theft and house-breaking with intent to commit theft, a charge under S. 456 without any specified object cannot be entertained.

Although it is not essential under S. 456, I.P.C. to specify any particular offence, yet when it is specified, a conviction for house breaking with some other intent is unsustainable. 16 C.W.N. 696 = 13 Cr.L.J. 224 = 14 Ind. Cas. 320.

—S. 457.

#### Synopsis.

1. Attempt and Abetment.
2. Offence under.
3. Proof of offence.
4. Sentence.

#### 1. Attempt and Abetment.

—S. 457—Attempt.

Where the accused, with intent to commit house-breaking, tried to enter a shop but were disturbed and captured as soon as they had opened the door,

Held: that the offence committed was an attempt to commit house-breaking by night with intention to commit theft punishable under Ss. 511 and 457, Penal Code, as the offence of house-breaking cannot be committed without entry. 106 Ind. Cas. 340 = 9 A.I. Cr.R. 323 = 29 P.L.R. 54 = 29 Cr.L.J. 4.

—Ss. 457, 511, 109—House breaking by night—Attempt—Abetment.

Where a person was charged and convicted of attempting as well as abetting the same offence, the High Court set aside the conviction and sentence on one of the counts. (1906) 8 Bom. L. R. 855 = 4 Cr.L.J. 450.

#### 2. Offence under.

—Ss. 457, 380, 147—Accused breaking temples and removing idols for celebrating festival.

Where the temples were broken into and the idols were removed by the accused for celebrating a festival and the taking was not dishonest;

Held, that the conviction under Ss. 457 and 380, Penal Code, was unsustainable but the accused were guilty under S. 147 as their common object was to enforce a right by means of criminal force, and violence was used in the prosecution of the common object. A.I.R. 1941 Mad. 71 = 1940 M.W.N. 873 = 52 L.W. 347 = 42 Cr.L.J. 263 (2) = 192 Ind. Cas. 256.



—Ss. 457, 451—Accused must have taken active means to conceal his presence.

It cannot be said that the mere fact that a house-trespass was committed by night makes the offence one of lurking house trespass. In order to constitute lurking house trespass, the offender must take some active means to conceal his presence.

**Held**, on facts that the accused could not be convicted under S. 457 but only under S. 451, Penal Code. A.I.R. 1940 All. 259 = 1940 A.L.J. 77 = 41 Cr.L.J. 623 = 1940 A.W.R. 78 = I.L.R. (1940) All. 175 = 188 Ind. Cas. 542.

—Ss. 457, 451—No evidence of any precaution to conceal presence.

Where there is no evidence of any precaution taken by the accused to conceal his presence, the conviction under S. 457 cannot be supported and the verdict must be treated as one of house trespass under S. 451. A.I.R. 1940 Pat. 14 = 5 B.R. 978 = 40 Cr.L.J. 833 (2) = 20 P.L.T. 879 = 183 Ind. Cas. 660.

—Ss. 457, 460—Theft, if essential ingredient of offence under Ss. 457 and 460.

Theft frequently follows an offence under S. 457, Penal Code, but it cannot be said that it is an essential ingredient of that offence. All that is required to complete the offence under S. 457 is that the burglar or house-breaker by night should have an intention to commit theft. It matters not for the purposes of that offence whether a burglar or house-breaker by night does actually carry out his intention and commit theft. Theft or an intention to commit theft is in no way a necessary or essential ingredient in either of these offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. That being so, an offence under S. 460 is not an offence which includes theft though it may frequently form part of a transaction which also includes theft. A.I.R. 1936 All. 337 = 1936 A.W.R. 1 = 1936 A.L.J. 518 = 37 Cr.L.J. 794 = 58 All. 695 = 163 Ind. Cas. 253.

—Ss. 457, 445—Placing hand across top of fence—Climbing of the wall twice, if necessary.

The offence of house trespass will be completed by the accused putting his hand across the top of the railings in a house. The offence under S. 457, Penal Code, will therefore be technically completed by the accused trying the *pallis* on the top of the fence and in doing so, placing his hand across the top of the fence.

A person makes the movement towards the committing of the offence under S. 457 at the time when he begins to move up the wall by climbing it. Climbing twice is not necessary before the attempt to commit burglary is committed. A.I.R. 1934 All. 833 = 36 Cr.L.J. 180 = 4 A.W.R. 99 = 152 Ind. Cas. 804.

—Ss. 457 and 459—The accused committed lurking house trespass and also caused grievous hurt in a courtyard but it was not proved that the courtyard was a part of the house:

**Held**, that he could be convicted only under S. 457, Penal Code, and not under S. 459. A.I.R. 1934 Cal. 557 = 38 C.W.N. 446 = 36 Cr.L.J. 619 = 154 Ind. Cas. 981.

—S. 457—Going on to the roof of a house but not entering it.

Going on to the roof of a house is not entering a building. Where a person reached the roof of a house but jumped down from the back of the roof, he cannot be said to have entered into the building though he is certainly guilty of an attempt to commit the offence of house-breaking. A.I.R. 1933 Lah. 433 = 34 Cr.L.J. 1184 = 34 P.L.R. 906 = 146 Ind. Cas. 20 (1).

—S. 457—Adultery—Consent or connivance by the husband—No offence.

It is the duty of the Court when trying an offence under S. 457 to satisfy itself that when the accused committed the alleged house trespass with the intent of committing adultery he had not the consent or connivance of the husband. 82 Ind. Cas. 50 = 25 Cr.L.J. 1186 = A.I.R. 1925 Cal. 160.

—S. 457—Entering house by invitation or connivance of woman living in the house—No offence.

If the accused succeeds in showing that his presence in the house was in consequence of an invitation from or by the connivance of a woman living in the house with whom he was carrying on an intrigue, and that he desired that his presence there should not be known to the person in possession, he cannot be convicted of criminal trespass. 81 Ind. Cas. 239 = 25 Cr.L.J. 751 = A.I.R. 1925 Lah. 23.

—S. 457—Robbery—Hurt to complainant while accused escaped—Offences.

Where the accused committed house-breaking in the house of the complainant and abstracted from it a chembu, and when the complainant attempted to catch him and recover his property the accused, in order to the carrying away of this property, caused him hurt,

**Held**, that the accused committed offences under Ss. 457, 392 and 394. 86 Ind. Cas. 715 = 21 M.L.W. 37 = 26 Cr.L.J. 859 = A.I.R. 1925 Mad. 466.

—S. 457—Entering house by merely pushing in shutters of door which was not chained or locked—Nature of offence.

Where the accused was found inside a house at night with the intention of committing theft, but the evidence showed that the door of the house entered was neither chained nor locked, and there was no evidence that accused entered by any other passage,

**Held**: that, as entry into the house by merely pushing in the shutters of the door does not come under any of the six clauses of S. 445 of the Penal Code which defines, "house breaking" the accused's conviction under S. 457 cannot stand. The act falls under S. 451, I.P.C. 66 Ind. Cas. 422 = 6 N.L.J. 37 = 23 Cr.L.J. 278 = A.I.R. 1922 Nag. 26.

—Ss. 457, 379, and 511—Lurking house trespass—Entering thorned enclosure—Attempted offence of theft.

The accused, a previous convict, made his way into an open thorned enclosure in which goats and sheep were kept but on being found out fled away.

**Held**, that he could not be convicted of lurking house-trespass under S. 457, P.C., but only of attempt-



ed theft under Ss. 379 and 511. 13 P.R. 1919 (Cr.) = 20 Cr.L.J. 492 = 51 Ind. Cas. 476.

—Ss. 457 and 380—Lurking house trespass—Theft—Criminal Tribes Act, S. 23.

Lurking house trespass is committed when a person enters premises of the nature described in S. 442, after taking necessary precautions to conceal such house trespass in the manner mentioned in S. 443, I.P.C. A person who enters the house when the door is open and removes certain articles but before getting out of the house is caught, does not commit an offence under S. 457, I.P.C., so as to be liable to the enhanced penalty under S. 23 of Criminal Tribes Act. 16 A.L.J. 383 = 19 Cr.L.J. 609 = 45 Ind. Cas. 513.

—S. 457—House trespass by night with intent—Alleged intent of theft—Proved intent—Adultery with complainant's wife.

Where A complained that B committed house trespass by night with intent to commit theft, and the intent proved was adultery with the complainant's wife:

Held, that the conviction was proper, and that it was not necessary under the circumstances that the complainant should bring a specific charge of adultery. 23 A. 82 = 1900 A.W.N. 208.

### 3. Proof of offence.

—Ss. 457 and 380—Accused dumb and deaf found in possession of articles stolen and obtained by house-breaking—Presumption—Evidence Act, S. 114.

Where the accused who is dumb and deaf, is found in possession of articles stolen and obtained by house-breaking, it cannot be inferred that he has committed an offence of house breaking and theft. Presumption under S. 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession. This cannot be done in case of a person who is born deaf and dumb. A.I.R. 1946 Mad. 60 = 58 L.W. 574 = (1945) 2 M.L.J. 407 = 1945 M.W.N. 692 (1) = 223 Ind. Cas. 106.

—S. 457—The mere recovery of a shirt alleged to belong to one of the complainants from the person of the accused charged under S. 457, Penal Code, is not sufficient for his conviction under S. 457. A.I.R. 1938 Lah. 252 = 40 P.L.R. 58 = 39 Cr.L.J. 491 = 174 Ind. Cas. 849 (1).

—S. 457—The evidence of suspicion under S. 457, Penal Code, is evidence of a very weak nature even in a case under S. 110, Criminal P.C. 170 Ind. Cas. 482 = 1937 O.W.N. 816 = 38 Cr.L.J. 889.

—S. 457—Two brothers living in same house admitting stolen property to be in their house and not claiming it—No explanation as to how it got there—Offence, if made out.

It is wrong to say that in no circumstances can a man be convicted of being in possession of stolen property if there are inmates of the house other than himself. The law is that no person can be convicted if it is doubtful whether he or some other person had guilty knowledge that the property was in the house occupied by him and others.

Where two brothers living in the same house being charged under S. 457, Penal Code, admit that stolen property was found in their house and do not claim it to be theirs, but do not explain how it got there, and the fact that the house in which the property was found was occupied by both of them is established, they can be convicted under S. 457 especially when they were seen with another person accused of the same offence on the evening before commission of the crime. A.I.R. 1936 All. 386 = 1936 A.L.J. 511 = 1936 A.W.R. 383 = 37 Cr.L.J. 813 = 162 Ind. Cas. 964.

—S. 457—A person found in possession of stolen property a couple of hours after commission of a burglary can be rightly convicted of an offence under S. 457. A.I.R. 1933 Oudh 117 = 10 O.W.N. 47 = 34 Cr.L.J. 649 (1) = 143 Ind. Cas. 835.

—S. 457—Accused producing articles identified as belonging to the house owner—But articles incapable of identification—Accused seen carrying away bundles on the night in question—No evidence that bundles contained the stolen articles—Evidence if sufficient for conviction.

The accused was charged with an offence under I.P.C., S. 457. The only evidence against him was that he produced certain articles (clothes) which the owner of the shop in which the house-breaking was committed, identified as belonging to him. The articles were incapable of identification and were such as any cloth merchant might stock and sell. One of the P.Ws. deposed that he saw the accused early morning, shortly after the offence was committed, somewhere in the village, carrying away bundles of cloth. It was contended that this evidence coupled with the production of the articles by the accused proved his guilt.

Held, that unless it was established beyond all possible doubt that the bundles contained the goods stolen from the shop in which the offence had been committed or that the articles produced by accused were the stolen property belonging to the owner of the shop, accused could not be convicted. 92 Ind. Cas. 587 = 7 L.L.J. 277 = 26 P.L.R. 533 = 27 Cr.L.J. 299 = A.I.R. 1925 Lah. 495.

—S. 457—Tank indicated by statement of accused—Vessels recovered from the tank not within sole control of accused—Sufficiency of evidence for conviction.

Where an accused arrested on the charges under Ss. 457 and 380, makes a statement indicating a tank from which vessels, corresponding to the description of articles stolen, are recovered, but where the tank is not the particular property, or within the sole control of the accused, but accessible to the public in general and it is doubtful whether the accused or some other person concealed the stolen articles, such evidence of itself is not sufficient for a conviction: 30 M.L.W. 791 = 1929 M.W.N. 785 = 2 M.Cr.C. 307 = 1929 Cr.C. 614 = A.I.R. 1929 Mad. 846 = 57 M.L.J. 548.

—S. 457—Accused wearing gold ornaments and carrying large sum of his own money at the time of his being caught inside another's house—Accused's explanation corroborated by eye-witness—No evidence of door having been broken open or wall having been punctured—Evidence if sufficient for conviction.



The accused was caught in the house of another. He had with him at the time a large amount which belonged to him and he was wearing his ear-rings and a gold ring. He was a goldsmith by caste and calling. The story of the accused was that he went to the house to negotiate the acquisition of the widowed daughter-in-law of the proprietor of the house for a relation of his own. This story was corroborated by the statement of a man who was admittedly present at the time. He was also a goldsmith by caste. This man was not mentioned in the first information report. Although the accused was caught inside the house shortly before dawn, the house having been duly shut up the night before; it was nowhere said that any door was broken open nor any hole was made through the wall.

**Held**, that under the circumstances the accused could not be convicted under S. 457. 86 Ind. Cas. 156 = 26 Cr.L.J. 716 = 26 P.L.R. 31 = A.I.R. 1925 Lah. 459.

—S. 457—Case doubtful—Property not well identified.

Where, upon evidence it appeared that the accused was with a party of men in one village in possession of certain bundles containing property stolen from another village :

**Held**, this evidence together with that furnished by the following of tracks of party does not disclose a clear case of an offence under S. 457, I.P.C., but a doubtful one which entitles the accused to an acquittal. 18 Cr.L.J. 657 = 27 P.W.R. 1917 (Cr.) = 40 Ind. Cas. 305.

—S. 457—Criminal case—Conviction of accused —Inconclusive evidence.

On a charge under S. 457, I.P.C., the accused was convicted on the ground that some of property claimed by the complainant as his was found in the accused's house and there were a few scratches on the body of the accused. It was found that the accused was an enemy of the complainant and that some of the property was not in the list of stolen goods and some were not identified. Under the circumstances the conviction was set aside on revision as based on inconclusive evidence. 79 P.L.R. 1915.

—Ss. 457, 380 and 411—House breaking and theft charge of—No direct evidence—Surrender of stolen articles by accused without explanation—Offence, nature of.

A person was charged under Ss. 457 and 380. There was however no direct evidence to prove house breaking and theft but the accused after some days surrendered the stolen goods. He is guilty of an offence under S. 411 and not under Ss. 457 and 380. 17 Cr.L.J. 179 = 33 Ind. Cas. 819 (Mad.).

#### 4. Sentence

—Ss. 457 and 380—Passing of separate sentences.

It is quite possible to commit the offence of lurking house-trespass without stealing anything at all just as it is possible to commit theft in a building without committing lurking house-trespass. The offences are, therefore, quite distinct and hence separate sentences can be passed for each offence. A.I.R. 1945 Mad. 330 = 47 Cr.L.J. 157 = 1945 M.W.N. 103 (1) = (1945) 1 M.L.J. 179 = 53 L.W. 75 (1) = I.L.R. (1945) Mad. 396 = 221 Ind. Cas. 304.

12—F. Y. D. 35.

—Ss. 457, 380, 71—Accused breaking house at night and committing theft—If can be convicted both under Ss. 457 and 380—Criminal P.C., 1898, S. 235 (1).

The offence of lurking house-trespass or house-breaking is committed whether the subsequent offence is committed or not. Section 457, I.P.C., looks merely to the object with which the house trespass or house-breaking is committed; it does not take into consideration the offence, if any, committed thereafter. There is no reason, therefore, why S. 457 should be considered a bar to a conviction for the offence committed after the house trespass or house-breaking. No doubt the offence of theft under S. 380, I.P.C., cannot be committed except by a person who has entered into a building, tent or vessel, but it is by no means necessary that the entry should have been effected by trespass or house-breaking. The offence of theft under S. 380 may be committed by a person in his own house. There is, therefore, no connection between S. 457 and S. 380. The offence of theft is no part of an offence under S. 457, and hence where an accused, after breaking the house at night, commits theft therein, he can be convicted under S. 457 and also under S. 380 and S. 71 has no application to such a case. Section 235 (1), Criminal P.C., authorises such convictions. A.I.R. 1942 Oudh 214 = 1941 O.W.N. 1365 = 43 Cr.L.J. 252 = 1942 A.W.R. 5 = 17 Luck. 513 = 197 Ind. Cas. 710.

—Ss. 457 and 380—Consecutive sentences.

Separate consecutive sentences under Ss. 457 and 380 cannot be passed. 123 Ind. Cas. 393 = 31 Cr.L.J. 492 = 1930 Cr.C. 767 = A.I.R. 1930 Pat. 335.

—Ss. 457 and 380—Separate sentences.

Separate sentences cannot be passed under S. 457 and S. 380 of the Indian Penal Code for house-breaking followed immediately by theft: 2 W.R. (Cr.) 63; 8 W.R. (Cr.) 31; 6 W.R. (Cr.) 49; 6 W.R. (Cr.) 92 and 5 W.R. (Cr.) 49, Foll. 96 Ind. Cas. 528 = 5 Pat. 464 = 27 Cr.L.J. 976 = 7 P.L.T. 794 = 7 A.I.Cr.R. 3 = A.I.R. 1926 Pat. 367.

—Ss. 457, 401—Generally concurrent sentences should be given though consecutive sentences are legal. A.I.R. 1932 Lah. 298 = 33 Cr.L.J. 251 = 33 P.L.R. 602 = 136 Ind. Cas. 27.

—S. 457—Burglary—Sentence.

Burglary is a serious crime and whenever it is detected, the person concerned must be given a deterrent punishment. A.I.R. 1932 Lah. 258 = 33 P.L.R. 215 = 33 Cr.L.J. 500 = 137 Ind. Cas. 716.

—S. 457—Sentence.

When a policeman whose duty it was to protect the lives and property of the subjects of the Crown was convicted of a serious offence of burglary, sentence of five years' rigorous imprisonment was held not excessive. 125 Ind. Cas. 639 = A.I.R. 1930 Lah. 667.

—S. 457—The offence of house-breaking by night in order to commit theft, under Cl. 2, S. 457, I.P.C., is punishable with imprisonment for a term of 14 years and therefore S. 562, Cr.P.C., is not applicable to this offence in the case of an adult. 103 Ind. Cas. 839 = 6 Bur. L.J. 83 = 8 A.I.Cr.R. 568 = 28 Cr.L.J. 759 = A.I.R. 1927 Rang. 254.



—S. 458—Applicability—House-breaker—Companions.

Section 458 only applies to the house-breaker who actually has himself made preparation for causing hurt to any person or for assaulting any person or for wrongfully restraining any person and so on, and not to his companions as well who themselves have not made such preparation. 77 Ind. Cas. 446 = 4 Lah. 399 = 25 Cr.L.J. 398 = A.I.R. 1923 Lah. 509.

—S. 459—Accused committed lurking house trespass and also caused grievous hurt in a courtyard but it was not proved that the courtyard was a part of the house :

Held, that the accused could not be convicted under S. 459. A.I.R. 1934 Cal. 557 = 38 C.W.N. 446 = 36 Cr.L.J. 619 = 154 Ind. Cas. 981.

—S. 459—Burglary—Accused armed with lathis.

Where a party of men armed with lathis go and commit burglary and actually use the lathis in trying to escape, the provisions of S. 459 are applicable as there was intention to commit burglary with arms even though they did not intend to use weapons unless there was occasion to do so. 117 Ind. Cas. 802 = 11 L.L.J. 230 = 30 P.L.R. 125 = 30 Cr.L.J. 838.

—S. 459—Causing grievous hurt after entry is complete—Nature of offence.

The offence of house-breaking is complete when entry into the house is effected and any grievous hurt subsequently caused by the persons breaking into a house cannot be said to be grievous hurt caused while they were committing the house-breaking. 102 I.A. Cas. 450 = 49 All. 864 = 25 A.L.J. 515 = 8 L.R.A.(Cr.) 108 = 28 Cr.L.J. 554 = 8 A.I.Cr.R. 105 = A.I.R. 1927 All. 536.

—S. 460—Scope and applicability.

S. 460, I.P.C., applies to those persons who have actually committed lurking house-trespass at night and not to those who may have accompanied their associates but did not commit the offence. It applies to the actual doers and not to others. The act of causing death or grievous hurt by any one of the intruders would certainly make others, who did not themselves cause the death or the grievous hurt, equally liable. 48 P.L.R. 425 = 228 Ind. Cas. 623 = 48 Cr.L.J. 269 = A.I.R. 1947 Lah. 188.

—S. 460—Scope.

Section 460 does not provide for an offence but merely lays down a principle of constructive liability. A.I.R. 1940 Lah. 281 = 42 P.L.R. 229 = 41 Cr.L.J. 779 = 189 Ind. Cas. 672.

—Ss. 460 and 302—Person causing death at time of committing lurking house-trespass by night :

Held, that he could not escape being tried under S. 302 or S. 304. A.I.R. 1940 Lah. 281 = 42 P.L.R. 229 = 41 Cr.L.J. 779 = 189 Ind. Cas. 672.

—S. 460—An offence under S. 460 is not an offence which includes theft though it may frequently form part of a transaction which also includes theft. A.I.R. 1936 All. 337 = 1936 A.W.R. 1 = 1936 A.L.J. 518 = 37 Cr.L.J. 794 = 58 A. 695 = 163 Ind. Cas. 253.

—S. 460—While abducting a woman for which purpose a number of persons armed with *chhavis* and *dangs* entered a house at night, some of them attacked

an inmate of the house with *lathis*. He died and grievous hurt was caused to another :

Held, that the offence committed was one under S. 460 and required maximum punishment of transportation for life. A.I.R. 1936 Lah. 911 = 38 Cr.L.J. 30 = 38 P.L.R. 1150 = 165 Ind. Cas. 874.

—S. 460—"At the time of committing of house-breaking by night"—Meaning.

The expression "at the time of the committing of house-breaking by night" must be limited to the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time. 2 P.R. (Cr.) 1882, Foll.

A party of four people were running away being discovered while breaking into a house by night. The accused was caught while so running and some one of his party inflicted injury on the person arresting the accused, causing his death.

Held, that the accused cannot be convicted under S. 460. 65 Ind. Cas. 628 = 2 Lah. 342 = A.I.R. 1921 Lah. 94.

—S. 460 and Ss. 326, 457 and 458—Armed burglar.

An armed person breaking into a house to commit theft and stabbing his pursuers to death, is not guilty under S. 460 but under Ss. 326, 457 and 458. 27 P.R. 1916 (Cr.) = 18 Cr.L.J. 350 = 38 Ind. Cas. 734.

—Ss. 460, 366 and 149—Conviction under—Very long term of sentence—No harm done to girl.

The accused were convicted under Ss. 260 and 366 read with S. 149, I.P.C. and sentenced to various very long terms of imprisonment, except for the grievous injury to one of the inmates of the house, no great harm was done and the girl was rescued :

Held, that the case did not call for very heavy sentences and that they should be reduced. A.I.R. 1936 Lah. 15 = 37 Cr.L.J. 430 = 38 P.L.R. 323 = 161 Ind. Cas. 313.

—S. 463.

See also S. 465.

Synopsis.

1. Offence under.
2. Proof of offence.
3. Miscellaneous.

1. Offence under.—See also S. 464.

- (a) Essentials of.
- (b) What amounts to.
- (c) What does not amount to.

(a) Offence under—Essentials of.

—S. 463—'Person'—Idol.

An idol being a judicial person and, therefore, a "person" within the definition under Code, the signature of an idol constitutes the offence of forgery. A.I.R. 1944 Mad. 77 = 56 L.W. 645 = (1943) 2 M.L.J. 445 = 1943 M.W.N. 712 (1) = I.L.R. (1944) Mad. 685 = 211 Ind. Cas. 528.



**—S. 463—Essentials.**

Intent to cause injury is not an essential ingredient —“Dishonestly or fraudulently” are not tautological —“Fraudulently” does not imply deprivation of property or an element of injury. A.I.R. 1944 Lah. 380 = 46 P.L.R. 255 = 46 Cr.L.J. 341 = 217 Ind. Cas. 387.

**—Ss. 463 and 464—For supporting false defence, document fabricated by putting false date and spurious postmarks on envelope.**

The proper administration of justice is so vital to the ordered existence of a civilized community that an intent to defraud justice is something very closely, very nearly affecting the public and the complainant. Hence, if the accused, in order to make good a false defence and to cause justice to miscarry, fabricates a document, by putting false dates and spurious postmarks on an envelope, he does it with one of the intents referred to in S. 463, I.P.C. A.I.R. 1943 Sind 46 = 43 Cr.L.J. 905 = 202 Ind. Cas. 773.

**—Ss. 464 and 477—Alteration in document—Erasure of thumb impression.**

A thumb impression in account books means a signature to the receipt for money or acknowledgment of liability. The erasure of the thumb impression in account books, therefore, constitutes total destruction of the receipt or of the acknowledgment and not a mere alteration in the document. The offence does not fall under S. 463 or S. 464 but under S. 477 and a complaint by the Court (because the erasure was made while the account books were in the Court) was incompetent. 1936 M.W.N. 489 (2).

**—Ss. 463, 464 and 465—School teacher required by Board to keep diary of work regularly—Alteration to disguise fact that it had not been kept on certain dates—Teacher, held guilty under S. 465. A.I.R. 1936 Rang. 380 = 164 Ind. Cas. 1088 = 37 Cr.L.J. 1059.****—S. 463—Forged document—Maker of part of document—Presence of maker at completion—Whether necessary.**

Under S. 463, I.P.C., not only the maker of a forged document but the maker of a part of such document is declared to be guilty of forgery if he has made such document or any part of it with the requisite intent. It is, therefore, immaterial if the person who makes a part of the forged document was present or not at the time when the forged document was completed. A.I.R. 1933 Sind 37 = 26 S.L.R. 105 = 34 Cr.L.J. 305 (2) = 142 Ind. Cas. 74.

**—Ss. 463 and 465—Offence under—Ingredient.**

In order to constitute the offence of forgery it is not necessary that the wrongful gain or loss should be actually caused. It is sufficient that there should be the intention of causing it where certain so-sharers applied for entry in the revenue papers so as to include certain additional names therein and it appeared that the signatures of certain parties were put as though it was authorised, held that the accused were liable to be convicted under S. 471, though not under S. 466, I.P.C. 1930 A.L.J. 1451 = 1931 Cr.C. 418 = 32 Cr.L.J. 559 = 130 Ind. Cas. 492 = A.I.R. 1931 A. 258.

**—S. 463—“Making of part of document”—Proof of falsity.**

The “making of a part of a document” must be the making of a part of a false document and in the making of a part of a document not only the intention or purpose must be proved but the fact that the document was false must also be proved. 115 Ind. Cas. 135 = 1929 A.L.J. 592 = 10 L.R.A. (Cr.) 86 = 12 A.I.Cr.R. 14 = 30 Cr.L.J. 408 = 1929 Cr.C. 6 = A.I.R. 1929 All. 396.

**—S. 463—“Claim”.**

The term “claim” is not limited in its application to a claim to property only: 15 All. 210 and 25 Cal. 512, Foll. 118 Ind. Cas. 385 = 10 Lah. 545 = 30 Cr.L.J. 900 = 30 P.L.R. 724 = A.I.R. 1929 Lah. 152.

**—S. 463—Creation of false document for supporting even true or genuine title.**

In order to constitute forgery the document need not be intended to support a false claim or a false title. If, in order to support a true claim or a genuine title, a false document is created, it is a forgery. Whether a document is a false document or not, does not depend upon the adjudication of the Court on the claim or title which is intended to be propped up by the false document. 96 Ind. Cas. 850 = 7 A.I.Cr.R. 58 = 27 Cr.L.J. 994 = A.I.R. 1926 Mad. 1072.

**—S. 463—“Claim or title”.**

A conviction under S. 465 would stand though the fabricated document was intended to confirm an already existing title only, and not to create a new one. 6 M.L.T. 266 = 10 Cr.L.J. 367 = 3 Ind. Cas. 736.

**—S. 463—Essentials of offence under—Intent to commit fraud—Process-server forging names to save himself of trouble or from consequences of neglect of duty.**

An intent to commit fraud involves an intent to cause injury. It involves something more than mere deceiving.

Where a process-server, with a view to save himself trouble or possibly to hide the fact that he had neglected his duty, forges the names of certain persons on whom he was to serve notices, such an act does not show an intent to commit fraud. A.I.R. 1935 Rang. 203 = 36 Cr.L.J. 1025 = 156 Ind. Cas. 888.

**—Ss. 463 and 464—Forgery—Essentials of.**

In order to constitute the offence of forgery under Ss. 463 and 464, the document must be made dishonestly or fraudulently. In order to be fraudulent, there must be some advantage on the one side with a corresponding loss on the other. Each case has to be decided on its own facts. A.I.R. 1932 Bom. 545 = 34 Bom. L.R. 1090 = 56 B. 488 = 34 Cr.L.J. 357 = 142 Ind. Cas. 386 (2).

**—S. 463—“Intent to defraud”—Proof of possibility of actual deceit and injury.**

In order to constitute in point of law an intent to defraud, there must be a possibility of some person being defrauded by the forgery, or there must be a possibility of some person being not only deceived but injured by the forgery. 11 Bom. H.C.R. 3, Foll. A.I.R. 1930 Pat. 271 = 126 Ind. Cas. 862.



—S. 463—Necessary elements.

The elements which have to be proved in a case of forgery are (i) that the document is not executed on a date on which it is shown to have been written and (ii) that the parties who executed it do so with fraudulent intent. 109 Ind. Cas. 679 = 6 Rang. 49 = 29 Cr.L.J. 599 = A.I.R. 1928 Rang. 117.

—S. 463—Using false document.

If a man intends to gain an unfair advantage by deceitful means and uses a false document for that purpose, his conduct is fraudulent. 96 Ind. Cas. 850 = 7 A.I.Cr.R. 58 = 27 Cr.L.J. 994 = A.I.R. 1926 Mad. 1072.

—S. 463—"Defrauding"—Meaning.

The expression "intent to defraud" as it occurs in S. 463, Indian Penal Code, implies conduct coupled with intention to deceive and thereby to injure; in other words "defraud" involves two conceptions, namely, deceit and injury to the person deceived, that is infringement of some legal right possessed by him but not necessarily deprivation of property: 38 Cal. 75, Foll. 90 Ind. Cas. 534 = 42 C.L.J. 215 = 26 Cr.L.J. 1574 = A.I.R. 1926 Cal. 224.

—S. 463—Absence of intention to cause it to be believed that the document was signed by another person—No forgery.

Per Mukerji, J.—If a person gives a note or other security as his own note or security, and the credit thereupon be personal to himself without any relation to another, his signing such a fictitious name may indeed be a cheating but will not amount to forgery, for in that case it is really the instrument of the party whose act it purports to be and the creditor has no other security in view. But that if a note be given in the name of another person either really existing or represented so to be and in that light it obtains a superior credit or induces a trust which will not be given to the party himself, it is then a false instrument and punishable as forgery. We have to judge of the intention at the time when the document was made and it is upon that intention that the criminality of the act has to be judged.

Where in making out the cheque the accused intended to pass it off as a genuine cheque drawn by himself in his own favour.

Held, that there was no forgery. 84 Ind. Cas. 1041 = 40 C.L.J. 256 = 52 Cal. 347 = 29 C.W.N. 447 = 28 Cr.L.J. 401 = A.I.R. 1925 Cal. 14.

—Ss. 463 and 467—Forgery—Fraud.

The concealment of an already practised fraud is a fraud. 37 Bom. 666 = 15 Bom. L.R. 708 = 14 Cr.L.J. 518 = 20 Ind. Cas. 998.

—Ss. 463, 471 and 477-A—Accounts, tampering with, to remove evidence of misappropriation—Altered accounts showing true extent of liability—Intent to defraud.

Where in order to remove evidence of misappropriation of a sum of Rs. 10, the amount was shown in the accounts as having been received on a date on which it could not have been received.

Held, that the entry, though false did not conceal liability but rather showed in regard to such liability the true position of affairs; and so "intent to de-

fraud" in its true significance was not made out; and there could be no conviction under Ss. 465, 471 or 477-A. (1909) 14 C.W.N. 82 = 36 C. 955 = 10 Cr.L.J. 581 = 4 Ind. Cas. 416.

—Ss. 463 and 464—Forgery.

Whenever the word 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime, namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. Under S. 463 the making of a false document with any of the intents therein mentioned is forgery, and S. 464 sets forth when a person is said to make a false document within the meaning of the Code. Therefore if a person fabricates documents with the view of assisting another to bring a suit on which he has been engaged to a successful issue and intending to deceive the police officer or officers to whom they are directed into acting in them as genuine documents, he is guilty of forgery: 15A. 210; 25 C. 512 and 28 M. 90 Foll. (1906) A.W.N. 48 = 3 A.L.J. 149 = 23 A. 358.

—Ss. 463 and 464—Forgery—Essentials—Intent to defraud—Fraudulently—Claim—Spurious signature in a certificate with a view to get exempted from producing the attendance certificate as preliminary to admission as candidate for examination.

The accused applied for admission as an examinee to the Matriculation Examination of the Madras University. Not having kept terms in any recognized school, he sent a certificate along with the application purporting to have been signed by the headmaster of a recognized school that he was of a good character and had attained his twentieth year. The certificate was spurious. The bye-law of the University requiring the certificate ran as follows:—"Provided that a candidate who produces a certificate from the headmaster of a recognised high school that he is of good character and has completed his twentieth year shall be exempted from the production of the attendance certificate." The University did not admit him to the examination, but confiscated the fee paid by the accused.

Held, by the majority (Subramonia Aiyar and Davies, J.J., dissentiente) that the accused was guilty of forgery. Per Chief Justice:—"The offence is complete if a document, false in fact, is made with intent to commit a fraud although it may not have been made with one of the other intents specified in S. 463. An intended deprivation of property is not an essential element of an intention to defraud. A claim to be admitted to a University examination is a claim within the meaning of S. 463. The word 'claim' need not be limited to a claim with reference to property or to a claim enforceable at law. If the accused fabricated the certificate with the intention that the University should take action on it, it must be taken that he did so 'with the intention of causing loss or detriment to the University.' (Per Subramonia Aiyar, J.):—"The meaning of the phrase 'with intent to defraud' is with intent to deceive in such a manner as to expose any person to loss or risk of loss". Per Davies, J.—The University did not suffer any loss. A person to be defrauded must suffer some harm or damage or



injury. Per *Benson, J.*:—The act was fraudulent both by reason of the advantage the accused intended to secure, but also by reason of the injury to the University and through it to the public from such acts if unrepressed. (1905) 28 M. 90 (F.B.). See 25 M. 726 = 12 M.L.J. 68.

1. (b) Offence under—What amounts to.

—Ss. 463 and 465—Accused altering date of *bahi* with intention to convert illegal claim into legal one—Offence—Sentence.

Where the accused realised that his claim was very likely to be an unenforceable one unless he altered the date of the *bahi*, and his intention in fact was to convert an illegal or doubtful claim into an apparently legal one and altered the dates in the *bahi*:

**Held**, his action must be held to be dishonest and he was liable to conviction for forgery.

**Held**, also that as accused had a good claim except for the technical bar of limitation, the Court should not view his action with the same severity as if he had attempted to make out a claim for which there was no basis at all and sentence of imprisonment might be remitted and fine imposed. A.I.R. 1937 Nag. 89 = I.L.R. (1937) Nag. 45 = 38 Cr.L.J. 233 = 166 Ind. Cas. 310.

—Ss. 463, 465 and 193—Fabrication of electoral roll is an offence under Ss. 193 and 465. A.I.R. 1934 Cal. 838 = 39 C.W.N. 20 = 62 C. 275 = 36 Cr.L.J. 385 = 153 Ind. Cas. 657.

—Ss. 463 and 465—Object of screening oneself—Main object to screen oneself from punishment—Incidental probability of gain—If offence.

Where an accused person manipulates entries in certain registers with the main object of screening himself from punishment for a past offence, he will yet be liable if he stands to gain by his act, as for example, if as a result of such entries he will be continued in service while as a fact he is not fit to be continued. 92 Ind. Cas. 433 = 18 S.L.R. 199 = 27 Cr.L.J. 257 = A.I.R. 1925 Sind 233.

—Ss. 463 and 465—Forged certificate.

A false statement in an application for a post and a forged certificate amount to offences under S. 465. 76 Ind. Cas. 225 = 25 Cr.L.J. 129 = 4 U.B.R. 174 = A.I.R. 1925 Rang. 9.

—Ss. 463 and 465—Accused using forged receipt for debt due from him but written off as bad debt—Object to obtain certificate of solvency—Offence.

Where accused who was an insolvent, desiring to obtain a certificate from the receiver that he was solvent, in order to be able to tender for Municipal contracts, produced before the Receiver a forged receipt for a debt which the creditor had written off as bad debt.

**Held**, that he was rightly convicted under S. 465 read with S. 471. 59 Ind. Cas. 200 = 43 All. 225 = 22 Cr.L.J. 56 = A.I.R. 1924 All. 356.

—Ss. 463, 465 and 471—Forgery—Dishonest intention—Forging receipt for getting appointment.

An insolvent who applied for some contract work was asked to produce an order that he was solvent.

To obtain a certificate of solvency he produced before the Official Receiver a forged receipt showing that he had paid up a certain debt which the creditor had written off as a barred debt.

**Held**, the intention of the accused was by means of deceit to obtain a wrongful gain to himself so that he had acted dishonestly and was guilty under Ss. 465 and 571. 18 A.L.J. 1137 = 59 Ind. Cas. 200 = 43 A. 225 = 22 Cr.L.J. 56.

—Ss. 463 and 465—Signing certificate of purchase of arms and ammunition in false names and giving wrong address.

Accused, an European who was entitled to possess arms, signed a prescribed certificate of purchase of arms in the name of another with an address not his own, thereby deceiving the gunsmith and the Government. **Held**, that he committed forgery, his act having been done fraudulently if not dishonestly. 43 Cal. 421 = 20 C.W.N. 326 = 17 Cr. L.J. 69 = 32 Ind. Cas. 661.

1. (c) Offence under—What does not amount to.

—Ss. 463 and 465—Clerk of the Court making false entry in diary of Court only to screen his own negligence as clerk—No other intention—He, by his act, not facilitating any misappropriation or embezzlement nor did intend to cause injury to any other person:

**Held**, that the clerk could not be convicted either under S. 477-A or under S. 465, I.P.C. A.I.R. 1939 Rang. 156 = 40 Cr.L.J. 552 = 181 Ind. Cas. 439.

—S. 463—No fraudulent act—Plaint forged in order to save case being barred by limitation.

The mere fact that the person forged signature of another person, in a plaint, to enable him to file the plaint in time to save case being barred by limitation will not make the act of the person fraudulent. A.I.R. 1930 Pat. 271 = 126 Ind. Cas. 862.

—S. 463—Forgery, what is—Entry of excess payment in muster-roll.

An entry of excess payment in a muster-roll would not make the muster-roll a forged document. 115 Ind. Cas. 135 = 1929 A.L.J. 592 = 10 L.R.A. Cr. 86 = 12 A.I.Cr.R. 14 = 30 Cr.L.J. 408 = 1929 Cr.C. 6 = A.I.R. 1929 All. 396.

—S. 463—False certificate.

A false certificate of not very great importance is not a forgery as it is not made an affidavit. 115 Ind. Cas. 135 = 1929 A.L.J. 592 = 10 L.R.A. Cr. 86 = 12 A. I. Cr. R. 14 = 30 Cr.L.J. 408 = 1929 Cr.C. 6 = A.I.R. 1929 All. 396.

—S. 463—Antedating document.

Merely antedating a document is not forgery unless there is dishonesty or fraud on the part of the alleged forger. 98 Ind. Cas. 111 = 8 P.L.T. 104 = 27 Cr. L.J. 1263 = A.I.R. 1927 Pat. 87.

—S. 464—Account books—Account books not kept in ordinary course of business—If necessarily forged.

It is one thing to hold that because an account book does not appear to have been kept in the regular



course of business and does not contain entries that it ought to have contained, it cannot be acted upon in order to convict a person whose name appears therein as having received money, and it is quite a different thing to hold as a positive fact that that account book is forged: and in absence of any other evidence no prosecution should be allowed to be launched on the basis that it was forged. 98 Ind. Cas. 56 = 27 Cr.L.J. 1240 = A.I.R. 1927 Pat. 47.

**—S. 463—Fabrication of false evidence—Intent to weaken criminal case against accused—Nature of offence.**

Where the intention in of the accused is to discredit the evidence of witnesses that might be produced against him by the complainant in a criminal case, the offence committed by him would be one of attempting to fabricate false evidence and not forgery. 86 Ind. Cas. 671 = 7 L.L.J. 118 = 26 Cr.L.J. 847 = 26 P.L.R. 95 = A.I.R. 1925 Lab. 327.

**—Ss. 463 and 471—Forgery—Making—Copy of a forged document.**

Where a maker of a copy of a forged document has authority to make the copy, a false copy is a false document; but where the maker of the copy holds no office reasonably capable of being construed as giving him such authority, then he does not commit the offence by making the false copy. 4 Pat. L.J. 16 = 20 Cr.L.J. 142 = 49 Ind. Cas. 174.

**—Ss. 463 and 465—Forgery—Antedating a will.**

Mere antedating a will does not amount to forgery in the absence of other circumstances. 3 O.L.J. 477 = 17 Cr.L.J. 540 = 36 Ind. Cas. 588.

**—S. 465—Signing a telegram in another's name.**

Mere signing of a telegram in another's name without any intention to cause injury to him and actually causing to injury, will not amount to forgery though the signature was without authority. 16 Cr.L.J. 76 = 26 Ind. Cas. 668 (Cal).

**—Ss. 463, 465 and 477-A—Receiving V.P.P. money—False entry in register that the parcel was refused.**

Where the accused received the proceeds of a V.P.P. and kept it himself instead of immediately remitting it to the vendor of the article and made a false entry in the register of V.P.P. articles to the effect that the parcel in question had been refused by the addressee and returned to the vendor.

Held, that the facts constituted an offence under S. 447 and not one under S. 465. The fact that the accused subsequently remitted the money does not make any difference. 11 Cr.L.J. 185 = U.B.R. (1907-1909) Penal Code, p. 29 = 4 Ind. Cas. 1089.

**—Ss. 463, 465, 471 and 477-A—Altering accounts to show receipt of sums misappropriated.**

For an offence under any of the Ss. 465, 471 and 477 there must be an intention to commit fraud.

Where the accused altered certain accounts for the purpose of showing the receipt of a certain amount which has been criminally misappropriated, he is not

guilty under Ss. 465, 471 and 477-A, for the real purpose is not to defraud but to remove evidences of crime. 36 Cal. 955 = 14 C.W.N. 82 = 10 Cr.L.J. 581 = 4 Ind. Cas. 416.

**—Ss. 463 and 471—Forgery and using a forged document.**

Where the accused, a tahsildar of an estate, prepared a false receipt acknowledging on the part of his employer the receipt of certain papers and it was proved that some of those papers were in the office of the estate but as to the rest the prosecution failed to prove that they were not also in the office of the estate.

Held, that the accused could not be convicted of an offence under S. 471, as the prosecution had failed to prove any dishonest or fraudulent intention on the part of the accused in making use of the receipt. The preparation of a false receipt acknowledging on the part of a certain person the receipt of certain documents, after having made over those documents to that person, does not amount to an offence under S. 463, nor does the use of such a receipt constitute an offence under S. 471. (1908) 8 C.L.J. 317 = 12 C.W.N. 1113.

**—S. 463—Falsification of accounts to conceal criminal misappropriation—Cr.P.C., S. 342.**

Where a person misappropriates a sum of money and to screen the misappropriation falsifies the account, the offence will not constitute a forgery for want of the intent described in S. 463, but becomes part and parcel of the offence of misappropriation and the whole transaction must be considered practically as one offence consisting of criminal misappropriation. (1904) 6 Bom. L.R. 94.

**2. Proof of offence.**

**—Ss. 463, 464, 467 and 471—Forgery—Proof of—Onus on prosecution.**

To establish forgery the prosecution must prove not only that the document is a false document under S. 464, I.P.C., but that it was forged by the accused with one of the intents mentioned in the S. 463. (1918) P.H.C.C. 36 = 19 Cr.L.J. 344 = 44 Ind. Cas. 456.

**—S. 463—'Forgery'—'Intent to cause damage, etc.'—'Possible intent'—Duty of prosecution to prove intent.**

It is not enough for a conviction under Ss. 463 and 467 if a possible intent to cause damage or injury or to support any claim or title could be inferred from the facts. The prosecution must give some evidence from which such intent and dishonesty can be legitimately inferred. (1902) 6 C.W.N. 382.

**—Ss. 463 and 465—Offence under—If made out. See Penal Code, Ss. 23, 25, 29 and 465. 1949 A.L.J. 183 = A.I.R. 1949 A. 353.**

**—S. 463—Forgery—Complainant need not be confined to witnesses stated in complaint.**

A complainant who alleges forgery in respect of a document by antedating it is not obliged to confine himself to the evidence of the witnesses named in the petition of complaint. A.I.R. 1936 Pat. 531 = 3 B.R. 54 = 38 Cr.L.J. 72 = 165 Ind. Cas. 564.



—S. 463—Forged writing—Imitation closely copied from forged writing—Whether proper standard for comparison—Proof of fraud—Evidence required.

It is not conceivable that a suspected forger would deliberately imitate the forged writing and create evidence against himself. Consequently, such writing does not afford a proper standard for comparison.

Proof of fraud by positive and express evidence cannot be expected in the large majority of cases and in such cases, circumstantial evidence is the only means available. But such evidence must not fall short of proof and no conviction can rest on mere suspicion and conjecture, however strong these may be.

[Caution to be observed in relying on identification evidence pointed out.] A.I.R. 1933 Lah. 308 = 34 Cr. L.J. 714 = 34 P.L.R. 694 = 144 Ind. Cas. 301.

—S. 465—Non-resemblance of writing.

Conviction for forgery cannot be based on non-resemblance of handwriting. 82 Ind. Cas. 145 = 28 C.W.N. 947 = 40 C.L.J. 135 = 25 Cr.L.J. 1217 = A.I.R. 1924 Cal. 960.

—Ss. 463 and 465—Facts to be considered—Test—Characteristic peculiarities of individuals—Mere comparison of writing—If enough.

Per Das, J.—It is dangerous to come to any conclusion as to forgery on a mere comparison of handwriting.

One of the most useful tests in construing a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all. The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formulation of an idea or in the mode of spelling particular words. 65 Ind. Cas. 882 = 3 Pat. L.T. 653 = A.I.R. 1922 Pat. 619 (F.B.).

—Ss. 465 and 467—Forgery—Similarity of handwriting.

A conviction for forgery cannot be based on the mere similarity of the handwriting of the accused without other evidence of complicity. 20 Cr.L.J. 534 = 51 Ind. Cas. 774 (Pat.).

—Ss. 463, 465 and 471—Forged document—Handwriting of the accused—Evidence—Initials of the accused at the bottom.

Where the body of the document forged is entirely in the handwriting of a person, it is evident that he forged it.

The initials of one of the accused at the bottom of a forged document, are not enough to prove forgery against him. (1914) M.W.N. 363 = 15 Cr.L.J. 417 = 24 Ind. Cas. 153.

—S. 463—Expert evidence—No corroboration—Legality of conviction.

Conviction under S. 465 based only upon the uncorroborated statement of a finger print expert is bad,

especially when he has not been called as a witness and cross examined by the accused. 77 Ind. Cas. 423 = 4 Lah. 246 = 25 Cr.L.J. 375 = A.I.R. 1923 Lah. 622.

—Ss. 465 and 467—Forgery of cheque—Expert evidence as to handwriting.

To base a conviction upon the opinion of an expert in handwriting is, as a general rule, very unsafe. When it is sought to convict a clerk employed in an office of forgery upon the supposed similarity between his handwriting and that of some fragmentary pieces of writing upon which the charge is based, the prosecution should make an attempt to show that the accused is the only man in the office who could have written the forged document. (1904) 2 A.L.J. 444.

—Ss. 463 and 465—Admission and confession—Admission in civil suit about genuineness of document—If confession of forgery.

Admission is usually applied to a civil transaction, and to those matters in criminal cases which do not involve a criminal intent, while the term confession is usually used in criminal Court as denoting an acknowledgment of guilt. Admission in a civil suit that a document is genuine cannot in the forgery case be regarded as confession at all. 1929 Cr.C. 194 = A.I.R. 1929 Cal. 539.

—Ss. 463 and 470—Intention—How far a matter of inference.

The intention necessary for offences under Ss. 463 and 470 cannot be merely inferred from the consequences that should be anticipated from the action of the accused. (1902) 4 Bom. L.R. 440.

### 3. Miscellaneous.

—S. 463—'Forgery'.

The word "forgery" is used as a general term in S. 463, I.P.C., and that section is referred to in a comprehensive sense in S. 195 of the Cr.P.C. 12 Bom. 36, Foll. 96 Ind. Cas. 521 = 1 Luck. 523 = 7 A.I.Cr.R. 45 = 3 O.W.N. 614 = 27 Cr.L.J. 969 = A.I.R. 1926 Oudh 485.

—S. 463—Reference in S. 195 (1) (c), Cr.P.C.

S. 463, I.P.C. is used in S. 195 (1) (c) in a comprehensive sense so as to embrace all species of forgery and thus includes a case falling under S. 467. 85 Ind. Cas. 377 = 5 Lah. 550 = 26 Cr.L.J. 537 = A.I.R. 1925 Lah. 266.

—S. 464. See also Note under S. 463.

—S. 464—Interpretation—'Makes'.

The word "makes" means, creates or brings into existence.

A writing may purport to be a will although it turns out to be technically defective (41 Mad. 589, Rel. on), and therefore such a will, though incomplete and ineffective, cannot be said to have been not "made" within the meaning of S. 464. 111 Ind. Cas. 435 = 10 Lah. 265 = 11 A.I.Cr.R. 171 = 31 P.L.R. 41 = 29 Cr. L.J. 851 = A.I.R. 1928 Lah. 681.

—S. 464—Antedating.

Mere antedating of the document would not necessarily make it a false document unless it operates or



could operate to prejudice anyone. 98 Ind. Cas. 252 = 5 Pat. 573 = 8 P.L.T. 133 = 27 Cr.L.J. 1308 = A.I.R. 1926 Pat. 535.

—S. 464—False documents, what are—Kabuliats.

Kabuliats of a past period prepared subsequently by usufructuary mortgagee to defraud mortgagor as to the amount paid by mortgagor's tenant are forged documents. 88 Ind. Cas. 283 = 26 Cr.L.J. 1115 = A.I.R. 1925 Nag. 337.

—S. 464—Kabin-nama.

Where a Muhammadan with the intention of making a claim to a woman's property, alleged marriage with her and executed a false *kabin-nama* in her favour to support his claim.

Held: that the document was not a false document within S. 464. 69 Ind. Cas. 451 = A.I.R. 1924 Cal. 536 = 23 Cr.L.J. 723.

—S. 464—Making an entry not imposing a liability—No forgery.

Every false or fabricated document is not a forged document. There must be acts that constitute the document a false or fabricated one, that is to say, the case must fall within the definition of making a false document in S. 464, I.P.C., and such false document must also possess the character or tendency described in S. 463. An entry to the credit side which amounts to merely an assertion to the effect that, if the debt is not paid as agreed upon, he will take 1½ times the amount does not operate to impose any liability to pay interest upon the debtors and therefore would not have the tendency referred to in S. 463, I.P.C., i.e., it would not cause damage or injury to the debtors, because it does not purport to be any agreement by them to pay interest. 77 Ind. Cas. 225 = 3 Lah. 373 = 25 Cr.L.J. 337 = A.I.R. 1923 Lah. 11.

—S. 464—Forgery—Intention to defraud—Signing plaint on another's behalf.

A *gumasta* filed a plaint on behalf of S and verified the words 'S bakalad khas'. S accepted the plaint gave evidence in support of it and obtained a decree on its basis.

Held, that the accused was not guilty of forgery inasmuch as he did not make the signature of S on the plaint, dishonestly or fraudulently. 19 Cr.L.J. 236 = 43 Ind. Cas. 828.

—Ss. 464, 465 and 467—Forgery—False document—Surplusage—Fabrication of charge—Intention.

A charge of forgery cannot lie against a person who was not the writer of the forged document or who did not sign the forged name. A charge under S. 467, I.P.C., is bad if the intention is not set out. The forging of a name as a witness to a document which has no effect on the validity thereof but a mere surplusage would not make the document a false document. 17 C. W. N. 354 = 14 Cr.L.J. 129 = 18 Ind. Cas. 881.

—S. 464—Signing a bail bond with fictitious names—No offence.

Certain persons signed a bail bond with names which were not their own.

Held, they were not guilty under S. 464 as they had informed the Magistrate that their names were the names they afterwards signed to the bail bond and therefore they could not be held to have intended to cause the Magistrate to believe that the bond was signed by any real or fictitious person other than the accused. (1910) M.W.N. 232 = 8 M.L.T. 124 = 11 Cr.L.J. 440 = 7 Ind. Cas. 176.

—S. 464—Executing a mortgage claiming to be an adopted son of the deceased owner.

Where a person describes himself as the adopted son of another (which was found against) whose property he purported to mortgage and the mortgagee knew the person well,

Held (Per Munro and Abdur Rahim, J.J. Pinhey, J. Dissenting), that mere description as the adopted son would not amount to making false document within the meaning of S. 464 because the person makes only false claim to be the adopted son and had no intention of defrauding anybody. Per Pinhey J.—The person is guilty because though there was no actually adopted son he wanted to defraud the widow of last owner. 32 Mad. 90 = 19 M.L.J. 78 = 4 M.L.T. 463 = 9 Cr.L.J. 85 = 1 Ind. Cas. 751.

—S. 464, Expl. 2—Signing a deed with a false description as the adopted son of another with a view to set up a claim.

Per Munro and Rahim J.J. (Pinhey J. dissentiente).—The making of a document by a person falsely describing himself in the body of the document as the adopted son of another with a view to put forward a claim as the adopted son of that other does not fall within the definition of "forgery" within the meaning of S. 464. Pinhey J.—The act constitutes the offence of forgery by reason of Expl. 2 to S. 464. V died leaving a widow and no issue. R, nephew of V, executed a mortgage of some of the properties of V to a third person describing himself as the adopted son of V but signing therein simply as "R". Held, Per curiam (Pinhey J. dissentiente) that R was not guilty of forgery. (1908) 19 M.L.J. 78 = 32 M. 90 = 9 Cr.L.J. 85 = 4 M.L.T. 463 = 1 Ind. Cas. 751.

—Ss. 464, 465, 468, 415, 417, 511—Intention to cause it to be believed that document was made at a time at which it was not made proof of.

By the Full Bench (Rampini J. dissenting) on certificate granted by the Offg. Advocate-General Pugh, for review:

On the 25th of Jaista, a bill was presented by the accused in his shop by B, a servant of H, for payment of money due by the accused to H. On the bill was printed a stipulation that any payment on account of the bill unless endorsed on its back would not be admitted. The prosecution alleged that the accused took the bill from B and in the presence of B and several other persons wrote on its back the endorsement: 17th Jaista—through B, Rs. 501, whereupon B snatched the bill away from the accused and asked for payment of the amount thus entered on the bill, to which the accused answered "go away. I have paid." Upon these allegations the accused was convicted on charges of forgery and attempt to cheat. The defence was that Rs. 501 had in fact been paid to B on the 17th of Jaista, and had accordingly been entered in the books of the accused (which were



produced) on the 17th of Jaista, but that payment had not been endorsed on the bill on the 17th of Jaista as B had not brought the bill on that date, that the bill was endorsed by the accused in the manner mentioned on the 25th of Jaista, and that B took it away without protest or altercation of any kind.

**Held**, on the evidence generally that there was not evidence to go to a jury in respect of either of the charges.

**Held**, as to forgery:—That the circumstances of the case did not justify an inference that the endorsement was made by the accused with the intention of causing it to be believed that it was made on the 17th and not on the 25th of Jaista when in fact it was made.

**Held**, as to the charge of attempting to cheat, that the bill having been snatched away from the accused before he had given any indication of what he meant to do with it, the acts of the accused did not constitute an attempt to cheat supposing it was cheating that the accused intended and was prepared to commit. (1907) 8 C.W.N. 278 (F.B.).

—S. 464—‘Dishonest’—Writing a conveyance of his own property to himself.

Writing a conveyance by a stranger to himself of property already conveyed to the accused by the stranger in the name of the accused’s wife is not ‘dishonesty’ making a false document. (1902) 6 C.W.N. 382.

—Ss. 464 and 471—False document—Alteration of date—Change immaterial—Offence—Charge not material to facts—Effect of.

The accused changed the date of a document so that it may be taken in evidence: but the alteration was prejudicial to his case.

**Held**, that the accused acted improperly but not dishonestly and could not be convicted of an offence under S. 471. 17 A.L.J. 872 = 20 Cr.L.J. 573 = 52. Ind. Cas. 61.

—Ss. 464 and 467—Incomplete document—Unauthorised alterations or interpolations before completion—Recitals to be used in support of future claim—Valuable security—Penal Code, Ss. 25 and 30.

Per Oldfield and Phillips, JJ.—A document is ‘made’ within S. 464, I.P.C., even when some only of the intended executants sign it, as the execution of it by them is complete and the document would be binding on them on the other intending executants affixing their signature. There is nothing in S. 464, I.P.C., to require that a document should be legally effective and valid for its alteration to constitute the offence of making a false document. A document conferring or creating rights is a valuable security though all the intended executants have not signed it. Under S. 467 of the I.P.C., the document must purport to be a valuable security and its validity or otherwise is immaterial. Per Oldfield and Sadasiva Aiyar, JJ.—Where alterations in a document made by a person who believes in good faith that he might use them to support a bona fide claim such alterations cannot be said to have been made fraudulently or dishonestly so as to constitute the offence of forgery. Per Sadasiva Aiyar, J.—A man cannot be convicted of forgery where his intention in making

a false document is to secure something to which he is legally entitled or thinks bona fide that he is legally entitled. A document incomplete on its face neither is nor purports to be a document creating or conferring right and cannot therefore be a valuable security and alterations or interpolations therein will not constitute the offence of forgery. 41 Mad. 529 = 19 Cr.L.J. 177 = 43 Ind. Cas. 593.

—S. 464—Forgery—Alteration of document—Dishonestly and fraudulently.

An intention to defraud implies something more than deceit. The advantage intended to be secured or the harm intended to be caused need not have relation to property or be such as is implied in the term ‘dishonestly’ but it must be something to which the party perpetrating the deceit is not entitled either legally or equitably. There can be no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused. A man cannot be convicted of forgery where his intention has been merely to secure something to which he was legally entitled. (1915) M.W.N. 278 = 16 Cr.L.J. 246 = 28 Ind. Cas. 102.

—Ss. 464 and 471—Material alteration—Witness added in a document which required no attestation.

Forgery is not committed by the interpolation of the name of a witness in a document which was not necessary to be attested as it was not a material alteration. Material alteration is one which changes the nature of the document. 38 Cal. 75 = 11 Cr.L.J. 505 = 14 C.W.N. 1076 = 12 C.L.J. 277 = 7. Ind. Cas. 629.

—Ss. 464, 471, 24, 25—Forgery, interpolation of the name of a person as an attesting witness, if—False document, ingredients of—Material part of document if altered—Dishonestly and fraudulently.

Where the accused, after the execution and registration of a document which was not required by law to be attested, added his name to the document as an attesting witness:

**Held** by (Mookerjee, J. agreeing with Harrington, J. dissenting)—That the accused was not guilty of an offence under S. 471: that the accused by inserting his name as an attesting witness cannot be held to have done the act either dishonestly or fraudulently within the meaning of these words as defined in Ss. 24 and 25. The word ‘fraudulently’ defined. The interpolation of the name of a person as an attesting witness to a document not required by law to be attested, subsequent to its execution and registration is not alteration of the document in a material part. (1910) 14 C.W.N. 1076 = 11 Cr.L.J. 505. 7 Ind. Cas. 629 = 12 C.L.J. 277 = 38 Cal. 75.

—S. 465. See also S. 463.

—Ss. 465 and 471—Accused posting outside Madras application with forged documents addressed to the Madras Public Service Commission—Offence where committed—Jurisdiction.

Where the accused posts at Vizagapatam along with his application for admission to a competitive examination to the Madras Public Service Commission some documents which were forged, intending to use them as genuine, the real user of the documents comes in only when the Madras Public Service Commission



looks into the application and considers it, as it is open to the petitioner to withdraw the application even before it is considered by the Commission. Where the matter has been considered by the Madras Public Service Commission the offence of using such forged documents as genuine is committed at Madras and the Presidency Magistrate's Court would have jurisdiction to try the same. 1949 M.W.N. 452 = A.I.R. 1949 Mad. 833 = 51 Cr.L.J. 34 = (1949) 2 M.L.J. 152.

—S. 465—Charge—Opportunity to meet.

In a case where the charge of forgery is brought for the first time against the accused in the course of proceedings for other offences, every proper opportunity should be given him to meet the charge which he may, with some reason say, has taken him by surprise. A.I.R. 1939 Sind 222 = 40 Cr.L.J. 818 (2) = I.L.R. (1940) Kar. 95 = 183 Ind. Cas. 619.

—S. 465—Charge and conviction—Offence under S. 171 (f)—Conviction under Sec. 465—Legality.

The offence of false preparation of signature sheet at an election being specifically described and designated by the legislature, it is not open to any Court to say that, although the offence may be specifically one under S. 171 (f) of the Penal Code, it falls equally under S. 465 of the same Code and therefore, it is open to the Court to try the offender under either of the two sections. 84 Ind. Cas. 714 = 22 A.L.J. 1106 = 6 L.R.A.Cr. 25 = 26 Cr.L.J. 362 = 47 All. 268 = A.I.R. 1925 All. 230.

—Ss. 465 and 468—Charge for offence under S. 465—Conviction under S. 468—Legality.

Section 468 is an aggravated form of forgery and where the accused is charged for an offence under Section 465 his conviction under Section 468 is illegal. 69 Ind. Cas. 628 = 11 L.B.R. 45 = A.I.R. 1921 L.B. 36 = 23 Cr.L.J. 740.

—S. 465—Sentence—Deterrent sentence.

The offences under Ss. 196 and 465 are indeed serious and difficult to detect and consequently call for deterrent punishment. 97 Ind. Cas. 805 = 50 Bom. 783 = 28 Bom. L.R. 1051 = 27 Cr.L.J. 1173 = A.I.R. 1926 Bom. 555.

—S. 465—Separate offences—Separate conviction—Legality.

If a man commits two offences he can certainly be convicted of them both, more especially when they are separate transactions and the commission of one does not necessarily involve the commission of the other. 77 Ind. Cas. 825 = 25 Cr.L.J. 473 = A.I.R. 1924 Nag. 162.

—S. 466—Record of proceedings in Court tampered with to obtain decision of Court—If amounts to fraud—Accused obtaining access to record interpolating list of documents filed and inserting documents in record, held guilty under S. 466. A.I.R. 1943 Pat. 393 = 22 Pat. 292 = 10 B.R. 337 = 45 Cr.L.J. 292 = 211 Ind. Cas. 106.

—S. 466—Effect of signing—Knowledge of Contents—Responsibility—Signature by legal practitioner.

A man who signs his name to a document makes himself thereby in every way as responsible for it as if

he was the original drafter of it. If it turns out that the document is one which no man acting honestly could in the circumstances have drafted, then he will be bound to answer for every word, line, sentence and paragraph, and it will not be the least defence that somebody else wrote it out and he only signed it. Signature implies association and carries responsibility.

If a legal practitioner puts his signature to a document he will be deemed to have read it and to carry it in his recollection to the extent that an ordinarily competent, careful and reasonable man would carry it and he will be bound by all the implications arising from it just as much as if he had written every word of it with his own hand. Practitioners must realize that if they make, or associate themselves with statements which they know are dishonest and untruthful for the purpose of misleading the Court they must on proof of misconduct bear personal responsibility and that it will be no defence for them to say that it was done in the interests of the client or at his instigation or at the instigation of a colleague at the bar, or that they were so negligent in the matter that they did not read the document or consider it at all. 98 Ind. Cas. 493 = 48 All. 542 = 27 Cr.L.J. 1373 = A.I.R. 1927 All. 45 (F.B.).

—S. 466—Plaint filed in Court—Alteration of.

A plaint is a record of a proceeding of the Court of justice in which it is filed. It is a document which once filed cannot be altered or amended without the special sanction of the Court and when so altered, an offence under S. 466 is committed. 13 Cr.L.J. 588 = 15 Ind. Cas. 1004 (Cal.).

—Ss. 466 and 471—Using as genuine a forged document—Copies of a forged original.

Where a person, knowing or having reason to believe that the entries in certain village khasras were forged, took copies of those khasras and used them as evidence in his favour in a civil suit: it was held that he might be properly convicted of fraudulently or dishonestly using as genuine the khasras, which he knew or had reason to believe to be forged, and punished under S. 471 read with S. 466 of the Penal Code. (1906) 28 A. 402 = 1906 A.W.N. 71 = 3 A.L.J. 190.

—Ss. 466 and 464—Forgery of record of Court—Definition.

A mukhtar, who was appearing for the plaintiff in ejectment suit before a Rent Court, open court but without the permission of the Court, or even of the officer of the court in whose custody the record was, took the plaint in the case and altered it so as to represent the plaintiff as claiming ejectment of the defendant from one field more in addition to those mentioned originally in the plaint. It did not appear whether the plaintiff was or was not entitled to eject the defendant from that field, but inasmuch as the alteration was made openly and the prosecution had not established that it was made fraudulently or dishonestly, it was held that upon these facts the mukhtar could not properly be convicted of the offence defined, in S. 464. 1905 A.W.N. 93.

—Ss. 466 and 471—Fraud—Dishonesty.

The elements of fraud or dishonesty as explained in the Penal Code must be present in the mind of the



person accused to bring his act under S. 466. (1901) 5 C.W.N. 609 = 28 C. 434.

—S. 466. See S. 199. 9 C.W.N. 69.

—S. 466—Charge and conviction.

The Court should not convict both under Ss. 466 and 467 but should choose whichever of the two sections appears to it most suitable. After convicting under one of these two sections it will be quite unnecessary to add a charge under S. 468. 86 Ind. Cas. 993 = 12 O.L.J. 194 = 2 O.W.N. 174 = 26 Cr. L.J. 929 = 29 O.C. 1 = A.I.R. 1925 Oudh 413.

—Ss. 466, 467 and 471—Sanction—Beng. Agri. Debtors Act, S. 54.

Section 54, Bengal Agricultural Debtors Act, has no application except in respect of the offences expressly mentioned therein. Therefore, no sanction under this section is necessary as regards the complaint with a view to the prosecution in respect of offences under Ss. 466, 467 and 471, Penal Code. A.I.R. 1940 Cal. 286 = 44 C.W.N. 530 = 41 Cr.L.J. 662 = I.L.R. (1940) 2 Cal. 14 = 188 Ind. Cas. 686.

—S. 466—Complaint of Revenue Court.

Where a karnam committed forgery in a petition for transfer of registry field before Tahsildar, a complaint from the Revenue Court, *i.e.*, Tahsildar is necessary. 1934 M.W.N. 612.

—S. 467.

### Synopsis.

1. Abetment.
2. Complaint of Court, if required.
3. Offence under.
4. Offences under Ss. 467 and 471.
5. Proof of offence.
6. Sentence.
7. Valuable Security.
8. Miscellaneous.

#### 1. Abetment.

—S. 467—Assistance in forgery—Nature of offence.

A person who did not make, sign or execute a document, but was instrumental in getting the false document dishonestly or fraudulently made, should be convicted under S. 467 read with S. 109 and not S. 467 alone. 113 Ind. Cas. 68 = 30 Cr. L.J. 52 = 11 A.I.Cr.R. 428 = A.I.R. 1929 Lah. 210.

#### 2. Complaint of Court, if required.

—S. 467—Charge under against scribe of forged document used in civil proceedings—Complaint by Court, if required by S. 195, Cr.P.C.

In the case of a charge under S. 467, I.P.C., against a scribe of a forged document used in civil proceedings, no complaint by the Court against him is required by the provisions of S. 195 (1) (b) or (c) of the Cr.P.C. A complaint could be made against him under the provisions of S. 190 (1) (a) of the Cr.P.C. I.L.R. (1947) All. 411 = 48 Cr.L.J. 706 = 231 Ind. Cas. 148 = 1947 A.L.W. 191 = 1947 A. Cr.C. 107 = 1947

A.W.R. (H.C.) 44 = 1947 A.L.J. 98 = A.I.R. 1947 A. 173.

—S. 467—Once a forged document is brought into Court, then private complaints under S. 467, Penal Code, subsequent to this, are barred by S. 195, Cr.P.C., even in respect of anterior forgeries—*anterior*, that is, to the litigation. A.I.R. 1943 Nag. 327 = 45 Cr.L.J. 175 = 1943 N.L.J. 456 = I.L.R. (1944) Nag. 238 = 210 Ind. Cas. 136.

—S. 467—Prosecution under—Complaint of Court, if necessary.

A complaint of the Court is not necessary for prosecuting the accused who were not parties to proceedings under Legal Practitioners Act for an offence under S. 467, Penal Code. A.I.R. 1941 Mad. 323 = [1940], 2 M.L.J. 1063 = 1940 M.W.N. 1270 = 42 Cr. L.J. 468 = 193 Ind. Cas. 322.

—Ss. 467 and 471—Offences under Ss. 467 and 471, Penal Code, cannot be taken cognisance of except on a complaint in accordance with the provisions of S. 195, Cr.P.C., A.I.R. 1932 Sind. 90 = 268 S.L.R. 73 = 33 Cr.L.J. 452 (2) = 137 Ind. Cas. 341.

—S. 467—Accused not parties to the proceedings in which the document was produced—Sanction if necessary.

No sanction (now complaint) is necessary for an offence under S. 467 when the accused are not parties in the proceedings in which the document is produced: 24 Mad. 121, Foll. 71 Ind. Cas. 63 = 16 M.L.W. 534 = 24 Cr.L.J. 15 = A.I.R. 1923 Mad. 87.

—S. 467, Cr.P.C. (1898), S. 195(c)—Sanction for prosecution necessary.

Sanction (now complaint) is necessary for prosecution under S. 467 although this section is not mentioned in S. 195 (c), C.P.C. 14 C.W.N. 479 = 11 Cr.L.J. 280 = 5 Ind. Cas. 879.

#### 3. Offence under.

—S. 467—D having two sisters G and B, latter being a widow—D and G conspiring and G holding herself out as B and sale deed in D's favour of land belonging to B—Deed executing registered—Offence.

One D had two sisters G and B. The latter being a widow, was residing with her brother. On the date of the death of B, a sale-deed was registered which purported to have been executed by her, and to convey to her brother D, certain land which was the land of her husband. The thumb-impression on this sale-deed was not that of B, but that of G who deliberately held herself out to the deed writer and also to the Registrar as B. D had supplied the deed-writer with the particulars relating to the land which had to be entered in the sale-deed:

Held, that (i) by supplying the particulars relating to the land, D aided and assisted in the commission of the forgery, as without them, the deed writer could not have drawn up the deed at all;

(ii) that as D and G had conspired and acted fraudulently, intending to deceive the Sub-Registrar and to deceive and also to injure the reversioners of B who, by the coming into existence of the sale-deed, would or might be led to think that B had alienated



her husband's property for legal necessity, their conviction under S. 467, Penal Code, was proper. A.I.R. 1943 Pat. 227 = 22 Pat. 95 = 10 C.L.T. 37 = 9 B.R. 434 = 44 Cr.L.J. 652 = 207 Ind. Cas. 552.

—S. 467—Attestors to forged valuable security, if can plead that they signed it believing in representation of others.

There is no estoppel which bars an accused person in any case from pleading that he had no dishonest or criminal intention. Attestors to a forged valuable security can plead that they signed believing in the representation of others and consequently, had no criminal intention. In other words, there is nothing to prevent the attestors from pleading that they were foolish and not criminal in what they did. A.I.R. 1939 Mad. 730 = 1939 M.W.N. 514 = 41 Cr.L.J. 11 = 184 Ind. Cas. 460.

—Ss. 467 and 420—Where the accused deceived the complainant into believing that gold jewels had been pledged in order to get money dishonestly while in fact there had been no pledge and false entries had been made in accounts to support the false representation, the offence is not one under S. 409 but under Ss. 420 and 467. 1937 M.W.N. 729.

—S. 467—A supervisor of a Society getting affixed to debt entry false thumb impression of a sweeper and thus misappropriating money:

Held, that the accused was guilty under S. 467. A.I.R. 1935 Bom. 30 = 36 Cr.L.J. 522 = 36 Bom. L.R. 1120 = 154 Ind. Cas. 559.

—S. 467—Forging of withdrawal application from Savings Bank—Whether covered by the section—Forgery on two dates of two applications—Single charge, if sufficient.

Where the accused was charged with forging two withdrawal applications and receiving the amounts so drawn on two different dates out of the money the complainant had deposited in a Savings Bank but the charge as framed was one single charge with one head, and the Judge, instead of keeping the two offences distinct and separate, lumped them together and asked the jury for a single finding instead of a separate finding regarding each offence:

Held, that the procedure followed was likely to cause confusion and to interfere with the definite proof of a distinct offence, and that the conviction could not stand and must be set aside and a re-trial ordered.

Section 467, Penal Code, provides punishment for forgery not only of a document purporting to be a valuable security but also of any document which purports to give authority to any person "to receive or deliver any money." A.I.R. 1933 Pat. 488 = 34 Cr.L.J. 892 = 14 P.L.T. 580 = 144 Ind. Cas. 936.

—S. 467—Alteration to be with intention of causing injury or damage dishonestly or fraudulently is essential for the offence under S. 467. 1931 M.W.N. 361.

—S. 467—Essential for conviction.

In order to convict persons charged under Ss. 467-109, it must be established that the act was done dishonestly or fraudulently as required by S. 464. 112 Ind. Cas. 359 = 10 L.L.J. 369 = 29 Cr.L.J. 1031 = 11 A.I.Cr.R. 391.

—S. 467—Liability of attestor—Attestation with knowledge of forgery—Nature of offence.

If a person falsely puts his name down as an attesting witness to the signature of somebody who he knows has never signed at all, he is guilty of forgery just as well as the scribe. The persons attesting like the above must be put on their trial on a charge under S. 467 read with S. 120-B. 1929 Cr. C. 194 = A.I.R. 1929 Cal. 539.

—S. 467—Liability of writer—Writer not present at execution—No forgery.

The writer of a forged receipt is not guilty under S. 467 where there is no evidence that he was present at the execution of the receipt or that he helped anyone to make use of it. 82 Ind. Cas. 216 = 25 Cr.L.J. 1253 = A.I.R. 1925 Cal. 192.

—Ss. 467 and 471—Forging a receipt for misappropriating money.

A Bench clerk received a sum of money paid in as fine and misappropriated it and to cover up the misappropriation forged a false receipt.

Held, that the offence under Ss. 467 and 471 was committed especially since the false receipt was made for the purpose of enabling him to misappropriate the money: 11 Mad. 411, Foll. 83 Ind. Cas. 338 = 3 Bur. L.J. 113 = 25 Cr.L.J. 1378 = A.I.R. 1924 Rang. 331.

—S. 467—Receiving money-order addressed to another—Making false signature of the payee—Payee not informed by the receiver—Offence.

An offence of forgery under S. 467, I.P.C. is committed when a person receives the amount of the money-order from the postman by causing the signature of the payee to be made falsely on it and does not inform the payee about the receipt of the same. 66 Ind. Cas. 328 = 24 Bom. L.R. 99 = 23 Cr.L.J. 264 = A.I.R. 1922 Bom. 82.

—Ss. 467 and 471—False documents—Copy of false document not a false document. (1910) 20 M.L.J. 534 = 7 M.L.T. 428 = 11 Cr. L.J. 401 = 6 Ind. Cas. 776.

#### 4. Offences under Ss. 467 and 471.

—Ss. 467, 471 and 109—Acquittal under S. 467—If bars conviction under Ss. 467 and 471—Person aggrieved under S. 476—Remedy.

The offence of abetment of forgery is quite different from the offence of using as genuine a forged document and there is nothing either in law or in fact to prevent a man being innocent of the first offence and guilty of the second. Even if one offence did involve the other an accused person could not claim to be acquitted of both offences because the provisions of S. 195, Criminal P.C., constituted a bar to his trial and conviction for one of them.

An acquittal under S. 467 read with S. 109, Penal Code, does not bar a conviction under Ss. 467 and 471. A.I.R. 1932 Cal. 545 = 55 C.L.J. 336 = 34 Cr.L.J. 39 (2) = 140 Ind. Cas. 544.

—S. 467—Accused once convicted under S. 467—Subsequent conviction under S. 471 in respect of the same documents—If proper.



An accused cannot be convicted of the independent offence under S. 471 read with 467 after his previous conviction under S. 467/109 in respect of the same documents. The language of S. 471, I.P.C., most obviously suggests that this provision is expressly directed against some person other than the forger himself. The reason for the presence of S. 471 on the statute book in the somewhat unusual language which is employed therein, is in order to provide a useful alternative charge in cases where there is uncertainty as to whether the person on trial is himself the forger of the document, or has merely used it as genuine, knowing it to be nothing of the sort: 23 All. 84, Foll. 89 Ind. Cas. 523 = 21 N.L.R. 152 = 26 Cr.L.J. 1387 = A.I.R. 1926 Nag. 137.

—Ss. 467 and 471—A forger using as genuine a forged document—Conviction under Ss. 467 and 471—If proper.

A person, who, being himself the forger thereof, has used as genuine a forged document, cannot be punished under S. 471, for the use of the forged document as well as for the forgery, under S. 467, but can be punished only under S. 467. 83 Ind. Cas. 1051 = 26 Cr.L.J. 1275 = A.I.R. 1925 Nag. 440.

—Ss. 467 and 471—Conviction both for forging document and for using it as genuine, whether illegal.

When a person is convicted under S. 467, I.P.C., for having a forged promissory note, a further conviction and sentence under S. 471 for using that note as genuine is not illegal in the course of the same trial. 17 Cr.L.J. 73 = 32 Ind. Cas. 665 (Mad.).

—Ss. 467, 471 and 477—Separate offences—Conviction.

Where the act of the accused which constitutes forgery is the same as the act which amounts to fraudulent destruction or defacement or cancellation of the document, he cannot be convicted of separate offences under Ss. 467, 471 and 477, I.P.C. 52 P.L.R. 1913 = 4 P.R. 1913 Cr. = 14 Cr.L.J. 183 = 19 Ind. Cas. 183.

### 5. Proof of offence.

—S. 467—Proof of offence.

Where there is no evidence that the accused wrote the signature of the landlord on a rent receipt, the admission by him that he wrote the body of the document is not sufficient to support a charge under S. 467, I.P. Code. A.I.R. 1949 Dacca 9 = 50 Cr.L.J. 776.

—S. 467—Good reasons in document itself proving it to be forged—Document scribed by accused with dishonest motive—Conviction.

Where, beside the expert's evidence, there are intrinsic good reasons in the document itself which prove it conclusively to be a forged document and where there can be no doubt that the document was scribed by the accused with dishonest motive, he can be convicted under S. 467. A.I.R. 1936 Oudh 381 = 1936 O.W.N. 1066.

—S. 467—Forgery—Proof.

The mere fact that a document is written on a paper which is not supposed to have been issued to the public

is insufficient to support a charge of forgery, especially when the evidence that the paper on which it was written was not issued to the public is absent. 35 P.L.R. 599.

—Ss. 467 and 471—Forgery.

Prosecution must prove deceit or fraud in the use of blank paper by the accused. 1932 M.W.N. 117.

—Ss. 467 and 471—Asking forgiveness if amounts to admission.

Asking forgiveness is not an incriminating circumstance and when used with reference to forged receipts is not an admission of forgery or of using forged documents. 14 C.L.J. 652 = 13 Cr. L.J. 62 = 13 Ind. Cas. 398.

—S. 467—Document alleged to be forged purporting to be in handwriting of accused—Accused not denying handwriting to be his—Handwriting expert, stating that signature is that of accused—Inference that document is in handwriting of accused.

When the document alleged to have been forged purports to be in the handwriting of the accused and he has not denied it to be his handwriting but has, on the other hand, stated that the handwriting and the signature on the document appear to be like his handwriting and the expert after comparing the signature of the accused with some of his admitted signatures stated definitely that the signature is that of the accused, the Court is justified in holding that the document is in the handwriting of the accused. The fact that the expert has not compared the entire writing with any other writing of the accused but gives his opinion merely on comparison of the signature on the document makes no difference, when the expert has given scientific reasons with regard to the signature and nothing has been shown why his opinion should not be accepted. A.I.R. 1936 Oudh 381 = 1936 O.W.N. 1066.

—S. 467—Forgery—Charge for—Evidence of handwriting expert—If sufficient.

In a charge for forgery, the opinion of a handwriting expert should not ordinarily be accepted as conclusive to prove the facts deposed to by him and a conviction for forgery cannot be sustained merely on the evidence of an expert. A.I.R. 1932 Lab. 490 = 33 P.L.R. 597 = 33 Cr.L.J. 593 (1) = 138 Ind. Cas. 368.

—S. 467—Basis of conviction—Comparison of handwriting—Opinion of Judge.

A conviction for forgery should not safely be based entirely upon a comparison of the handwriting. But the Court is competent to see for itself whether certain handwritings placed before it are similar or not. 65 Ind. Cas. 426 = 23 Cr.L.J. 74 (Pat.).

### 6. Sentence.

—S. 467—Sentence—Deliberate forgery.

For an offence of deliberate forgery of a will, a sentence of 5 years' rigorous imprisonment is not too severe. A.I.R. 1936 Oudh 381 = 1936 O.W.N. 1066.

—S. 467—Sentence of fine alone, if according to law.

Section 467, Penal Code, requires that some imprisonment should be awarded if a person is convicted



under that section. The sentence of fine alone is, therefore, not in accordance with law. A.I.R. 1931 Mad. 730 = 1939 M.W.N. 514 = 41 Cr.L.J. 11 = 184 Ind. Cas. 460.

### 7. Valuable security.

—Ss. 467, 471, and 30—Transit pass of forest lessee—Whether valuable security.

During the pendency of proceedings against a lessee of a forest from the Government, the lessee used a transit pass book the entries in the 'original' of which were forged. A complaint was, therefore, made charging the lessee with having fraudulently or dishonestly used as genuine the transit pass book, and the accused was convicted under Ss. 471, 465, Penal Code:

**Held**, that the transit passes were 'valuable securities' within the meaning of S. 30, Penal Code, and that the offence, if any, was punishable under Ss. 467-471, Penal Code, and exclusively triable by a Court of Session. A.I.R. 1932 Cal. 390 = 36 C.W.N. 505 = 59 Cal. 1233 = 55 C.L.J. 349 = 33 Cr.L.J. 685 = 138 Ind. Cas. 705.

—S. 467—Valuable security—Meaning of.

A document which has been held to be valuable security within the meaning of S. 30 of the I.P.C. falls within the scope of S. 467 of I.P.C. 8 P.W.R. 1916 Cr. = 17 Cr.L.J. 205 = 34 Ind. Cas. 317.

### 8. Miscellaneous.

—Ss. 467, 109 and 120-B—Charge and conviction.

Where accused are charged under S. 120-B-467, Penal Code, with the offence of conspiring to forge a valuable security and subsequently an additional charge is framed of abetment under S. 467-109, Penal Code, and after recording all the prosecution evidence, the charge under S. 120-B-467 is cancelled for want of sanction required by S. 196-A, Criminal P.C., the Court can convict the accused under S. 467-109. A.I.R. 1940 Cal 277 = 71 C.L.J. 181 = 44 C.W.N. 474 = I.L.R. (1940) 1 Cal. 531 = 41 Cr.L.J. 719 = 189 Ind. Cas. 173.

—S. 467—Criminal trial—Forging Hundi—Power of Magistrate, First Class to try a case of forging Hundi.

The offence of forging a Hundi falls under S. 467 and is triable only by the Sessions Court or by a Magistrate, invested with enhanced powers. Though the offence includes a minor offence, triable by an Ordinary First Class Magistrate, the latter has no power to deal with the case. A First Class Magistrate can dispose of a Sessions case either by an order of discharge or by committal to the Sessions only. 31 P.R. 1910 Cr. = 194 P.L.R. 1910 = 11 Cr.L.J. 639 = 8 Ind. Cas. 389.

—S. 467—Offence under—Conviction under S. 167 also—If proper.

The offence under S. 167, is included in the offence under Ss 467 and 471, and, therefore conviction, both under S. 167, and Ss. 467 and 471, is not maintainable 99 Ind. Cas. 122 = 3 O.W.N. 760 = 7 A.I.Cr.R. 51 = 13 O.L.J. 817 = 28 Cr.L.J. 90 = A. I. R. 1926 Oudh 615.

—Ss. 468 and 416—Accused appearing for examination for another candidate and answering for such candidate:—

**Held**, guilty both of forgery and cheating. A.I.R. 1936 Cal. 403 = 40 C.W.N. 956 = I.L.R. (1937) 1 Cal. 71 = 37 Cr.L.J. 1156 (2) = 165 Ind. Cas. 505.

—S. 468—Using stamp for another client altering endorsement of stamp-vendor is not an offence under S. 468, Penal Code, unless the person so doing acts dishonestly. A.I.R. 1931 Lah. 337 = 32 P.L.R. 432 = 32 Cr.L.J. 1051 = 133 Ind. Cas. 645.

—S. 468—Offence under—Letter written by accused knowing that it will be used for defrauding some person—Legality of conviction.

Where the accused wrote the letter knowing that it will be used to defraud a certain person:

**Held**, that the letter was a forgery and a conviction under S. 468 was right. 101 Ind. Cas. 493 = 9 L.L.J. 103 = 8 A.I.Cr.R. 74 = 28 Cr.L.J. 461 = A.I.R. 1927 Lab. 724.

—S. 468—Completion of offence—Forgery with the intent specified.

The offence under S. 468 is complete as soon as there is a forgery with the particular intent mentioned in the section. When the intended cheating or attempt at it takes place another distinct offence is committed. 77 Ind. Cas. 827 = 25 Cr.L.J. 475 = A.I.R. 1924 Nag. 120.

—Ss. 468 and 471—Forgery—Process—Attestation of device.

A process server filing a forged attakshi to explain the delay in returning the process, is guilty under Ss. 468 and 471, I.P.C.: 11 M. 411, 35 C. 450, Foll. 42. Mad. 558 = 36 M.L.J. 201 = 20 Cr.L.J. 287 = 25 M.L.T. 345 = (1919) M.W.N. 433 = 50 Ind. Cas. 175.

—S. 468—Forgery of partner.

A person is guilty of the offence of forgery if he forges a document in the name of the firm of which he is a partner, since the fraud is not against himself alone but is against the other partners. 9 W.R. 37 declared overruled by 13 B.L.R. 207. (1904) 6 Bom. L.R. 553.

—Ss. 468, 467, 109, 471, 417 and 511—Registration Act, S. 82—Forgery—Using as genuine a forged document—Cheating—Misjoinder of charges—Defective charge—Case to be investigated by jury.

Where the case against an accused was that he had executed a **kobala** for the sale of certain property, to a purchaser the registration endoresment on which was alleged to be forged and had subsequently purported to mortgage the identical property to the same purchaser by a registered mortgage-bond which was also alleged to be a forgery and on the footing of which he had tried to raise a loan, and was charged firstly with regard to the **kobala** under S. 467 alternatively with Ss. 467, 109 and 468 alternatively with Ss. 468, 109, secondly with regard to the mortgage bond and his dealing with the same under S. 82, Registration Act, and Ss. 467, 109, 471, 417, 514, I.P.C., and was convicted under Ss. 467, 109, I.P.C., of forging the mortgage bond and under S. 417, 511, I.P.C., of attempting to cheat and under S. 471, I.P.C., for using as genuine the mortgage-bond knowing it to be forged.



**Held**, that there was misjoinder of charges and that the conviction should be set aside. (1903) 30 C. 822 = 7 C.W.N. 639.

**S. 468—Evidence and proof—Document forged—Prosecution not explaining how it came with the accused—Use of the document by accused not proved—Accused denying the charge—Propriety of conviction.**

Where an admittedly forged document was alleged to be found with the accused but it was not explained by the prosecution how it came to be with him nor that he used the same and the accused specifically alleged that the case was false,

**Held**, that his conviction either under S. 468 or under S. 471 was not maintainable. 89 Ind. Cas. 398 = 8 N.L.J. 87 = 26 Cr.L.J. 1358 = A.I.R. 1925 Nag. 294.

**S. 468—Complaint under—Search—Document found exhibited in criminal case—Document called in evidence by Civil Court in suit by accused against complainant—Prosecution of accused under S. 468—Complaint of Civil Court—If necessary.**

On a complaint against the accused under S. 468, Penal Code, a search warrant was issued and a document was discovered in accused's house. This was made an exhibit in the criminal case. In a civil suit filed by accused against the complainant, the Civil Court requested the Criminal Court to send the document in question, and the document was also tendered in evidence in the civil case. The contention on behalf of the accused was that as the document in question was tendered in evidence in the civil case, the accused's prosecution under S. 468, Penal Code, could not continue as the Civil Court had not filed a complaint in writing against the accused :

**Held**, that the Criminal Court had taken cognizance of an offence under S. 468, Penal Code, long before the document in dispute was called for by the Civil Court. In fact, the document in question had become an exhibit in the criminal case before it was sent to the Civil Court. In these circumstances, it could not be held that the case under S. 468 against the petitioner, could not continue, as the Civil Court which had called for the document in question had not presented a complaint in writing against the accused. A.I.R. 1937 Lah. 238 = 38 P.L.R. 1120 = 38 Cr.L.J. 581 (2) = 168 Ind. Cas. 740.

**Ss. 469 and 471—Use of forged document—Civil suit—No evidence about actual commission—Conviction.**

Where the Court finds that a document is a forgery and that it has been used by the accused in a civil suit but there is no evidence that the accused actually committed the forgery, the accused could not be convicted of an offence under S. 469 of the I.P.C. and the conviction ought to be only under S. 471 of the Code. 7 Cr.L.R. 254 (Mad.).

**S. 470—Intention—Inference.**

See S. 463. 4 Bom. L.R. 440.

**S. 471.**

See also Penal Code, S. 467.

#### Synopsis

1. Offence under.
2. Proof of offence.

3. Sentence.

4. Miscellaneous.

#### 1. Offence under.

(a) Ingredients.

(b) 'Use'—What constitutes.

(c) What is and what is not.

#### 1. (a) Offence under—Ingredients.

**S. 471—Essential ingredients—Accused when can be convicted.**

In order to convict the accused for dishonesty, or fraudulently using a forged document, the prosecution has to prove, beyond reasonable doubt, that the accused knew that the document was forged. It is not sufficient merely to prove that the document was not executed by the person, by whom it was alleged to have been executed.

Where, although the accused has failed to establish his version of the document by reliable evidence, there remains a reasonable possibility that the story put up by him in defence might be true, he cannot properly be convicted under S. 471. (1946) 12 B.R. 289 = 222 Ind. Cas. 620 = 47 Cr.L.J. 317 = A.I.R. 1947 Pat. 251.

**S. 471—For a conviction under S. 471, the accused must use the forgery in any judicial proceeding.** 1932 M.W.N. 454.

**Ss. 471, 465 and 24—Filing petition in Court with forged signatures—Wrongful loss or gain not actually caused—Liability of accused.**

It is sufficient for the purposes of forgery to show that there was a criminal intention to cause wrongful gain to one or wrongful loss to another person as that constitutes the definition of 'dishonesty' in S. 24 of the I.P.C. It is not necessary that the wrongful gain or wrongful loss should be actually caused.

The accused presented an application to the Revenue Court purporting to be under S. 107 of the U.P. Land Revenue Act and purporting to be signed by a number of co-sharers and praying that as a partition had already been agreed to by the parties, mutation should be made according to this partition in the revenue papers. The application was accompanied by the agreement. It was discovered that the signatures of two of the co-sharers who had not agreed to this partition had been forged in the application and agreement and the accused were prosecuted under Ss. 465 and 471,

**Held**, that as there was nothing to show that the accused had forged their signatures, they were not guilty under S. 465 but they were guilty under S. 471 Penal Code, of the offence of having dishonestly used the documents knowing or having reason to believe that they were forged. A.I.R. 1931 All. 258 = 1930 A.L.J. 1451 = 32 Cr.L.J. 559 = 130 Ind. Cas. 492.

**S. 471—User for securing acquittal—Proof of wrongful gain or loss—If necessary.**

Section 471 does not necessarily contemplate user for producing material gain or material loss to another as explained in S. 24 but it does apply to user for the purpose of securing an acquittal. Neither the acquisition nor the deprivation of property is an essential ingredient of the intent in an offence under S. 471. The obtaining of an acquittal is very distinctly the



obtaining of an advantage and brings the case within the definition of "dishonestly" in S. 24. 113 Ind. Cas. 712 = 9 P.L.T. 800 = 30 Cr.L.J. 236 = 12 A.I. Cr.R. 236 = A.I.R. 1929 Pat. 60.

—S. 471—Acquisition or deprivation of property.

Neither the acquisition nor the deprivation of property is an essential ingredient of the intent in an offence under S. 471. 91 Ind. Cas. 993 = 52 Cal. 881 = 27 Cr.L.J. 177 = A.I.R. 1926 Cal. 89.

—S. 471—Ingredients of offence—Using forged document—Intention to deceive.

An offence is committed under S. 471 whenever a document is used as genuine with the intention that some person thereby should be deceived, and by means of such deception that either an advantage should accrue to the person so using the document, or injury should befall some other person or persons. 91 Ind. Cas. 993 = 52 Cal. 881 = 27 Cr.L.J. 177 = A.I.R. 1926 Cal. 89.

—S. 471—'Fraudulently'—Meaning.

The term "fraudulently" in S. 471 does not necessarily connote deceit and injury to the person deceived. It may, but it need not, do so. 91 Ind. Cas. 993 = 52 Cal. 881 = 27 Cr.L.J. 177 = A.I.R. 1926 Cal. 89.

—S. 471—Fraudulent use.

A man can use a document fraudulently even though it is used for the purpose of supporting a good title. 83 Ind. Cas. 504 = 51 Cal. 469 = 26 Cr.L.J. 24 = A.I.R. 1924 Cal. 718.

—S. 471—Non-reliance—Effect.

That accused did not rely on the document as a valuable security is no defence to a charge under S. 471. 82 Ind. Cas. 145 = 28 C.W.N. 947 = 40 C.L.J. 135 = 25 Cr.L.J. 1217 = A.I.R. 1924 Cal. 960.

—S. 471—Participation in offence—Person not physically presenting but actively participating in process of presentation—If guilty.

If a person actively participates in the process of presentation of a forged document for registration, he can be convicted under S. 471, although he may not have physically presented it for registration. 119 Ind. Cas. 63 = 52 Mad. 532 = 29 M.L.W. 559 = 1929 M.W.N. 279 = 2 M.Cr.C. 87 = 30 Cr.L.J. 983 = A.I.R. 1929 Mad. 450 = 56 M.L.J. 554.

—S. 471—Fraud—Dishonesty. See Ss. 467 and 471. 5 C.W.N. 609 = 28 C. 434.

1. (b) Offence under—"use"—What constitutes.

—S. 471—Offence under, when made out—Production of document alleged to be forged at instance of Court.

The use of a document contemplated by S. 471, Penal Code, must be a voluntary one, and not the mere production of the document in compliance with an order of the Court which must be obeyed. The production of a receipt alleged to be forged after the end of the case and at the insistence of the Court cannot possibly be either a voluntary or a fraudulent or dishonest use of the document within the meaning of

S. 471, Penal Code. A.I.R. 1935 All. 940 = 37 Cr.L.J. 46 = 1935 A.W.R. 1453 = 159 Ind. Cas. 287.

—S. 471—Production by Court's order—Knowledge of forgery—Offence.

Although a person has been served with summons to produce this document, if he fails to disclose that he believes that the document has been forged and fraudulently or dishonestly puts forward the document as being a genuine document, he is not acting involuntarily, but is deliberately using the document for a criminal purpose. 91 Ind. Cas. 993 = 52 Cal. 881 = 27 Cr.L.J. 177 = A.I.R. 1926 Cal. 89.

—S. 471 and 468—Production of account in obedience to Court's order.

The production of a document in obedience to summons by a Court to produce it, does not amount to using the document as genuine, and so no offence under S. 471 is committed. 36 Mad. 387 = 10 M.L.T. 563 = (1912) M.W.N. 3 = 22 M.L.J. 141 = 13 Cr.L.J. 35 = 13 Ind. Cas. 275.

—S. 471—Production of document in Court not involuntary but brought about by conspiracy on accused's part—Offence.

Although a person who produces documents in obedience to the order of the Court may not be held guilty of using forged documents even if they are found to be forged, the case would be different where the production of the documents in Court is not voluntary but in pursuance of a conspiracy between the accused, one of them being made the custodian of the documents in order to get over some technical objection. 88 Ind. Cas. 181 = 26 Cr.L.J. 1093 = A.I.R. 1925 Nag. 345.

—S. 471—Receipts filed in rent suit and placed before plaintiff for admission or denial—Plaintiff denying—Held, they were 'used'.

In a rent suit against him, the accused filed certain receipts and placed them before the plaintiff for admission or denial and the plaintiff denied them:

Held, that if the plaintiff had been deceived and had admitted them, the accused would have achieved his object. The term "use" is of wide meaning and that the accused did use the receipts. A.I.R. 1935 All. 521 = 1935 A.L.J. 493 = 1935 A.W.R. 628 and 700 = 36 Cr.L.J. 1199 = 157 Ind. Cas. 557.

—S. 471—In previous trial accused referring to document which was filed and istafanama which was not filed—Prosecution producing it and defence counsel referring to it in cross-examination—Held, no user within S. 471.

The only evidence of user within the meaning of S. 471, Penal Code, was that at the previous trial the accused put in a written statement in his defence in which he referred to certain documents which had been filed and also referred to the istafanama which was alleged to be forged. The istafanama was neither filed or produced nor put in evidence by the accused or on his behalf. It was produced and put in evidence by one of the witnesses for the prosecution in cross-examination; the istafanama was referred to by the Pleader appearing on behalf of the accused:

Held, that this could not be held to be user within the meaning of S. 471, Penal Code. A.I.R. 1935 Cal. 687 = 39 C.W.N. 1309 = 37 Cr.L.J. 30 = 63 C. 481 = 159 Ind. Cas. 149.



—**S. 471**—Where accused produces a forged document in the proceedings before the Manager dealing with claim under Chota Nagpur Encumbered Estates Act, this constitutes a user of a false document within the meaning of S. 471. A.I.R. 1935 Pat. 515=16 P.L.T. 693=36 Cr.L.J. 1354=15 Pat. 69=1 B.R. 872=158 Ind. Cas. 324.

—**S. 471—Filing by witness—If amounts to using document.**

Where the accused, who was a witness in the suit, from some interest in, or desire to assist, the defence filed certain document for the purposes of the suit in advance of a trial.

**Held**, that he “used” the document within the meaning of S. 471. The wider the definition of the word “use” in S. 471 the better, as the use has to be fraudulent. 116 Ind. Cas. 632=49 C.L.J. 193=30 Cr.L.J. 656=13 A.I.Cr.R. 73=A.I.R. 1929 Cal. 203.

—**S. 471—“Used as genuine”—Meaning.**

Whenever a person fraudulently or dishonestly presents a forged document to another person as being what it purports to be, or causes the same to be so presented, knowing or having reason to believe that the said document is a forged document, the document is “used as genuine” within S. 471. It matters not whether the document is presented by the accused himself, or by his agent expressly authorised in that behalf, or whether it is produced by the accused of his own motion or pursuant to the order of the Court, if in the event he uses it as genuine. 91 Ind. Cas. 993=52 Cal. 881=27 Cr.L.J. 177=A.I.R. 1926 Cal. 89.

—**S. 471—Using as genuine—Filing document to support claim.**

To constitute use of a document it is not necessary that the Court should accept the document produced before it or filed in Court; if a person puts forward a document as supporting his claim in any matter, whether that document is acted upon by the Court or used in evidence is immaterial for the purpose of constituting use of the document by the party within the meaning of S. 471, Indian Penal Code. 35 Cal. 820 Expl. 39 Cal. 463; 17 C.W.N. 94, Foll. 83 Ind. Cas. 504 = 51 Cal. 469 = 26 Cr.L.J. 24 = A.I.R. 1924 Cal. 718.

—**S. 471—Presenting document before Sub-Registrar.**

Presentation of a forged document before the Sub-Registrar is sufficient evidence of user. 74 Ind. Cas. 536=89 Ind. Cas. 1050=2 Pat. 459=4 P.L.T. 727 = 24 Cr.L.J. 792 = 26 Cr.L.J. 1482 = A.I.R. 1924 Pat. 128.

—**S. 471—Giving forged document to Police—Investigating officer.**

A person giving a forged document to the investigating officer during the police investigation and thus causing that officer to do something which otherwise he would not have done is guilty of having used forged document within S. 471. 60 Ind. Cas. 674=22 Cr.L.J. 274=3 U.P.L.R. (Pat.) 42.

—**S. 471—Filing forged document with plaint.**

Filing of a forged document along with plaint amounts to a ‘user’ of the document within S. 471 of

the Code. 3 Pat.L.J. 385 = 19 Cr.L.J. 709 = 46 Ind. Cas. 293.

—**Ss. 471 and 467—Citation—Production of forged title and user.**

The production of a forged title deed in answer to a citation in which no particular deed is specified and giving evidence in regard to it amounts to ‘user’ within the meaning of S. 471, I.P.C. He may be prosecuted though sanction under S. 193, Cr. P. Code, has not been granted in respect of the statements made by him regarding the document. 18 Cr.L.J. 839=41 Ind. Cas. 663 (Cal.).

—**S. 471—‘User’ meaning of—Sanction.**

In a rent suit accused summoned some documents from complainant. The documents were produced by the accused as coming from the custody of the complainants who now alleged that the documents were forged and were not produced by them, but by the accused;

**Held**, that the facts constituted, ‘user’ within the section. For a prosecution for such offence, sanction under S. 195 or 476 of Cr.P. Code is necessary. 19 C.W.N. 125=16 Cr.L.J. 309=28 Ind. Cas. 645.

—**S. 471—‘User’.**

Where during examination of witness for prosecution, in a rioting case, the accused gave to Muktear a document, which was given to the witness who said it was not genuine and the document, a rent receipt was initialled by Magistrate and filed it,

**Held**, this was not sufficient user to support conviction under S. 471. In mitigation of punishment the fact that the document was used in a criminal trial for the purpose of getting out of a difficulty and that it was not supported by perjury may be taken into account. 39 Cal. 463 = 15 C.L.J. 509 = 16 C.W.N. 623=13 Cr.L.J. 201=14 Ind. Cas. 201.

—**S. 471—Alleged executant denying registration—Accused called upon in a judicial enquiry to say whether it was genuine or forged—Accused appearing and asserting its genuineness not dishonest or fraudulent user within the terms of S. 471, I.P.C.**

A presented a document for registration before a Sub-Registrar alleging that S had executed it. S having denied execution, the Sub-Registrar reported the matter to the District Magistrate. The District Magistrate ordered a judicial enquiry and the Deputy Magistrate who was conducting the same called upon A to state whether the document was genuine or forged. A appeared and stated that the document was genuine by the Deputy Magistrate held otherwise. A was thereafter tried and convicted under S. 471.

**Held**, that it was impossible to say that A ‘used’ the document. The use of a forged document which is contemplated by S. 471, is such use as causes wrongful gain or wrongful loss; that is to say, that section applies to the case of a person who appears before some other person or before a Court with a document and endeavours to induce that person or Court to do some act which he would not do if it was known to be a forgery. (1907) 11 C.W.N. 838=5 C.L.J. 454.



## 1. (c) Offence under—What is and what is not.

—S. 471—Offence under—Giving of a post-dated forged cheque—Money paid to party and nobody defrauded—Conviction under S. 471—Sustainability.

Where a debtor to gain time for repayment of a debt gives a post-dated forged cheque to the creditor which on presentation is returned as the drawer had no account with the bank, the debtor can be convicted under S. 471, I.P. Code, though he might subsequently have paid the debt to the creditor who has not therefore been defrauded. It is enough to sustain the conviction that the accused got time on the strength of his false representation. 3 Sau.L.R. 8.

—Ss. 471 and 467—Fabrication of false document, when criminal—Intention.

The fabrication of a false document is criminal only when certain intentions can be attributed to the person who fabricates it. The question of intention is one of fact.

One of the trustees of a boarding house was given a cheque for Rs. 400 by one B. The money was to be used for the purposes of the boarding house. It was established that the money was misappropriated by the trustee and he was sentenced to a fine of Rs. 800 under S. 406, Penal Code. It was found that in order to protect himself from the consequences of his offence of criminal breach of trust, he forged a letter purporting to be from B and acknowledging the receipt of the amount of the cheque :

**Held**, that the trustee, by obtaining this forged document and using it, was not only protecting himself from punishment but was also rendering it probable that B or the Brahman boarding house would suffer loss. If the forgery had succeeded in its object, B would have been deprived of this money. A person must be held to have intended the natural consequences of his action and therefore, in this particular case, the act of the trustee was a criminal act within the provisions of Ss. 467 and 471, Penal Code. A.I.R. 1940 All. 551 = 1940 An.W.R. 559 = 1940 A.L.J. 759 = 42 Cr.L.J. 247 = 192 Ind. Cas. 130.

—S. 471—Date of decree in certified copy of decree altered with erroneous belief that decree being time-barred, could thus be executable—Execution of such decree sought—Original decree not in fact time-barred—Offence—"Fraudulently or dishonestly," meaning of.

It is necessary for the prosecution, when the charge is under S. 471, Penal Code, to show that the accused knew or had reason to believe the document to be forged and used it fraudulently or dishonestly.

Where the execution is sought on the basis of a copy of the decree in which the dates were altered under the impression that the decree was time-barred, a sufficient intent to defraud is involved in the advantage directly aimed at by the petitioner on the basis of the altered dates, and it is immaterial that the alterations were brought about under an erroneous impression that the decree was time-barred. A fraud, it is clear, is attempted upon the Court and in such a case, it is not necessary for the prosecution to go further and establish an intent to cause loss or risk of loss. But even if the contrary were to be held, the definition of 'injury' in S. 44, Penal Code, is very wide, and the threat of a decree that could not be executed by any competent

authority is a threat of harm or injury within the meaning of the Code. (Meaning of the expression 'fraudulently and dishonestly' discussed.) A.I.R. 1940 Pat. 486 = 41 Cr.L.J. 427 = 21 P.L.T. 206 = 187 Ind. Cas. 256.

—S. 471—Civil suit by accused—He mentioning in his affidavit of documents in his possession certain delivery order—Defendants requiring him to produce that document—Document produced alleged to be forged—Accused, if could be charged under S. 471.

An accused had filed a civil suit in which he was required under the provisions of O. 11, Rr. 12 and 13, Civil P.C., to file an affidavit of documents which were or had been in his possession relating to some matter in question in the suit, and in the affidavit, mention was made about certain delivery order. Nevertheless, the accused did not produce it in Court, nor made any use of it. It was the defendants who, in cross examining the accused, required the production of the delivery order; and it was at their instance that it was produced. The document was alleged to be forged and the accused was charged under S. 471, Penal Code. There was no evidence that the accused used the delivery order for the purpose of cheating and no evidence that he used the delivery order as genuine and no evidence that he forged it;

**Held**, that under the circumstances, no charge, under S. 471, Penal Code, could be established as the accused was forced by the defendants to refer to this document in his evidence. But for the defendants, it would not have been produced in Court. By mentioning the document in his affidavit of documents in his possession, it might be that he showed that at one stage he had made preparation for using the document, but no more than that could be inferred. A.I.R. 1938 Rang. 194 = 39 Cr.L.J. 592 = 175 Ind. Cas. 488.

—S. 471—The handing over of the forged receipt to the *Vakil* and their production in Court in support of the defence amounts to using the forged receipts as genuine and the conviction under S. 471 is right. A.I.R. 1936 Mad. 280 = 1935 M.W.N. 1346 = 70 M.L.J. 109 = 43 L.W. 226 = 37 Cr.L.J. 421 = 161 Ind. Cas. 196.

—S. 471—Offence under—Alleged true copy of original certificate attached to a competitive examination application—Original certificate called for and produced—Date of birth in original found altered—Forgery.

In order to qualify for appearance at a certain competitive examination C attached a copy of a certificate certified as a true copy of original along with his application. On being asked to produce the original C produced it. The date of birth in the original certificate was changed from 5th January, 1901 to 15th January 1904, so as not to debar him from appearing in the above competitive examination.

**Held**, that the original document was a forged one inasmuch as the original date in it was altered and that C knew that it was a false document. That it was made with intent to cause damage and injury to other candidates for the examination and to support C's claim to appear. 118 Ind. Cas. 385 = 10 Lah. 545 = 30 Cr.L.J. 900 = 30 P.L.R. 724 = A.I.R. 1929 Lah. 152.



—S. 471—Party setting up two titles and supporting one by false document.

If a party to a suit sets up two different titles and supports one of them with a false document he has committed an offence under S. 471 even if it be found that the other title is good. 96 Ind. Cas. 850=7 A.I.Cr.R. 58 = 27 Cr.L.J. 994 = A.I.R. 1926 Mad. 1072.

—S. 471—Offence under—Accused asked to produce documents in support of complaint of trespass—Forged documents knowingly produced—Offence.

Where the accused was told to produce copies of the revenue records in support of his complaint of trespass and he knowingly produced forged copies as genuine.

**Held**, that the case was different from one where a person has a forged document in his possession which he does not intend to use as genuine, but which a Court forces him to produce, and that the accused was guilty. 88 Ind. Cas. 595=6 Lah. 50=26 Cr.L.J. 1171=26 P.L.R. 156=A.I.R. 1925 Lah. 333.

—S. 471—Forging receipt—Misappropriation of money—Offence.

A Bench clerk received a sum of money paid in as fine and misappropriated it and to cover up the misappropriation forged a false receipt.

**Held**, that the offence under Ss. 467 and 471 was committed especially since the false receipt was made for the purpose of enabling him to misappropriate the money. 11 Mad. 411, Foll. 83 Ind. Cas. 338 = 3 Bur.L.J. 113 = 25 Cr.L.J. 1378=A.I.R. 1924 Rang. 331.

—S. 471—Altering prescription and obtaining a larger quantity of morphia.

Accused obtained a prescription from a medical man for one tube of **morphia** and altering the words "one tube" to "four tubes" presented the prescription to a chemist and obtained four tubes of **morphia** from him.

**Held**, that the accused was guilty of an offence under S. 471, I.P.C. 63 Ind. Cas. 617 = 22 Cr.L.J. 681 (Lah.).

—Ss. 471 and 474—Forgery—Hundi by non-existing firm—Conviction not technically correct but doing substantial justice—Admission of accused in trial Court—Binding effect.

A **Hundi** drawn by a firm which never existed is a forgery. When **P** takes a **Hundi** from **Q** knowing that the latter has fabricated it, he is guilty under S. 474, and if he negotiates it knowing it to be a forged document, he is guilty of the more serious offence under S. 471. 30 P.W.R. Cr. 1916=37 P.L.R. 1917 = 17 Cr.L.J. 474=36 Ind. Cas. 154.

—S. 471—Forged document—Support of false claim.

Where, in order to sustain a false claim, a forged document is relied on in another document filed in support of the claim, it constitutes an offence under S. 471, I.P.C. 16 Cr.L.J. 703 = 30 Ind. Cas. 751 (Mad.).

—S. 471—Guilty knowledge—Document produced before Patwari for mutation—Stone altered—Area not altered—No offence.

Where the accused produced a sale-deed before a Patwari for entering mutation (with a view to get the Tahsildar's attestation) in which the stone of the land was altered but not the area.

**Held**, that no offence under S. 471, I.P.C., was committed. In the absence of evidence that the accused forged it or knew it was forged, the conviction is unsustainable. 25 P.R. 1913 Cr. = 19 Cr.L.J. 667 = 273 P.L.R. 1914=21 Ind. Cas. 907.

—Ss. 471 and 467—Accused forgerer.

Though a person charged under S. 471 is himself the forgerer of the document, it is no reason why he should not be charged under S. 471, especially when he cannot be charged under S. 467 owing to want of territorial jurisdiction. To form an offence under S. 471, forgery must be proved. 13 Cr.L.J. 862=17 Ind. Cas. 798 (Mad.).

—S. 471—Using certified copies of forged originals knowing the originals to be forged.

The use of certified copies of forged originals by a person who knows that the originals are forged amounts to making use of forged documents within the meaning of S. 471, 28 All. 402, Foll. 86 Ind. Cas. 1993=12 O.L.J. 124 = 2 O.W.N. 174 = 26 Cr.L.J. 929 = 29 O.C. 1=A.I.R. 1925 Oudh 413.

—S. 471—False document—Copy.

The copy of a document alleged to be false does not come within the definition of a false document and therefore conviction is bad. 7 M.L.T. 428=20 M.L.J. 534=11 Cr.L.J. 401=6 Ind. Cas. 776.

## 2. Proof of Offence.

—S. 471—Proof of offence.

In order to convict a person for dishonestly or fraudulently using a forged document, the prosecution has to prove beyond reasonable doubt that he knew that the document was forged. Mere proof that the document has not been executed by the person by whom it is alleged to have been executed, is not enough. 12 B.R. 289=222 Ind. Cas. 620=47 Cr.L.J. 317 =A.I.R. 1947 Pat. 251.

—Ss. 471, 193 and 465—Pleader filing forged document.

Mere suspicion on the part of the Pleader as to the genuineness of the receipt, would not establish his knowledge of the forgery which is the essential ingredient of the offence. A pleader is under no higher obligation than any other agent would be and to justify his prosecution, it should be shown that he had been a party (principal or accessory) to the concoction of the document or that he had the knowledge that it was concocted. The mere fact that the suspicions of a Pleader ought to have been aroused by the sight of the document is not **prima facie** evidence that he knew or had reason to believe the document to be forged. A.I.R. 1940 Nag. 360=1940 N.L.J. 183=41 Cr.L.J. 753=189 Ind. Cas. 579.

—Ss. 471 and 193—In a charge under Ss. 471 and 193, Penal Code, failure to establish that the document in question is forged would result in acquittal. (1940) 72 C.L.J. 46.



—Ss. 471 and 467—Prosecution must prove forgery and intention of accused to use document knowing it to be forged.

It is not sufficient for the prosecution to establish that the document is not a genuine document for the purpose of obtaining a conviction under Ss. 467-471, Penal Code, it must be shown affirmatively that the accused either knew or had reason to believe that the document was forged. This matter of knowledge is one which may, in certain cases, follow necessarily as an inference from a finding of fact. (1936) 166 Ind. Cas. 531=3 B.R. 177=38 Cr.L.J. 235.

—S. 471—User—Question of fact.

Whether there has been an user or not must depend upon the circumstances of each case. 91 Ind. Cas. 993=52 Cal. 881=27 Cr.L.J. 177=A.I.R. 1926 Cal. 89.

—S. 471—Forgery committed in record room—Copies of false entries used in contesting a suit—Fradulent or dishonest intention of accused and his knowledge as to the forged nature of the document—Proof.

When forgeries are committed by a person inside the record room, and copies producing the false entries are put in a suit the use of such certified copies is a use of forged documents. The mere circumstance that the documents had been forged would not be sufficient to justify a conviction. It is necessary to prove in order to obtain such a conviction that the use has been fraudulent or dishonest and in addition that the person putting, in the copies knew, or had reason to believe that the originals were forged. 93 Ind. Cas. 66=1 Luck. 306=13 O.L.J. 391=27 Cr.L.J. 402=3 O.W.N. 171=A.I.R. 1926 Oudh. 255.

—Ss. 471 and 467—Forgery—Evidence insufficient—Knowledge that document is forged—Effect of.

Where a portion of a document is altered with the intention of causing it to be believed that it was executed at a time when it really was not executed and the accused used it knowing it to be forged, an offence under section 471, I. P. C. is committed and the charge of forgery is unsustainable. 16 Cr.L.J. 701=30 Ind. Cas. 749 (Mad.)

—S. 471—Series of forgeries—Relevancy of.

A series of similar transactions in which forgeries were committed can be used as evidence of intention and not as evidence of the forgery. But it is doubtful whether the mere filing of a copy of a forged document is a user of it. 43 Cal. 783=20 C.W.N. 262=17 Cr.L.J. 130=33 Ind. Cas. 306.

—Ss. 471 and 472—Using forged document—Guilty knowledge—Conduct—Filing of document—Charge under Ss. 465 and 471—Conviction under Ss. 466 and 471.

The fact that a man who files a document is interested in establishing its contents, does not raise a presumption that he filed it knowing to be forged. Conduct is the principal criterion of guilty knowledge. The filing of a document as the basis of a plaint or as a necessary sequel to the pleas in the plaint is itself an user, and it then becomes incumbent on the person using it to show that he filed the document in all good faith believing it to be genuine. Convictions under Ss. 471 and 474, I. P. C. cannot stand together.

6 N. W. P. H. Cr. 39, Foll. Where a charge is laid against an accused under S. 465 read with S. 471, I. P. C., he cannot be convicted and sentenced under S. 466 read with S. 471. 17 C.W.N. 94=13 Cr.L.J. 449=15 Ind. Cas. 81.

—S. 471—Forgery—Comparison of handwriting—Value of.

Ordinarily, in determining whether a document is forged or genuine, comparison of handwriting is a valuable aid. A.I.R. 1933 Pat. 481=34 Cr.L.J. 828=144 Ind. Cas. 872.

### 3. Sentence.

—S. 471—Sentence.

S was convicted under S. 471 for having used a forged document and P for having abetted the same; S was sentenced to 4 years and P to 2 years rigorous imprisonment.

Held, that the sentence was not severe. 116 Ind. Cas. 632=49 C.L.J. 193=30 Cr.L.J. 656=13 A.I. Cr.R. 73=A.I.R. 1929 Cal. 203.

—S. 471—Punishment.

A person dishonestly using as genuine a forged document can be punished under S. 471 with the punishment provided by S. 467. 5 O.W.N. 138=A.I.R. 1927 Oudh 630.

—S. 471—Separate Offences—Separate conviction.

If a man commits two offences he can certainly be convicted of them both, more especially when they are separate transactions and the commission of one does not necessarily involve the commission of the other. 77 Ind. Cas. 825=25 Cr.L.J. 473=A.I.R. 1924 Nag. 162.

### 4. Miscellaneous.

—Ss. 471, 467 and 409—Postman charged under Ss. 409, 467 and 471 for misappropriating amount of money order and forging thumb impression and using such forged document—Offences committed on April 10, 1939—Sanction of Governor-General, held necessary for prosecution under S. 471 but trial could proceed for other offences. A.I.R. 1941 Mad. 38=(1940) 2 M.L.J. 564=52 L.W. 516=1940 M.W.N. 1116=42 Cr.L.J. 263 (1)=I.L.R. (1941) Mad. 258=192 Ind. Cas. 263.

—S. 471—Charge under—When facts disclose offence under S. 103, legality of.

A person cannot be prosecuted under S. 471, Penal Code, where the facts alleged constitute an offence under S. 193 for which a complaint by the Court is necessary. A.I.R. 1933 Mad. 413=37 L.W. 547=1933 M.W.N. 217=34 Cr.L.J. 800=144 Ind. Cas. 519.

—Ss. 471 and 467—Offences under Ss. 467 and 471, Penal Code, cannot be taken cognizance of except on a complaint in accordance with the provisions of S. 195, Criminal P.C. A.I.R. 1932 Sind. 90=26 S.L.R. 73=33 Cr.L.J. 452 (2)=137 Ind. Cas. 341.

—S. 471—Interpretation—'Uses'.

The words "produced or given in evidence" in S. 195 (c), Cr. P. Code, do not limit the procedure under



that section to a limited class of user within the wider class contemplated by S. 471. 113 Ind. Cas. 712=9 P.L.T. 800=30 Cr.L.J. 236=12 A.I.Cr.R. 236=A.I.R. 1929 Pat. 60.

—S. 471—Order for prosecution under S. 82 Registration Act, and S. 471, I.P.C.—Former found illegal under S. 74—Order under S. 471, I.P.C.—If affected.

Where a person is ordered to be prosecuted under S. 82, Registration Act and S. 471, I.P.C., and the prosecution under S. 82 is illegal having regard to the provisions of S. 74, Registration Act, the illegality or irregularity in no way affects the validity of the order of prosecution under S. 471, I.P.C. and if the prosecution under S. 82 is set aside the part of the order under S. 471 remains. For Penal Code has no relation to Registration Act and is governed by principles entirely different from those governing prosecution under S. 82. 119 Ind. Cas. 888=10 P.L.T. 889=30 Cr.L.J. 1101=1929 Cr.C. 252=A.I.R. 1929 Pat. 500.

—S. 471—Jurisdiction—Trial under S. 196—Facts disclosing offence under S. 471—Procedure.

Where a petitioner was tried for an offence under S. 196 and convicted but from the facts it appeared that an offence under S. 471 was committed, which is exclusively triable by Sessions Court, the conviction was set aside and trial by Court of Sessions was ordered. 96 Ind. Cas. 119=44 C.L.J. 113=30 C.W.N. 840=27 Cr.L.J. 871.

—S. 471—Report of expert—No affidavit in support—No examination—Legality of sanction.

The report of the Government Expert, who never came into the witness-box and whose report is not supported even by an affidavit is inadmissible in evidence and should not form the basis of the order directing the prosecution on a charge of forgery. A sanction based on a piece of evidence that can in no circumstances be called legal evidence and especially when there is positive legal evidence against it is illegal. The power of sanction should be used with great caution. 75 Ind. Cas. 148=21 A.L.J. 399=4 L.R.A. Cr. 92=24 Cr.L.J. 900=A.I.R. 1923 All. 601.

—S. 471—Sanction—Proceedings for patta transfer before a Deputy Tahsildar—Offence committed in—Sanction of Revenue Court.

Certain forged Will was presented by the accused in proceedings for the transfer of a patta before a Deputy Tahsildar.

**Held**, the Deputy Tahsildar constituted a Revenue authority and his sanction was necessary for the parties to the proceedings to be proceeded against under S. 471, I.P.C. 71 Ind. Cas. 63 = 16 M.L.W. 534 = 24 Cr.L.J. 15=A.I.R. 1923 Mad. 87.

—S. 471—Sanction to prosecute for forgery.

Before a conviction can be had under S. 471, I.P.C., the accused must be proved to know or to have reason to believe that the document was forged and unless it is proved, no sanction for his prosecution can be given. 3 Bur.L.T. 151=11 Cr.L.J. 749=8 Ind. Cas. 995.

—Ss. 471 and 474—Stay of criminal proceedings pending civil suit—Registration Act, S. 77.

Where the alleged executant of a document having denied execution before the Sub-Registrar, an enquiry was held and the District Magistrate directed the prose-

cution of the person presenting the document for registration and the said person filed a civil suit under S. 77 of the Registration Act, the High Court directed the criminal proceedings to be stayed pending the disposal of the civil suit. (1906) 5 C.L.J. 233=5 Cr.L.J. 199. Also 30 M. 226.

—S. 474—Interpretation—‘Intention to use.’

The ‘intention to use’ contemplated in S. 474, Penal Code, should be fructified into an actual use to attract the provisions of S. 195, Cr. P. Code 99. Ind. Cas. 1025 = 28 Cr.L.J. 225=A.I.R. 1927 Mad. 1060.

—S. 474—No sanction necessary.

For a prosecution under S. 474, I.P.C., no sanction is necessary. 19 C.W.N. 125=16 Cr.L.J. 309=28 Ind. Cas. 645.

—S. 476—Forgery—Person forging neither deriving benefit nor causing loss or injury to others—Offence, if committed.

Certain tenants of P asked him to apply for agricultural loans and on the loan being sanctioned, a security bond and a receipt bearing the signatures of the tenants were submitted to the Township Officer and the loan was disbursed. Subsequently, it turned out that the application, the security bond and the receipt were not signed by the borrowers. P and certain others were arrested and sent up for trial. It appeared that the money was received by the tenants and was duly returned to the Government :

**Held**, that though the persons who signed the application, the security bond, and the receipt by impersonating the borrowers practised deception on the Township Officer, they did not derive any advantage therefrom, or cause loss to the Government as the loan was received by the tenants and returned to the Government and that therefore, neither forgery nor abetment of forgery had been proved.

**Held**, further, that even assuming the accused had committed the offence with which they were charged, the offence was only of a technical nature. A.I.R. 1933 Rang. 114 = 34 Cr.L.J. 922 = 145 Ind. Cas. 229.

—S. 477—Will—Death of testator—Concealment of will—Absence of secretion—Offence under S. 477, if committed.

The executant of a will died and the will, after execution, remained with the solicitors until 2nd February 1926 when it was made over to the accused who was the only son of the testator. The testator also left a widow and a daughter's son. The accused did not take any steps for obtaining probate of the will. In order to obtain some money from the Land Acquisition Court, he swore an affidavit in July, 1930 that his father had died intestate. After the Will had been discovered in August, 1932, attempts were made to bring about a settlement between the widow and the accused and ultimately probate was applied for in respect of the Will in question and probate was obtained. The accused was charged under S. 477, Penal Code.

**Held**, that if as a matter of fact the accused had been advised that, having regard to the terms of the Will, it was not necessary to obtain probate, that would furnish sufficient explanation for the action of the



accused in suggesting in the affidavit of July, 1930 that the testator had died intestate.

**Held**, also that as the accused obtained possession of the will with the knowledge of the solicitors who were responsible for the custody thereof till February, 1926, it could not be said that there was a secretion in the eye of the law and within the meaning of S. 477, Penal Code. A.I.R. 1934 Cal. 217=58 C.L.J. 283=35 Cr.L.J. 716=148 Ind. Cas. 587.

**—S. 477—Valuable security—Destruction of administrative order of Court not creating any, legal right—Offence.**

In order to make a person guilty of an offence under S. 477, Penal Code, the document should be a valuable security. An administrative order asking the **Nazir** of the Court to take a document of suretyship from the accused for his being released on bail does not by itself create a legal right in favour of the **Nazir** and hence, when such an order is destroyed, an offence under S. 477 is not committed. A.I.R. 1933 Bom. 494 = 35 Bom.L.R. 1062 = 35 Cr.L.J. 479 = 147 Ind. Cas. 279.

**—S. 477—Fraudulent secretion—Will.**

The fraudulent secretion of any document purporting to be a Will constitutes an offence within the meaning of the section, quite apart from its validity as defined in S. 3 of the Probate and Administration Act 97 Ind. Cas. 1054=4 Rang. 251=27 Cr.L.J. 1230=A.I.R. 1926 Rang. 202.

**—S. 477—Grant of letters—Effect.**

The grant of Letters of Administration to the accused is no bar to further proceedings under S. 477. 97 Ind. Cas. 1054=4 Rang. 251=27 Cr.L.J. 1230=A.I.R. 1926 Rang. 202.

**—S. 477-A.**

**Synopsis.**

1. Charge under.
2. Interpretation—"Falsify".
3. Offence under.
4. Proof of offence.
5. Miscellaneous.

**1. Charge under.**

**—S. 477-A—Offence under—Charge under—Form—Defect—If cured by S. 225, Cr. P. Code. See CR.P. CODE (V OF 1898), Ss. 222 (2) AND 225 AND PENAL CODE, S. 477-A. A.I.R. 1950 All. 167.**

**—Ss. 477-A and 480—Joinder of charges under—Legality. See CR. P. CODE (V OF 1898), S. 234 AND I.P. CODE, Ss. 477-A AND 480. A.I.R. 1950 All. 167.**

**—S. 477-A—The terms of S. 477-A, Penal Code indicate that a certain elasticity is permissible in framing a charge under it and it is not necessary to confine the charge to one particular false entry, and a general falsification of specified books, papers, or accounts may be alleged in combination with an allegation of fraudulent intent, no details of the person affected by the fraud, or the amount involved, or the date or dates on which the offence was committed being required. A number of falsifications can be**

included in a single charge provided they are connected with the same fraud; that is to say, although it is possible to regard them as separate offences, the law provides that they may also be regarded as one offence. A.I.R. 1944 Oudh 122=1944 O.W.N. 1=1944 An.W.R. 3=1945 Cr.L.J. 538=19 Luck. 493=212 Ind. Cas. 125.

**2. Interpretation—"Falsify".**

**—S. 477-A—Interpretation—"Falsify."**

It is not necessary for the prosecution to prove that any person or persons were actually deceived by the false document. It is quite sufficient if in the opinion of the Court the document had that tendency. The expression "falsify" applies to the preparation of an entirely new document containing false information. To falsify means "to render false" and a new document containing false information can be correctly described as a false document and the act of preparing such a document is falsification of the document. 98 Ind. Cas. 599=27 Cr.L.J. 1383=A.I.R. 1926 Lah. 385.

**3. Offence under.**

**—S. 477-A—Entry showing merely that accused had formed criminal intention—Effect of—Offence.**

An entry in the accounts which is of significance merely as showing that the accused had formed a criminal intention cannot by itself amount to the offence of falsification of accounts. 3 A.I.Cr.D. 277=A.I.R. 1949 Pat. 326=50 Cr.L.J. 682.

**—Ss. 477-A and 409—Public servant entrusted with money misappropriating it and making false entries in cash book is guilty under Ss. 409 and 477-A, Penal Code. A.I.R. 1941 Sind. 204=I.L.R. (1941) Kar. 328=43 Cr.L.J. 241=197 Ind. Cas. 692.**

**—Ss. 477-A and 465—"Intent to defraud" meaning of—Accused making false entry in diary of Court to screen his own negligence as clerk—Offence.**

The meaning of the term "with intent to defraud" is not restricted to cases of "deceit and injury to person deceived". The term means either an intention to deceive and by means of deceit to obtain an advantage or an intention that injury should befall some person or persons.

Advantage which is intended must relate to some future occurrence or in other words, must be of a prospective nature.

Where a clerk of a Court has not committed any offence of criminal breach of trust or criminal misappropriation but he had the false entries made merely for the purpose of screening his own negligence of his duties as clerk of the Court nor had he by these false entries facilitated any misappropriation or embezzlement nor did he intend thereby to cause injury to any other person, it cannot be contended that by means of the deception, he intended to secure his advancement in the service and he cannot be convicted either of the offence under S. 477-A or under S. 465, Penal Code. A.I.R. 1939 Rang. 156=40 Cr.L.J. 552=181 Ind. Cas. 439.



—S. 477-A—"With intent to defraud" within meaning of S. 477-A, what is—Difference between act done "dishonestly" and "fraudulently" pointed out.

A reference to S. 25, Penal Code, shows that the expressions "fraudulently" and "with intent to defraud" are synonymous; but there is no further definition of their meaning in the Code.

The difference between an act done dishonestly and an act done fraudulently is this. If there is the intention by the deceit practised to cause wrongful loss that is dishonesty, but even in the absence of such an intention, if the deceitful act willfully exposes anyone to risk of loss, there is fraud. A.I.R. 1938 Pat. 165=16 Pat. 688=4 B.R. 337=39 Cr.L.J. 374=19 P.L.T. 297=173 Ind. Cas. 759=1938 Pat.W.N. 49.

—S. 477-A—Essential ingredients—'Intent to defraud', meaning of — Manager offering bribe out of company's funds—Intention to promote company's interests—Offence, if committed.

One of the most important ingredients of S. 477-A, Penal Code, is 'intent to defraud'. This expression implies conduct coupled with intention to deceive and thereby to injure; in other words "defraud" involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him but not necessarily deprivation of property. Where, therefore, the manager of a company offers bribe out of the funds of the company, his intention being not to cause any injury to the company but on the contrary to promote its interests, though his act might be punishable under another section of the Penal Code, yet it is clearly not punishable under S. 477-A, Penal Code.

What the law punishes is an act that causes harm illegally to any person in body, mind, reputation or property, or an attempt to commit such an act. Therefore, any body who has committed an act, not with the intention of causing an injury to any body but with the intention of promoting the interests of others is clearly not punishable under the Code. A.I.R. 1937 Rang. 280=38 Cr.L.J. 887=170 Ind. Cas. 257.

—S. 477-A—Person acting as agent many thousands of miles away, whether a servant—Letter filed as exhibit—Witness, if can be allowed to determine which portion of it is to go in evidence—Court, if can hand back the exhibit.

A person who is acting as an agent for another many thousands of miles away must have had power to act on his own initiative which is the ordinary mark of difference between a servant and an agent.

Documents containing accounts in respect of which falsifications were alleged to have been made were prepared by an agent but were never made over to the employer, who was many thousands of miles away in another country and there was no falsification after they reached the hands of the complainant:

**Held**, that it did not amount to an offence under S. 477-A, Penal Code, as the documents could not be said to be belonging to or in possession of the employer. A Court has inherent powers for refusing disclosure of matters which, in the public interest, should be kept secret, but it cannot allow a witness to put in a portion

of a letter and say which portions of it are to go in and which portions are to be concealed from his opponent nor is there any warrant for a letter which once had been made an exhibit, being handed back to a party. A.I.R. 1936 Rang. 299=37 Cr.L.J. 927=164 Ind. Cas. 369.

—S. 477-A—A supervisor of a society getting affixed to debt entry false thumb impression of a sweeper and thus misappropriating money:

**Held**, that the act amounted to falsification of accounts under S. 477-A. A.I.R. 1935 Bom. 30 = 36 Bom.L.R. 1120=36 Cr.L.J. 522=154 Ind. Cas. 559.

—S. 477-A—Falsification of accounts by one partner—Partner in charge of books—Fact of existence of partnership—Whether sufficient for maintaining charge.

The mere fact that a partnership subsisted between the parties is no answer in a properly proved case to a charge of falsification of accounts against a partner who is in charge of the books. A.I.R. 1932 Cal. 464=36 C.W.N. 303=33 Cr.L.J. 597=138 Ind. Cas. 339.

—S. 477-A—By managing partner—Falsification of accounts.

Where a partner of a firm is appointed to manage its business and write its accounts and he falsifies its accounts he is liable under S. 477-A. 6 Bom.L.R. 553, Foll. 88 Ind. Cas. 189=18 S.L.R. 274=26 Cr.L.J. 1101=A.I.R. 1925 Sind. 328.

—S. 477-A—Falsification of accounts by managing partner.

Where a partner in a firm is appointed as such to manage the business of the firm or to write its account he acts as its servants; and if he falsifies accounts he is liable to be punished under S. 477-A. (1904) 6 Bom. L.R. 553.

—S. 477-A—Accused obtaining by falsifying accounts securities worth amount justly going to be due to himself in near future but whose realisation is doubtful—Offence.

If together with the intention of deceiving there be an attempt to obtain an undue advantage, there would be in law an intent to defraud.

Where an accountant in a Bank noticing that the Bank might fail any day and that it might become difficult for him to recover the money deposited by him as security which was going to be justly payable back to him shortly, obtained securities worth his deposit by falsification of accounts and without the higher authorities of the bank being aware of the fact and where in an enquiry in respect of a charge under I.P.C., S. 477-A, the accused was discharged.

**Held**, that the order of discharge was wrong and that there was enough material on the record to direct further enquiry. 21 All. 113, Foll. 89 Ind. Cas. 520=47 All. 948=23 A.L.J. 657=26 Cr.L.J. 1384=6 L.R.A. Cr. 145=A.I.R. 1925 All. 654.

—S. 477-A—Document prepared to conceal fraud already committed—Offence.

Where there is an intention to obtain an advantage by deceit, there is fraud and if a document is fabricated with such intent it is forgery. A man who deliberately makes a false document in order to conceal defraud



already committed by him is acting with intent to commit fraud, as by making the false document he intends the party concerned to believe that no fraud had been committed. Where a document is prepared with the intention of concealing a fraud that had already been committed, and thus to enable the person who had made "wrongful gain" to retain the property that he had acquired by unlawful means, it amounts to a false document and the person making the document is guilty of forgery. A.I.R. 1933 All. 525 = 34 Cr.L.J. 1056 = 1933 A.L.J. 1372 = 55 All. 783 = 145 Ind. Cas. 749.

**—S. 477-A—Falsification for saving oneself—Nature of offence.**

Where a person makes false entries to cover defalcations in order to save himself from the consequences of defalcations.

**Held**, he cannot be convicted of forgery. 68 Ind. Cas. 834 = 20 A.L.J. 662 = 23 Cr.L.J. 610 = A.I.R. 1922 All. 435.

**—S. 477-A—Falsification to conceal embezzlement.**

The falsification of books to conceal an embezzlement or to assist in the completion of an offence of criminal breach of trust is an offence under S. 477-A. 11 Cr.L.J. 185 = 4 Ind. Cas. 1089 (U.B.).

**—S. 477-A—Falsification of account with a view to conceal previous fraud.**

Falls within the purview of S. 477-A. (1908) 12 C.W.N. 581 = 35 C. 450.

**—S. 477-A—Replacing stamps by used up stamps.**

Accused a clerk of the certificate department was charged with having tampered with requisitions filed under the Public Demands Recovery Act by replacing the stamps on those documents and on the accompanying *vakalatnamas* by others taken from other papers.

**Held**, that the acts alleged did not come within S. 477-A. 47 Cal. 71 = 23 C.W.N. 935 = 30 C.L.J. 258 = 54 Ind. Cas. 892.

**—S. 477-A — Falsification of balance sheet—Manager.**

Where the Managing Director and the Manager of the Head Office 'falsified' the books of the Bank so as to show a sham profit of Rs. 3,000, and completed the falsification by manufacturing pro-notes in order to give to the falsified balance sheet and account books an appearance of correctness, both of them are guilty of an offence under S. 477-A. 23 P.W.R. 1915, Cr. = 167 P.L.R. 1915 = 16 Cr.L.J. 473 = 28 P.R. 1915, Cr. = 29 Ind. Cas. 105.

**4. Proof of offence.**

**—Ss. 477-A and 405—Complaint by one partner against other partner and clerk for criminal breach of trust and falsification of accounts — Necessity of proving that clerk falsified account book wilfully and with intent to defraud complainant and partner abetted him.** (1935) 157 Ind. Cas. 208 = 36 Cr.L.J. 1112.

**—S. 477-A — False entries — Accused pleading that his father was partner of complainant's firm**

**and entries were made under his authority—Conviction, when good.**

Where the entries in account books according to the prosecution were false entries wilfully made by the accused who was the *gomasta* of the complainant's firm and the accused's defence was that the entries were merely in the nature of adjustment entries, that the accused's father was a partner of the complainant's firm and that the entries were made in the books of the complainant's firm under the direction and authority of the partners who constituted that firm :

**Held**, that as the point whether the father was a partner in the complainant's firm was made out or not was not clearly proved, the conviction should be set aside. A.I.R. 1934 Cal. 500 = 59 C.L.J. 83 = 36 Cr.L.J. 74 = 152 Ind. Cas. 226.

**—S. 477-A—Falsification of accounts—Nature of charge—Proving more than three instances of falsification—Legality of trial.**

When a person is charged with falsification of accounts, any number of falsifications may be proved in order to sustain the principal charge of falsification.

S. 477-A, Penal Code, speaks of two offences, namely, falsification of accounts and making of false entry or, omitting or altering, or abetting the omission or alteration of an entry and these two offences are distinct and not interdependent. A.I.R. 1931 Cal. 8 = 34 C.W.N. 925 = 32 Cr.L.J. 318 = 129 Ind. Cas. 356.

**5. Miscellaneous.**

**—S. 477-A—Where the accused went on defalcating such sums as he could conveniently do so without attracting the attention of his superior officer as occasion arose and opportunity offered :**

**Held**, that each defalcation was a separate offence. A.I.R. 1942 Pat. 401 = 23 P.L.T. 108 = 21 Pat. 113 = 8 B.R. 675 = 43 Cr.L.J. 625 = 200 Ind. Cas. 380.

**—S. 477-A — Diary in judicial proceeding, if "book, paper, writing, valuable security or account."**

**Quære.**—Whether a diary in a judicial proceeding falls within the category of "book, paper, writing, valuable security or account" within the meaning of S. 477-A, Penal Code, is highly debatable. A.I.R. 1939 Rang. 156 = 40 Cr.L.J. 552 = 181 Ind. Cas. 439.

**—S. 477-A—Public exposure of malpractices in connection with banking concerns and punishment of delinquents should be first concern of State, otherwise it has a very disastrous effect on the community in general.** A.I.R. 1939 Bom. 129 = 41 Bom.L.R. 98, = 40 Cr.L.J. 579 = 181 Ind. Cas. 870.

**—S. 477-A—Ex-manager of co-operative society prosecuted under Ss. 477-A and 120-B, Penal Code, as a result of letter written to Magistrate by successor — Society, held occupied position of accused.**

Where, as a result of a letter addressed to the Magistrate by the successor of an ex-manager of a Co-operative Society, the latter is prosecuted under Ss. 477-A and 120-B, Penal Code, and the letter is signed as Manager of the Society, the Society occupies the position of the accused. A.I.R. 1938 Cal. 829 =



I.L.R. (1939) 1 Cal. 123=69 C.L.J. 196=42 C.W.N. 1219=180 Ind. Cas. 755.

—S. 477-A—Sanction for prosecution.

The provisions of S. 477-A, Penal Code, are not covered by the provisions of S. 196 (1) (c), Cr. P. Code, and consequently, no sanction is required for institution of a prosecution under S. 477-A with regard to a document produced in Court. A.I.R. 1932 Sind. 53=25 Sind. L.R. 471=33 Cr.L.J. 328=136 Ind. Cas. 766.

—S. 478. See also S. 482.

—Ss. 478 and 482—Valid trade-mark must be distinctive—Surname, whether suitable for trade mark—Certain mark commonly used in market to denote goods of particular kind, if can be distinctive mark — Trade-mark is acquired by user.

The definition of trade-mark in S. 478 implies that the mark must be "distinctive" in the sense of being "adopted to distinguish the goods of the proprietor of a trade-mark from those of other persons." If a mark merely described the quality or origin of an article, or is such as is commonly used in the trade to denote goods of a particular kind, such a descriptive mark would obviously not be a distinctive mark. For this reason, it has been said, a surname is often not suitable for the purposes of a trade-mark. The device of a pictorial representation would obviously be more appropriate as a trade-mark, but it will still have to be "distinctive". (Systems in England and in India stated and distinguished.)

The complainant was a dealer in and manufacturer of certain brands of umbrellas. All these brands were known in the market as 'Aswini Chhati'. One of the brands bore a design printed on it which consisted of the picture of a swan holding a closed umbrella between its beak in the centre, with the name "Aswini Kumar De" in prominent type stretching over it like an arch from end to end, and the figure 8-A4 (the letter "A" overlapping the digits 8 and 4) on the top of it. Such designs were common to many other brands, in the market. The purchaser purchased the complainant's umbrellas by their name as "Aswini Chhati" and not by the trade mark :

**Held**, that the complainant could not claim exclusive title to the trade-mark used by him as a distinctive trade-mark. A.I.R. 1938 Cal. 216=66 C.L.J. 210=39 Cr.L.J. 537=I.L.R. (1938) 1 Cal. 665=42 C.W.N. 1121=175 Ind. Cas. 144.

—Ss. 478 and 482—Trade-mark—Invented word, test of—'Trade-mark', if means whole lable.

A mere ordinary addition to, or mis-spelling or variation of a word in use in the English language does

not make the word so formed [an invented word by the question in each case is one of fact. The test of an invented word is that it must have been substantially new at the date of registration ; or have been substantially new when first used by the applicant, and have been only used to denote his goods down to the date of registration. It is not necessary that its production should have involved any great ingenuity or anything like "invention" in the sense in which the term is used in patent law.

The word "Agurine" not being an ordinary English word nor a combination of two ordinary English words, must be regarded as a fit subject of a trade-mark.

The expression "trade-mark" in S. 478, Penal Code, includes the whole design on the box and the label, pasted on it.

Where there was a striking similarity in the design of the complainant's bottle and that of the accused and this fact was not disputed :

**Held**, that the accused had used a false trade-mark within the meaning of S. 482, Penal Code. A.I.R. 1932 Sind 94=26 Sind L.R. 241=33 Cr.L.J. 778=139 Ind. Cas. 335.

—S. 478—Change of trade-mark labels — Merchandise—Meaning of.

In India there is no registration of trade-mark or for a title to a trade-mark. The right of action, civil and criminal, is founded on deceit. If a person passes off his own inferior goods as the superior goods of the complainant and counterfeits his trade-mark the complainant must prove the reputation of his trade-mark. Where, however, the accused puts his own name on complainant's goods to advertise himself, he is guilty under S. 478, I.P.C. 'Merchandise' in Ss. 478 and 485, I.P.C., cover goods selected and guaranteed by the proprietor of the trade-mark, and an importer who affixes his name to the goods selected is a person whose merchandise they are. 12 S.L.R. 129=20 Cr.L.J. 277=50 Ind. Cas. 165.

—Ss. 478 and 482 — Trade-mark — Importer using a distinctive mark.

A distinctive mark may be used by a person who is only an importer of goods and he will require the property in that mark showing that all goods which bear it are imported by him. Hence where the complainants, importers of hand-made sugar used a distinctive mark denoting that the sugar contained in the bags so marked was imported by them (their customers feeling sure from the mark that the sugar was hand-made), and the accused used the same mark.

**Held**, that the accused were guilty of using a false trade-mark. 39 All. 123=14 A.L.J. 1080=17 Cr.L.J. 535=36 Ind. Cas. 583.



—**Ss. 478 and 486—Trade-mark—Counterfeiting—What is.**

The expression 'trade-mark' as defined in S. 478 must not be confined to the trade-mark of the complainants as registered but must include the whole design on the top of the box and the block label pasted round the side.

**Held**, on the facts, that the case clearly came within the definition of 'counterfeit' in S. 28, I.P.C. 19 C.W.N. 957=16 Cr.L.J. 719=30 Ind. Cas. 1007.

—**Ss. 478 and 482—Trade-mark—Property mark—Counterfeiting.**

Where the object of stamping certain words on certain articles is to inform the public that the articles are the merchandise of a particular person imported, sold and guaranteed by it, the mark is a trade-mark and not a property mark. For the purposes of the Penal Code it is not essential that an imitation should be exact in order to be 'counterfeit'. 8 S.L.R. 199=16 Cr.L.J. 230=27 Ind. Cas. 902.

—**Ss. 478 and 486—Design—Trade description.**

Where a design covers the whole body of goods and is part and parcel thereof, it is not a trade-mark but a 'design' under the Indian Patents and Designs Act, 1911. Nor is it 'Trade description' within S. 2 (2) of the Merchandise Marks Act, 1889. 8 S.L.R. 39=15 Cr.L.J. 670=25 Ind. Cas. 998.

—**Ss. 478 and 482—Merchandise Marks Act, Ss. 4 and 6—Calendar—Name—Trade-mark—Trade description.**

The use of the name of the calendar published by another person so as to make the people think that the calendar was issued by that individual is not an offence under S. 482 of the Penal Code or S. 6 of the Merchandise Marks Act because the name of the calendar (which cannot be said to be **manufactured**, even assuming it to be **goods**), is not a trade-mark under S. 478 of the Penal Code; nor even though unauthorised is it a false trade description under S. 4 of the Merchandise Marks Act. (1901) 3 Bom.L.R. 883=26 Bom. 289.

—**S. 478. See S. 417. 25 M. 726=12 M.L.J. 68.**

—**S. 478—Evidence and proof—Goods manufactured by complainant alone and reputed to be his.**

Under S. 478 complainant has to prove that the goods which are the subject of the mark are manufactured and sold by himself and that goods are known in the market as being of his manufacture alone.

Where the article bearing the mark was proved to have been manufactured and sold by both the complainant and the accused on a large scale and there was no sufficient evidence to support the view that

the articles was reputed to be the complainants' exclusive manufacture. A.I.R. 1928 Cal. 235.

—**S. 479—Property mark counterfeiting—Moveable property'.**

The National Bank of India was importing from England for sale in India bars of gold, each bar being of a uniform size, weight and touch with the words 'National Bank of India' impressed upon it in Guzerati characters as their property-mark. The gold so imported was, on account of that property mark, known in the market as "Narasanna Bak" among the people and it obtained a special value in the market. The accused impressed on the market gold of their own manufacture, the words 'Narasanna Bak' in Guzerati.

**Held**, that the National Bank of India owned a property-mark in the bars of gold imported and sold by them; and that the accused were guilty of counterfeiting that mark. The term moveable property in S. 479, is intended by the legislature to include a class or category of properties falling under one ownership, not merely the parts of it which may pass from the hands of the owner into other hands. The class is stable, though the units are ambulatory. The term is intended to include collective class nouns, e.g., nouns that express a number of objects of the same class collected together. (1904) 6 Bom.L.R. 513.

—**S. 480—Using false trade-mark—Onus proof as to intention.**

Where the accused is using a false trade-mark, the onus is on him to show that he is using the mark without intent to defraud. A.I.R. 1936 Rang. 96=37 Cr.L.J. 528=161 Ind. Cas. 1007.

—**S. 480—Ingredients—Marking goods in a manner calculated to mislead people—Intention to defraud—If necessary.**

In order to establish a case under S. 480 the prosecution must prove that the accused marked goods, that he did so in a manner reasonably calculated to cause it to be believed that the goods so marked were the manufacture or merchandise of some other person and that such goods are not the manufacture or merchandise of such person. It is unnecessary for the prosecution to prove that an accused in such a case had acted with intent to defraud; should the latter, however prove that he acted without intent to defraud, he is entitled to be acquitted. 1929 Cr.C. 498=A.I.R. 1929 Rang. 322.

—**S. 480—Claim to mark—If justification for infringement—Test of infringement—Resemblance in mark—Same name.**

A trader even with some claim to the mark or name cannot adopt a trade-mark, which causes his goods to bear the same name in the market as those of a rival



trader. If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. The actual physical resemblance of the two marks is not to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used become known in the market by particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device. 1929 Cr.C. 498=A.I.R. 1929 Rang. 322.

—S. 480—What is offence under—Accused keeping goods of complainant's mark for sale—Accused acting in good faith—Mark not counterfeit—No offence.

Where accused put for sale goods bearing trade-mark of complainant but it was found that the manufacturers sent those goods to wrong person from whom the accused got them and no intention to defraud was found :

**Held**, that no offence was committed under Ss. 480 and 482, nor under S. 486 as the mark was not counterfeit under S. 28, Penal Code. 95 Ind. Cas. 275=4 Rang. 16=27 Cr.L.J. 755=A.I.R. 1926 Rang. 134.

—S. 480—False trade-mark.

Where the trade-mark used by the accused is a crescent encircling a crow over the letters A.M.R., and that used by the complainant is a crescent encircling a star over the letters A.G.M., no offence of using a false trade-mark is committed. (1912) M.W.N. 85=13 C.L.J. 175=13 Ind. Cas. 927.

—S. 480—When a *bona fide* dispute exists between the parties as to the right to use a trade-mark, action should be taken before a civil and not before a Criminal Court. (1907) 11 C.W.N. 887=6 Cr.L.J. 151.

—S. 480—Trade-mark—False mark.

A person who sells to a customer soap not manufactured by a particular manufacturer in a box upon which the name of that manufacturer appears as a maker of soap, is guilty of an offence under the section. The mark is nonetheless a false mark, because it appeared on the box only and not upon the goods themselves. The fact that the manufacturer was not shown to have acquired a trade-mark in the sense in which the word is used in the English Patents, Designs and Trade-Marks Acts is immaterial. (1906) 29 M. 369=1 M.L.T. 409.

—Ss. 480, 482 and 486. See TRADE-MARK. 8 C.W.N. 307=31 C. 411.

—Ss. 480 and 477-A—Charge under S. 480—If could be added by Sessions Judge to charge under S. 477-A.

A charge under S. 480, Penal Code, could be added by the Sessions Judge to a charge under S. 477-A where though there was evidence before the committing Magistrate, he did not choose to frame the additional charge. I.L.R. (1950) A. 1256=1950 A.L.J. 155=51 Cr.L.J. 571=A.I.R. 1950 All. 167.

—S. 482. See also S. 478.

### Synopsis.

1. Essentials of offence.
2. Evidence and Proof.
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### 1. Essentials of offence.

—Ss. 482 and 486—Trade mark—Infringement—Ingredients of Ss. 482 and 486, stated—What prosecution must prove—False and counterfeit trade mark, distinction—Accused, if can be convicted under both Ss. 486 and 482.

To establish the charge under S. 482, Penal Code, it is necessary to prove that the accused's article is marked in a manner reasonably calculated to be believed that they are the marks of the article manufactured by the complainant. An accused would render himself liable to conviction under S. 482 if he uses a false-trade mark on any goods which may or may not have been manufactured by him. On the other hand, the ingredient of an offence under S. 486 is the sale or exposing or possessing for sale, goods or things with a counterfeit trade-mark. The offence under the first section will be complete as soon as a false trade mark has been used, but under the latter section it will be necessary that goods should be sold or be possessed or exposed for sale. Therefore it is perfectly legal to sustain the conviction under both sections provided that the mark on the goods of the accused is a false trade-mark and also counterfeit trade-mark :

**Held**, that the accused could not be convicted under S. 486 as it could not be said that the No. 301 used by the accused as trade-mark upon his goods was a counterfeit of No. 501, the registered mark of the complainant ; nor could it be said that words "India" were a counterfeit of "tomco". The accused, however, could be convicted under S. 482 as the accused's goods were a colourable imitation of the complainant's goods. A.I.R. 1941 All. 87 : 1940 A.W.R. (H.C.)



645=1940 A.L.J. 878=I.L.R. (1940) All. 75=  
42 Cr.L.J. 352=193 Ind. Cas. 189.

—S. 482—Offence under—Mere imitation, when offence.

In order to constitute to an offence under S. 482, Penal Code, mere imitation is not sufficient unless there is an infringement of a patent or copyright or there is an attempt to pass off goods as goods of another dealer or manufacturer either by using a false trade-mark or false description of a trade-mark or description likely to deceive purchasers by a deliberate imitation of a genuine mark of description or by falsely giving out goods as the goods of some other dealer or manufacturer. A.I.R. 1933 Nag. 344=35 Cr.L.J. 373=30 Nag.L.R. 45=146 Ind. Cas. 1084.

—S. 482—‘Using false trade-mark,’ meaning of.

Not only whosoever marks any goods or package of receptacle containing goods but also whosoever uses any such package or receptacle with any such mark thereon, is said to use a false trade-mark, if the whole thing is done in a manner reasonably calculated to cause it to be believed that the goods are of a certain manufacture, whereas, they are not of that manufacture. A.I.R. 1932 Sind. 94=26 Sind.L.R. 241=33 Cr.L.J. 778=139 Ind. Cas. 335.

—S. 482—Test for determining infringement—Likelihood of deception—Similarity of marks.

The proper test in case of an infringement of a trade-mark is whether the “get-up” of the defendant’s goods is likely to deceive a purchaser, who is acquainted with the plaintiff’s get-up” but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed and the Court must also have regard to the class of purchaser by whom the goods would normally be bought. 8 L.B.R. 561, Rel. on.

In a prosecution under S. 482, looking at the two marks together, it could be most emphatically said not only that no person seeing the two side by side would confuse the one with the other, but also that no person who had seen one of the marks and retained the slightest recollection of what it looked like, could by any possibility mistake the other for it, nor was it suggested that there was anything in the appearance of the two marks to lead to confusion. There was no evidence to show that any person had in fact been deceived and had been led to purchase the goods of the accused believing them to be the merchandise of the complainant. Any prominent and substantial part of the complainant’s trade-mark did not appear as a prominent and substantial part of the accused’s trade-mark. The evidence though perhaps sufficient to show that some people may call the accused’s

trade-mark by the same name as that of the complainant, was not sufficient to show that every one would do so nor that the mark of accused must inevitably lead to the attribution to their goods the same name as that of the complainant’s.

**Held**, that the complainants had not made out a good case for protection and the accused must be acquitted. 118 Ind. Cas. 113=7 Rang. 169=30 Cr.L.J. 882=1929 Cr.C. 617=A.I.R. 1929 Rang. 345.

—S. 482—Using false trade-mark—No intention to defraud.

Where the accused had used a false trade-mark but had no intent to defraud, he could not be convicted of and offence under S. 482. 16 A.L.J. 476=19 Cr.L.J. 722=46 Ind. Cas. 402.

—Ss. 482 and 486—False trade-mark—Merchandise Marks Act (IV of 1889), Ss. 6 and 7.

Where the trade marks are so different that no one would be misled, a conviction under Ss. 482 and 486. I.P.C., is bad but it is good under Ss. 6 and 7 of Act IV of 1889. 7 M.L.T. 309=11 Cr.L.J. 1393=6 Ind. Cas. 683.

—Ss. 482, 486, 216 and 7—Merchandise Marks Act (IV of 1889)—‘Goods’—Books if goods—Onus of proof as to what constitutes property mark and false trade description.

On a complaint alleging that the accused printed and sold an unauthorized edition of a book known as ‘A’ Manual of Telugu Grammar by Abboy Naidu with the contents, outer cover and title page exactly the same as in the authorized edition.

**Held**, (1) Books are goods within the meaning of the Merchandise Marks Act (IV of 1889); (2) that the words all rights reserved on the cover of the spurious edition could constitute a false trade description, if in fact no rights had been reserved.

**Quaere**, whether under the circumstances the insertion of all rights reserved could constitute a false trade description in a material respect;

**Held**, also that in order to bring the case under S. 482 the question will be whether the accused has marked the book he is selling in manner reasonably calculated to cause it to be believed that it is the manufacture or merchandise it is not, or belongs to one to whom it does not belong. (1907) 17 M.L.J. 490=31 Mad. 512.

—Ss. 482 and 416—Selling goods with a false trade-mark.

A person bought in auction goods with the label of another which that other had refused to pay for and katea nd sold the same without removing the label.



**Held**, that no offence was committed either under S. 482 or S. 486. (1905) 32 C. 969.

**—Ss. 482 and 486—False trade mark, using of—Property in mark, proof of—Bona fide Onus.**

The complainants, the H. B. T. Company, used for years past to import from Holland, white shirtings bearing the mark "H. B. T. C. 40,000" a label with the design of one lion and a snake and an oval stamp containing written in it the words "Sole importers, Holland Bombay Trading Company Limited" and a buff heading. The accused had in their possession for purposes of sale some packages of white shirtings bearing the marks H. P. F. C. 40,000, a label with two lions and two snakes and oval stamp containing written in it "Sole importers, Holland Export Company" and a buff heading. The letters H. B. T. C., in the complainants' and H. P. T. C. in the accused's marks were printed in similar types and were similar in size colour. The colour and size of the labels, as also the colour, size and type of the oval stamps in both were similar.

**Held** (where it was proved that complainants had a property in their mark) that the accused had used a false trade mark and were liable to conviction under Ss. 482 and 486. Under S. 486 the onus is not on the complainant to show that the accused acted dishonestly, but on the accused to bring himself within the exception to that section. (1903) 8 C.W.N. 421.

**2. Evidence and Proof.**

**—Ss. 482 and 486—Trade-mark—Infringement—What prosecution must prove.**

In the case of an infringement of a trade-mark, the prosecution must prove that the trade-mark on the accused's goods is likely to deceive a purchaser who is acquainted with the complainant's get-up but who trusts to his memory. Mere differences in detail do not prevent the two designs being essentially the same. What degree of resemblance is necessary is a matter incapable of definition a priori. A.I.R. 1941 All. 87=1940 A.L.J. 878=42 (C.L.J. 352=I.L.R. (1940) All. 751=1940 A.W.R. (H.C.) 645=193 Ind. Cas. 189.

**—S. 482—Complainant should show that goods sold under his label and get-up were goods which had reputation in market as being manufactured or sold by him.**

As a general rule in order to succeed in criminal proceedings something further has to be proved beyond what is required in civil proceedings arising out of the same transaction. An example is trespass. In some cases, proof of the same facts would entitle the plaintiff to a decree in a civil case and a complainant to a conviction in criminal proceedings.

Under S. 482, Penal Code the complainant must prove that the goods sold under his label and get-up were goods which had a reputation in the market being goods manufactured or sold by him of which the label and get up were distinctive and well-known in the particular market. A.I.R. 1939 Rang. 145=40 Cr.L.J. 546=181 Ind. Cas. 404.

**—S. 482—Offends under—Punishment—Measure of.**

In a case of an offence under S. 482, Penal Code, the measure of punishment should be the damage caused to the complainant. A.I.R. 1936 Pat. 579=17 P.L.T. 667=3 B.R. 71=38 Cr.L.J. 35=4 C.L.T. 12=168 Ind. Cas. 745 (2).

**—S. 482—Burden of proof—Absence of intention to defraud—Duty of accused.**

On the wording of S. 482 an intent to defraud is an ingredient of the offence, but, when it has been proved that a trade-mark is a false trade-mark, then, it is to be presumed that the accused person had that intent unless and until he rebuts the presumption when the accused person is entitled to an acquittal. The burden of proving the absence of such intent is upon the accused, but the question whether that burden has been discharged must be answered on a consideration of the whole of the evidence in the case. A.I.R. 1929 Rang. 322, Diss. from 118 Ind. Cas. 113=7 Rang. 169=30 Cr.L.J. 852=1929 Cr. C. 617=A.I.R. 1929 Rang. 345.

**—S. 482—Absence of intention to defraud—Duty of accused.**

Even though no cases of purchasers having been deceived by the use of false trade mark are proved, this fact standing alone is insufficient to justify the contention that the accused acted without intent to defraud. The state of mind or the persons responsible for the introduction of the trade-mark is a most relevant fact which can be established by evidence. In the absence of such evidence, the accused cannot be held to have discharged the onus of proving want of intention which was upon him. 1929 Cr. C. 498=A.I.R. 1929 Rang. 322.

**3. Genuine dispute—Jurisdiction of Criminal Court.**

**—S. 482—Genuine dispute between parties as to who used false trade-mark—Case should be brought in civil Court.**

Where, in criminal proceedings regarding infringement of a trade-mark, the accused claims that the label she used is her label and the Magistrate is unable to decide which of the parties, complainant or the accused used the label first, there is a genuine dispute between the parties as to whose mark it is and who has used a false trade-mark, and the case should be



brought in the civil Court and not in the criminal Court. A.I.R. 1939 Rang. 145=40 Cr.L.J. 546=181 Ind. Cas. 404.

—S. 482—Infringement of trade-mark—Complainant using a certain trade-mark—Accused using similar label with additions—Complainant using new trade-mark with one of the additions.

**Held**, complaint should be tried in criminal Court—The case was not one of a dispute between complainant and accused as to who is entitled to use the label which was introduced by the accused. A.I.R. 1937 Rang. 203=38 Cr.L.J. 840=169 Ind. Cas. 880.

—S. 482—Bona fide dispute—Discretion of Criminal Court.

Although the criminal Court has a discretion in view of the peculiar circumstances of a particular case, e.g., if there exists a *bona fide* dispute as to the right to use a trade mark, or where there has been undue delay in commencing criminal proceedings, to stay its own hands and direct the complainant to establish his rights in a civil Court, it is nowhere laid down by the legislature that an aggrieved person should seek his remedy in a Civil Court and not in a criminal Court. 1930 Cr. C. 765=7 O.W.N. 598=A.I.R. 1930 Oudh. 360.

—S. 482—Discretion of criminal Court.

It is nowhere laid down by the legislature that under no circumstances could a dispute relating to the infringement of a trade-mark be entertained by a criminal Court and that it should always be adjudicated upon by a civil Court. The only thing which can be said is that the criminal Court may in view of the peculiar circumstances of a particular case, stay its own hands and direct the complainant to establish his right in civil Court. 108 Ind. Cas. 607=9 Lah. 491=29 Cr.L.J. 425=29 P.L.R. 610=9 A.I. Cr. R. 406=A.I.R. 1928 Lah. 186.

—Ss. 482 and 486—Using a false trade mark or selling goods with a counterfeit, trade mark—Bona fide disputes as to the right to use a trade-mark—Jurisdiction of criminal Court.

Where the accused had in close proximity to the shop of the complainant, opened a shop from which he was selling rose-water in bottles which were similar to those which contained rose-water sold by the complainant and the accused had applied labels to his bottles which were similar to those used by the complainant, but on closer examination great differences in the labels were discernible.

**Held**, that the accused was not guilty under Ss. 482 and 486 of using a false trade-mark of selling goods to which a counterfeit trade-mark was applied. When a *bona fide* dispute exists between the parties as to the right to use a trade-mark action should be taken

before a civil and not criminal Court. (1907) II C.W.N. 387=6 Cr.L.J. 151.

#### 4. Limitation for prosecution.

—S. 482—Infringement of trade mark—Merchandise Marks Act (IV of 1885), S. 15—Limitation.

There is nothing in S. 15 of the Merchandise Marks Act to prevent a prosecution under S. 482 provided the infringement is within the period limited in the section. The owner of a trade mark cannot stand by for several years while his trade-mark is infringed, continuously for a number of years and then bring a complaint in respect of recent infringement. 17 Cr.L.J. 488=10 Bur.L.T. 19=9 L.B.R. 31=36 Ind. Cas. 168.

—S. 482—Merchandise Marks Act (IV of 1889), S. 15.

The accused was prosecuted once in 1908 and then in 1910 under S. 482, I. P. C. for using a false trade mark. He was acquitted both times, the Court holding in 1910 that the prosecution was time-barred under Merchandise Marks Act, S. 15. A fresh complaint on a fresh use was made.

**Held**, that the prosecution was barred by time and further that the intention of the whole Act should be considered. 4 Bur.L.T. 83=12 Cr.L.J. 246=10 Ind. Cas. 787.

#### 5. Prosecution of corporate body.

—S. 482—Corporate body—Prosecution.

A body corporate such as a firm, may be prosecuted for an offence under Ss. 480 and 482. 1929 Cr. C. 498=A.I.R. 1929 Rang. 322.

—Ss. 482 and 486—Who can be liable—A corporate body—Mens rea—Evidence of agents and servants.

A body corporate can be lawfully prosecuted under S. 482 or S. 486 of the Penal Code the word “however in the sections, not referring only to definite individual or individuals.

Under Ss. 482 and 486, prosecution has not to prove *mens rea*, but the burden is on the accused to prove his innocence and in the case of a limited company, innocence can be proved by the evidence of its agents or servants or otherwise. 7 Bur.L.T. 116=7 L.B.R. 306=15 Cr.L.J. 337=23 Ind. Cas. 689.

#### 6. Right to prosecute.

—S. 482—Right to prosecute—Prosecutor not-manufacturer.

A person not necessarily a manufacturer, who uses a mark for the purpose of his trade, may acquire rights to and to respect of that mark. Where in the course



of a user extending over a large number of years, goods are sold by a firm bearing a certain mark which had been known to purchasers by that mark, a prosecution would also lie at the instance of the firm. 1929 Cr. C. 498=A.I.R. 1929 Rang. 322.

### 7. Title to trade mark.

#### —S. 482—Title to trade mark—Use of distinctive mark for over 10 years—Acquisition of property in mark.

Where a trade mark in question is a distinctive mark which the firm has been using for over ten years, the firm using it acquires property in that mark as indicating that all goods which bear it have been manufactured by the firm and any flagrant imitation of the same with deliberate and dishonest intention will bring the act within the purview of S. 482. Registration of the mark is not necessary to complete the title to trade-mark in India. 7 O.W.N. 598=1930 Cr. C. 765=A.I.R. 1930 Oudh. 360.

#### —S. 482—Use of mark for 6 years—Proof of actual deception—If necessary.

A mark used for six years can become trade-mark within S. 482. Where the mark used by the accused is likely to deceive the public, evidence of actual deception is not necessary for conviction. 81 Ind. Cas. 922=26 Cr.L.J. 1098=A.I.R. 1925 Cal. 149.

### 8. Miscellaneous.

#### —Ss. 482 and 486—Order as to costs or confiscation of goods, if can be passed by High Court in revision.

In cases of a prosecution for infringement of a trade mark, the High Court will not pass any order in revision in respect of costs or confiscation of accused's goods. If the complainant has in fact suffered any damage, he must seek his remedy in civil Court. A.I.R. 1941 All. 87=1940 A.L.J. 878=I.L.R. (1940) All. 751=42 Cr.L.J. 352=1940 A.W.R. (H.C.) 645=193 Ind. Cas. 189.

#### —S. 482—Registrable trade-mark— Essentials of.

A registrable trade-mark must contain or consist of at least one of the following essential particulars ; (1) The name of a company, individual or firm represented in a special or particular manner ; (2) the signature of the applicant for registration or some predecessors in his business ; (3) an invented word or invented words (4) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification, a geographical name or a surname. (5) any other distinctive mark, but a name signature word or words other than such as fall within the description in the above paras.

(1), (2), (3) and (4) shall not, except by order of the Board or Trade or the Court be deemed a distinctive mark. Where none of the particulars appears, no trade-mark can be said to have been adopted. A.I.R. 1933 Nag. 344=35 Cr.L.J. 373=30 N.L.R. 45=146 Ind. Cas. 1084.

#### —Ss. 482 and 486—Trade mark—Search warrant, issue of.

To issue a search warrant for the search of a man's house and for the production of all papers and books in it for the purpose of an inquiry as to whether he had used or sold articles with a counterfeit trade-mark is a gross perversion of law. 17 Cr.L.J. 543=9 L.B.R. 45=10 Bur.L.T. 216=36 Ind. Cas. 591.

#### —Ss. 482, 485 and 486—Trade-mark —What is— Trade name—Distinction—Merchandise Marks Act, Ss. 5, 6 and 7—Dispute as to trade name— Civil nature.

The trade-mark must be some visible concrete device or design affixed to goods indicating the manufacture of a particular person. Improper use of a trade name may fall within S. 5 of the Merchandise Marks Act and be punishable under Ss. 6 and 7 of the same Act, but it is not punishable under Ss. 482, 485 and 486, I. P. C., which deal with trade-marks. A dispute about a trade name is a dispute of a civil nature. 40 Cal. 281=17 C.W.N. 227=14 Cr.L.J. 68=18 Ind. Cas. 404.

—S. 483—It cannot be said that counterfeiting a trade mark is an offence which is made up of parts of possessing the mould for counterfeiting and the act of counterfeiting. A.I.R. 1931 Cal. 445=32 Cr.L.J. 1171=134 Ind. Cas. 446.

#### —S. 483—Charge of counterfeiting trade-mark —Bona fide dispute—Civil nature.

Where there is a *bona fide* dispute as to the right to use a trade mark, the Magistrate has no jurisdiction to try a charge of counterfeiting the mark brought by one of the parties the question involved being essentially one of a civil nature. (1905) 32 C. 431=2 Cr. L.J. 236.

#### —S. 483—Property mark function of—Counterfeiting.

A property mark is intended to denote the ownership over all movable property belonging to a person whether it is all of one kind or of different kinds. So long as the person owns moveable properties his property mark impressed upon them remain his though any particular article out of it may after such impression pass out of his hands and cease to be his. The function of a property mark to denote ownership is not destroyed because any particular property on which it was impressed has ceased to be of that ownership. (1904) 6 Bom.L.R. 513.



—Ss. 485, 486 and 109—Two persons placing with printers Litho Stone for counterfeiting labels of complainant—Their conviction under Ss. 486 and 485 read with S. 109—Printers acquitted for offence under S. 485—Conviction of two persons under Ss. 485 and 109, held uncalled for.

The two petitioners placed with the two accused, an article described as a Litho Stone from which certain labels which were trade-marks of the complainant's goods were to be counterfeited. They instructed those two persons who were printers to make certain alterations in that instrument and it print certain labels from the die as altered. The alteration was such as to make the labels finally printed a clear counterfeit of the labels of the complainant. The two accused were acquitted of an offence under S. 485 but the two petitioners were convicted under S. 485 as well as under S. 485 read with S. 109 ;

**Held**, that as the two petitioners were convicted under S. 486, the further prosecution of them for offence under S. 485 read with S. 109 was uncalled for. A.I.R. 1940 Cal. 351=I.L.R. (1940) 2 Cal. 1=71 C.L.J. 497=44 C.W.N. 867=41 Cr.L.J. 836=190 Ind. Cas. 167.

—S. 485—Offence under—Trade-mark consisting of impression moulded on glass and label—Person found only with mould with intention of counterfeiting trade-mark.

Where a trade-mark consists of an impression moulded in the glass of which the bottles are made together with label and the person is found in possession of the mould in question with the intention of counterfeiting that trade-mark, although the apparatus for counterfeiting the label which would complete the trade-mark has not been found the person can be convicted under S. 485. A.I.R. 1930 Cal. 664=128 Ind. Cas. 33.

—S. 486—See also Penal Code, S. 482.

—S. 485—Trade-mark—Infringement—Tests to see—Test by putting articles side by side—Value of.

In trade-mark cases, the test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase and marks with many differences may yet have an element of similarity which will cause deception, more specially if the goods are in practice asked for by a name which denotes the mark or the device on it. A.I.R. 1943 Sind. 55=43 Cr.L.J. 927=203 Ind. Cas. 181.

—S. 486—Get up and general appearance of labels of accused so similar to those used by

complainant on same kind of goods, as to deceive purchaser—Offence.

In order to prove that a trade mark is an imitation of the other, it is not necessary that there should be a resemblance in every case. It is sufficient if the resemblances are of such a nature as to be calculated to mislead an unwary purchaser. Where therefore, the get up and general appearance of the labels of the accused are so similar to those of the complainant that the class of persons to whom the goods are sold would easily be deceived by the appearance of the accused's labels into supposing that the goods that they were purchasing were those of the complainant, the accused is guilty under S. 486, Penal Code. A.I.R. 1940 Cal. 351=I.L.R. (1940) 2 Cal. 1=71 C.L.J. 497=44 C.W.N. 867=41 Cr.L.J. 836=190 Ind. Cas. 167.

—S. 486—"Counterfeit" meaning of—Held, that the designs in both goods were practically same and amounted to counterfeit trade-mark and not mere false trade-mark.

For the purposes of S. 486, Penal Code, the word "counterfeit" does not connote an exact reproduction of the original counterfeit, and the difference between the counterfeit and the original is not limited to a difference existing only by reason of faulty reproduction. A person, for instance, convicted of counterfeiting the king's coin would not be able to avoid conviction on the ground that he had deliberately made a small alteration in the design or omitted a letter from the superscription surrounding the Monarch's head. The same principle would apply in the counterfeiting of a trade-mark :

**Held**, that Dongre's Balamrit is a commodity not ordinarily purchased by Europeans who are ignorant of the Nagri script, and the Indian purchaser would naturally look at the Nagri script and not at the English of which many purchasers may be presumed to be ignorant. If the English script were removed, the designs would be practically identical, and that the mere substitution of the word "Domre" for the word "Dongre" in the English script, particularly where there was no such substitution in the Nagri, was entirely insufficient to take the label out of the category of a counterfeit trade-mark and bring it within the category of a false trade-mark only. A.I.R. 1937 Nag. 341=20 N.L.J. 183=39 Cr.L.J. 109=I.L.R. (1938) Nag. 192=172 Ind. Cas. 228.

—S. 486—Counterfeiting trade-mark—Offence when committed—Test.

A person who employs a label which in general resembles the label used by another manufacturer, is guilty of counterfeiting a trade-mark under S. 486, Penal Code, irrespective of the circumstance that the registered trade-mark of the one is quite different



from the trade-marks of the other. The test is not, whether a literate purchaser would be deceived if he had the two marks side by side, but whether an ordinary unwary purchaser would be deceived. A.I.R. 1934 Lah. 1687 = 35 P.L.R. 749 = 16 Lah. 114 = 36 Cr. L. J. 776 = 155 Ind. Cas. 270.

—S. 486 - Offence under - Proper test.

In a case under S.486 the proper test is not whether a purchaser if literate would be deceived if he had the two articles side by side, but the matter should be considered from the point of view of the ordinary unwary purchaser. A.I.R. 1930 Cal. 728=34 C.W.N. 524 = 128 Ind. Cas. 334.

—S. 486 -- Validity of conviction -- Using another firm's soda water bottles innocently -- No offence.

The complainant and the accused were soda-water manufacturers, and each had special bottles of his own firm. It was a common practice of the place that water-manufacturing firms used bottles indiscriminately, i.e., bottles of one firm were sent by customers to another firm for being filled with mineral water. Accordingly the accused's firm used bottles of the complainant's firm.

Held, that as there was no intention to do anything harmful within the meaning of S. 486, conviction under that section could not be valid. 117 Ind. Cas. 691 = 30 Cr. L.J. 832 = 32 C.W.N. 1115 = A. I. R. 1928 Cal. 873.

—S. 486 - Labels - General resemblance.

Where the general get up of the labels of tins of two manufacturers were almost identical,

Held, that an offence was committed under S. 486 and that false trade-mark and counterfeit trade mark were the same thing. 16 Bom. L. R. 78=15 Cr. L.J. 522=24 Ind. Cas. 834.

—S. 486 - Counterfeiting a trade-mark—Representation.

In order to prove that a trade-mark is an imitation of the other, it is not necessary that there should be a resemblance in every case. It is sufficient if the resemblance are of such a nature as to be calculated to mislead an unwary purchaser. A representation that the goods of the manufacture of A are those of B need not be made orally or in writing but it may be made by the manner in which the goods are made up by the wrapper or by the name or design. The counterfeit is itself a representation. (1907) 9 Bom. L. R. 732 = 6 Cr. L. J. 75.

—S. 486 - Mark, whether must be exclusive property of anybody for purposes of S. 486.

For the purposes of S. 486, Penal Code, it is not necessary that the mark in question should be the

exclusive property of anybody. The only consideration which is of importance with reference to the provisions of S. 486 is whether the mark in question has come to be so identified with the merchandise of the person using the mark as to be regarded in the market as a distinctive mark to denote that particular merchandise. A.I.R. 1940 Cal. 351 = I.L.R. (1940) 2 Cal. 1 = 71 C.L.J. 497 = 44 C. W. N. 867 = 41 Cr. L J. 836 = 190 Ind. Cas. 167.

—S. 486 - Signature in forwarding note - Whether shows possession of goods - Conviction, legality.

The signature of the accused in the forwarding note does not necessarily prove that he was in possession of the goods and his conviction under S. 486, Penal Code, cannot be sustained. A.I.R. 1940 Mad. 822=1940 M.W.N. 535=42 Cr.L.J. 28=190 Ind. Cas. 647.

—S. 486 - Defence available to accused - Burden to show that his case comes under exceptions—Defence under Excep. (c) - Whether pre-supposes knowledge of accused not to know that mark was the trade-mark of any firm - Fact that accused gave information with respect to person from whom he got counterfeit goods, whether admissible.

Where the trade-mark is a counterfeit trade-mark, the accused can only escape conviction if he is able to show that he falls within the Exceps. (a), (b) or (c) enumerated in S. 486 Penal Code, and contrary to the ordinary provisions of the Code, the burden lies on him.

To a charge under S. 486, to limit a defence under Excep. (c) to the knowledge of the accused concerning the infringement of the trade-mark is unduly restrictive and at variance with the express terms of S. 486, proviso (c), which permits the accused to offer any evidence he chooses as to his innocence when once he admits that he was not deceived into thinking the label to be a genuine one. He cannot be presumed to be in a position to know whether a trade-mark has been infringed or not: he may, in fact be honestly of the opinion that the trade-mark is a false trade-mark and not a counterfeit, and his conduct in dealing with the wares he stocked and sold can be taken into consideration in deciding whether he has acted innocently.

It is true that proviso (b) to S. 486, Penal Code, as a defence permissible to the accused, is linked with proviso (a) but the fact that the accused did give all the information in his power with respect to the person from whom he obtained the goods is admissible in considering the question whether he acted innocently or not. A. I. R. 1937 Nag. 341 = 20 N.L.J. 183 = I.L.R. (1938) Nag. 192 = 39 Cr. L. J. 109 = 172 Ind. Cas. 228.



—S. 486, Excep. (c) — Scope of S. 486—No attempt at substitution of counterfeit goods with original—Conviction; propriety of.

The provisions of S. 486, Penal Code, are aimed at a retailer who connives with a fraudulent wholesaler or manufacturer in palming off on an unsuspecting public, goods which purport to be other than what they are. Where, therefore, no attempt at substitution is made, the accused cannot be convicted under this section. A.I.R. 1937 Nag. 341 = I.L.R. (1938) Nag. 192 = 20 N.L.J. 183 = 39 Cr. L.J. 109 = 172 Ind. Cas. 228.

—Evidence Act (I of 1872), S. 13 — Prosecution for infringement of trade-mark—Judgement in Civil Court negating right—Admissibility.

Where, in a prosecution for counterfeiting trade-mark, certain previous proceedings in the Civil Court relating to the exclusive right of the complainant were referred to and the judgments in the prior case were filed :

Held, that the judgments were relevant under S. 13 Evidence Act, as a particular instance when the right was claimed and was disputed. A.I.R. 1931 Oudh 277 = 8 O.W.N. 827 = 32 Cr. L.J. 1177 = 134 Ind. Cas. 477.

—S. 486—Merchandise Marks Act (IV of 1889), S. 15—Use of counterfeit trade-mark—Prosecution—Limitation — Starting point.

A prosecution under S. 486, Penal Code, and S. 15 Merchandise Marks Act, for using a counterfeit trade mark need not be instituted within three years of the first of the series of offences committed by the accused but can be instituted within three years of the specific offence complained against. A.I.R. 1931 Mad. 276 = 1930 M.W.N. 1263 = 32 Cr. L.J. 809 = 131 Ind. Cas. 848 (1).

—S. 486—In cases of prosecution for infringement of a trade mark, the High Court will not pass any order for costs or confiscation of accused's goods. If the complainant has in fact suffered any damage, he must seek his remedy in Civil Court. A.I.R. 1941 All. 87 = 1940 A.W.R. (H.C.) 645 = 1940 A.L.J. 878 = 1 I.L.R. (1940) All. 751 = 42 Cr. L.J. 352 = 193 Ind. Cas. 189.

—S. 489-A—Possession of counterfeit currency note—Guilty knowledge or intention to be proved by prosecution.

Where the accused who was found to be a simpleton produced four currency notes one of which was found to be a counterfeit note, but the accused had no other counterfeit note in his possession and he himself said he had borrowed it from another person the circumstances are so doubtful that it is not safe to maintain his conviction. In such cases, the

prosecution should prove the requisite guilty knowledge or intention of the accused. A.I.R. 1933 Lah. 596 = 34 Cr. L.J. 1156 = 34 P.L.R. 890 = 145 Ind. Cas. 1013.

—S. 489-A—Essentials—Ability and materials.

In the case of the counterfeiting of a currency-note both ability and materials of a particular kind are required. If those materials and ability are not present it cannot be said that an act performed without the ability to counterfeit and without materials which may help to a useful counterfeiting would be an attempt. 116 Ind. Cas. 797 = 51 All. 470 = 30 Cr. L.J. 690 = 11 A.I.R. Cr. 215 = 1929 A.L.J. 127 = 10 L.R.A. (Cr.) 29 = A.I.R. 1928 All. 754.

—Ss. 489-A—and 420—Misrepresentation that the accused can prepare counterfeit notes.

A charge of cheating can be based upon the intention of not performing a promise, non-fulfilment of which would not give rise to a cause of action in a Civil Court. Where on the representation of a person that he can counterfeit currency notes another is induced to advance money, the former is guilty of cheating under S. 420, though he did not intend to counterfeit, but not under S. 489-A. 18 Cr. L.J. 362 = 10 Bur. L. T. 255 = 38 Ind. Cas. 746.

—S. 489-B—In a case under S. 489-B, Penal Code, Judge ought not to stop merely at recording the verdict about the accused having uttered particular notes at particular places but should ascertain from them their opinion as to whether the said notes had been uttered with the knowledge of their being forged. A.I.R. 1936 Oudh 164 = 37 Cr. L.J. 182 = 1936 O.W.N. 28 = 11 Luck. 687 = 159 Ind. Cas. 919.

—Ss. 489-B and 120-B—Failure of specific charge of uttering of particular forged notes—Charge of conspiracy, if should be set aside.

It cannot be said that if the specific charge of the uttering of particular forged notes fails, the charge of conspiracy for the passing of forged notes as genuine must also fail. If the conviction for the offences triable by jury is set aside because of certain defect in the verdict, it does not follow as a necessary consequence of it that the conviction for the other offences for which the accused has been tried with the aid of assessors must also be set aside. A.I.R. 1936 Oudh 164 = 11 Luck. 687 = 1936 O.W.N. 28 = 37 Cr. L.J. 182 = 159 Ind. Cas. 919.

—S. 489-B—Object.

The object of the legislature in enacting the section is to stop the circulation of forged notes by punishing all persons who, knowing or having reason to believe them to be forged do any act which would lead to their circulation. 94 Ind. Cas. 414 = 7 Lah. 80 = 27 Cr. L.J. 638 = 27 P.L.R. 514 = A.I.R. 1926 Lah. 72



—S. 489-B—Interpretation—‘As genuine.’

The words “as genuine” govern only the verb “uses” and not any other verb. 94 Ind. Cas. 414 = 7 Lah. 80 = 27 Cr. L. 7. 631 = 27 P. L. R. 514 = A. I. R. 1926 Lah. 72.

—S. 489-B—Selling forged notes.

A person who knowingly sells a forged note to another is guilty under S. 489-B, whether the purchaser knows it to be forged or not. 94 Ind. Cas. 414 = 7 Lah. 80 = 27 Cr. L. J. 638 = 27 P. L. R. 514 = A. I. R. 1926 Lah. 72.

—S. 489-B—Evidence and also proof—Accused in possession of forged currency note—Genuine note of same number in accused’s house—Paper containing green honey-comb pattern resembling one in forged note also found in his house—Accused father and brother living in same house—Accused disposing forged note to shop keeper—Inference as to knowledge of forgery.

One G was prosecuted under S. 489-B for using as genuine a counterfeit note knowing it to be counterfeit. A counterfeit note was in possession of the accused. A genuine note bearing the same number was found in the house of the accused; one other forged note also bearing the same number was traced to the same village. A piece of paper containing a honey-comb pattern in green ink resembling the pattern on the forged note was also found in his house.

Held, that although there was no evidence that the accused made this pattern, but as it was found in the house in which he lived with his father and brothers it was a very fair inference that this pattern must have been made by some body in that house and that the forged note was copied from the original note, which was also in the same house, and as the accused was disposing of the copy of the genuine note to a shop-keeper no other inference was possible but that it was done with the knowledge that the note was forged. 116 Ind. Cas. 243 = 53 Bom. 344 = 31 Bom. L. R. 148 = 33 Cr. L. J. 588 = A. I. R. 1929 Bom. 128.

—S. 489-C—Counterfeit currency notes found in possession of person—Inference as to his intention.

The number of counterfeit notes found in a man’s possession and the circumstances in which they were so found may, by themselves, constitute a sufficient ground for drawing the inference, that the intention was to use them as genuine or that they may be used as genuine :

Held, on facts and circumstances of the case that the accused was in possession of the counterfeit currency notes with the intention of using them as genuine or that they might be used as genuine. Consequently, the accused was guilty of offence under S. 489-C, Penal Code. A. I. R. 1939 Mad. 96 = 1938 M. W. N. 1121 = 48 L. W. 754 = 40 Cr. L. J. 458 = 180 Ind. Cas. 631.

—S. 489-C—Possession of forged note—Ingredients of offence—Duty of prosecution to prove intention of accused to use them as genuine.

Mere possession of forged notes is not an offence. In order to bring a case within the purview of S. 489-C, Penal Code, it is also necessary to establish that at the time of his possession, he knew the notes to be forged or had reason to believe them to be so, and that he intended to use them as genuine or that they might be used as genuine.

The onus lies on the prosecution to prove circumstances which led clearly, indubitably and irresistibly to the inference that the accused had the intention, to foist the notes on the public and such intention, relating as it does to a future conduct could only be proved by collateral circumstances such as that the accused had palmed off such notes before, or that he was in possession of such and similar notes in such large numbers that his possession for any other purpose is inexplicable. A. I. R. 1931 Lah. 24 = 11 Lah. 555 = 32 Cr. L. J. 351 = P. L. R. 867 = 129 Ind. Ind. Cas. 494.

—S. 489-C—Offence under—Onus of Proof.

The onus lies on the prosecution to prove circumstances which lead clearly indubitably and irresistibly to the inference that the accused had the intention to foist the notes on the public. 11 Lah. 555 = 31 Punj. L. R. 867 = 1931 Cr. C. 88 = A. I. R. 1931 Lah. 24.

—S. 489-D—Possession of some instruments or materials for purposes of being used for counterfeiting notes—Case, if covered by S. 489 D.

The wording of S. 489-D, Penal Code, is very wide and would clearly cover a case where a person is found in possession of machinery, instruments or materials for the purpose of being used for counterfeiting currency notes, even though the machinery, instruments or materials so found were not all the articles required for the purpose of counterfeiting. A. I. R. 1939 Sind 190 = 40 Cr. L. J. 810 = I. L. R. (1939) Kar. 744 = 183 Ind. Cas. 591.



—S. 489-D—Ability to counterfeit—Proof of, if necessary.

In considering an offence under S. 489-D it is not necessary to prove that the accused had the ability to produce counterfeit currency notes with materials in his possession. 116 Ind. Cas. 797 = 51 All. 470 = 30 Cr. L.J. 690 = 11 A.I.Cr.R. 215 = 1929 A.L.J. 127 = 10 L.R.A. (Cr.) 29 = A.I.R. 1928 All. 754.

—S. 480-D—Dishonest intention—Possession of articles, sufficient to counterfeit—Presumption of intention.

Where the accused was in possession of certain materials sufficient, in the opinion of an expert, to counterfeit a currency note but had given no explanation as to why he was in possession.

Held, that this by itself would raise a presumption of his dishonest intention. 112 Ind. Cas. 911 = 26 A.L.J. 1391 = 9 L.R.A. (Cr.) 138 = 10 A.I.Cr.R. 443 = 30 Cr.L.J. 47 = A.I.R. 1928 All. 759

—S. 489-D—Possession of instruments and materials for counterfeiting currency notes—Nature of proof—Onus—Possession of articles for studying, if an offence.

Per Abdur Rahim and Sundara Aiyar, JJ. Ayling J. contra.)—To establish a charge under S. 489-D, the prosecution must prove first that the machinery, instrument or material found in the possession of the accused is such as would be used for the production of a counterfeit note and then further that the accused knew or intended that such articles would be used for that purpose. The onus of proving both these lies heavily on the crown, with expert evidence, if necessary. The word 'counterfeiting' should be used in the sense that resemblance must be such as may in circulation impose on people of ordinary intelligence. There is no offence committed where all that is proved is that the accused was studying the art of counterfeiting and equipping himself with objects suitable for the purpose.

Per Ayling, J.—The possession of even a single instrument for counterfeiting would be sufficient, provided it were shown that it was intended to be utilised for the purpose. This intention is a matter of inference dependent upon the facts and it is always open to the accused to show that he possessed them innocently. 10 M.L.T. 108 = 21 M.L.J. 766 = 12 Cr.L.J. 377 = 11 Ind. Cas. 241-

—S. 494.

#### Synopsis.

1. Applicability of Section.
2. Abetment.

3. Complaint by person aggrieved.

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#### 1. Applicability of section.

—S. 494—Applicability—Hindu convert to Christianity marrying Christian wife—Reconversion to Hinduism and marriage with Hindu girl—Offence.

The accused, a Hindu by birth became a convert to Christianity and married a Christian wife. Both of them were later converted to Hinduism and the accused then married a Hindu girl. On a complaint of bigamy by the first wife.

Held, that the accused, so long as he was a Hindu, at the time of the second marriage, did not commit the offence of bigamy, though his first wife, whom he married while a Christian, was alive, and he could not, therefore, be convicted under S. 494, I.P. Code. 51 Cr.L.J. 909 = A.I.R. 1950 Mys. 26.

—S. 494—Bigamy—Hindu convert to Christianity marrying a Christian wife—Reversion to Hinduism—Subsequent marriage with a Hindu woman during the life-time of Christian wife.

The accused, a Hindu convert to Christianity, married a Christian woman according to the Roman Catholic religion; he subsequently again became a Hindu. He then married a Hindu woman according to the Hindu rites, though his Christian wife was alive at that time.

Held, that the accused was not guilty of the bigamy. 3 M.H.C.R. App. VII, Foll. 33 Mad. 371 = 11 Cr. L.J. 682 = 8 Ind. Cas. 572.

—S. 494—Bigamy—Christian marrying a Hindu wife while a Christian wife is living.

A Native Christian who has a Christian wife living commits an offence under S. 494, by marrying a Hindu woman according to Hindu rites, whether he does so without renouncing the Christian religion or not. 3 M.H.C.R. App. VII, not followed, (1907) 17 M.L.J. 476 = 30 M. 550. = 2 M.L.T. 345.

—S. 494—Remarriage after conversion—Remarriage by Mahomedan wife after husband's



conversion to Ahmadiyan faith—Ahamadiyans not apostates from Islam—Offence.

The Ahamadiyans, followers of Ahamad, who lived in the Punjab 15 years ago, are merely a sect among Mahomedans and a person's acceptance of Ahamadiyan tenets does not render him an apostate from Islam so as to annul a marriage contracted by that person previous to his acceptance of Ahamadiyan principles. The 5th respondent had been married to the petitioner who subsequently joined the Ahamadiyan faith. Thereafter the 5th respondent without obtaining any divorce married the 3rd respondent on the opinion of certain Muslim theologians, that the petitioner's acceptance of Ahamadiyan doctrines amounted to apostacy.

Held, that the marriage with the 3rd respondent was an offence under S. 494. There was no question of the application of mens rea or of S. 79, Penal Code in the case of an offence under S. 494, I. P. C. 71 Ind. Cas. 65=45 Mad. 986=16 M.L.W. 626=1922 M.W.N. 662=24 Cr. L.J. 17=A.I.R. 1923 Mad. 171=43 M.L.J. 663.

—S. 494—Hindu woman converted to Mahomedanism—Marriage.

Where a Hindu Chamar woman became a convert to Mahomedanism and married a Mussalman husband she is guilty of an offence under S. 494 of the Penal Code. Conversion has not the effect of dissolving the marriage tie. 1 Lah. 440=59 Ind. Cas. 33=22 Cr. L.J. 1.

—S. 494—Bigamy—Christians—Apostacy.

A Christian marriage is not dissolved by the apostacy of one of the parties and a subsequent marriage of a Christian wife after her conversion to Islam is a bigamy. 18 Cal. 264; and 49 P. R. 1907, Foll. 20 Cr. L.J. 3=5 P. R. 1919 (Cr.)=13 P.W.R. 1919 (Cr.)=48 Ind. Cas. 493.

—S. 491—Decision of caste punch—Dissolution—Proof of.

A caste punch having no authority to grant a fargati, is not effective to dissolve a marriage contracted between accused and the complainant, and hence a bigamy is committed by the accused and the person with whom she afterwards contracted a marriage. 19 Bom. L. R. 56=18 Cr. L. J. 468=39 Ind. Cas. 308.

—S. 494—Marriage after apostacy of husband but before expiry of iddat.

The marriage of a Mohamedan woman after the apostacy of her first husband but before expiry of

iddat is invalid under the Muhammadan Law not by reason of its taking place during the life-time of her first husband and hence she is not guilty of bigamy. 39 Cal. 409=15 C.L.J. 263=16 C.W.N. 451=13 Cr. L. J. 257=14 Ind. Cas. 641.

## 2. Abetment.

—S. 494—Abetment of bigamy—Charge of, when established.

In order to succeed in a prosecution for abetment of bigamy the prosecution must prove that the person who is alleged to have committed bigamy was married lawfully once and has gone through a second marriage ceremony and that the person alleged to have abetted the bigamy knew, when he arranged or assisted at the second marriage, that the person who was remarried had contracted a valid first marriage and that the husband or wife of the first marriage was still living. A.I.R. 1934 All. 589=1934 A. L. J. 387=35 Cr. L.J. 1053=3 A.W.R. 598=150 Ind. Cas. 139.

—Ss. 494 and 109—Absence of knowledge of prior secret marriage—Abetment of bigamy, made out.

A person cannot be guilty of abetment of bigamy when he marries a woman without being aware of her prior secret marriage. A.I.R. 1933 Lah. 164=33 P. L. R. 10603=5 Cr. L. J. 597 (1)=147 Ind. Cas. 1223.

—S. 494—Offences under—Knowledge that woman was married, necessity of—'Void,' meaning of—Remarriage of married Muhammadan woman—Offence.

For abetment under S. 494, I.P.C. there must be evidence that the person accused of abetting the offence knew that the person he married was the wife of another man.

The word "void" in S. 494, I.P.C., is not used in the technical sense in which it is used in Muhammadan Law: the I.P.C. makes no distinction between a void and an invalid marriage and the term "void" used there covers marriage of both classes. A.I.R. 1931 Lah. 194=32 Cr. L.J. 1210=134 Ind. Cas. 589.

—Ss. 494 and 114—Abetment of bigamy.

Where, by reason of a mistake of fact, the accused thought that the previous marriage of a girl had been declared void by a court of competent jurisdiction, and went through a form of marriage with her.

Held, that he had not committed any offence. 31 P.W.R. 1918 Cr. = 19 Cr. L.J. 680=46 Ind. Cas. 40.



## 3. Complaint by person aggrieved.

—S. 494—Bigamy—Person aggrieved—Code of Criminal Procedure (Act V of 1908), S. 198—Procedure—Commitment.

In a case of bigamy the person aggrieved is either the first husband, or the second husband and not the father. Hence, where in such a case a complaint was preferred by the father of the husband, under S. 494, but not by either of the husbands :

Held, there was no valid complaint before the court and the commitment was bad. 32 A. 78=5 Ind. Cas. 176=11 Cr. L.J. 51=7 A.L.J. 10.

—S. 495—'Person aggrieved'—Brother of second husband—Criminal Procedure Code, S. 198.

Where a woman is charged with bigamy, the brother of her second husband is not a person 'aggrieved' within the meaning of S. 198, Cr. P.C. 10 B. 349. Foll. (1902) A.W.N. 198=25 A. 132.

—S. 494:—See Cr. P.C., 198. 25 A. 209—1903 A.W.N. 7.

—S. 494—Fresh complaint—Complainant failing to prove his alleged marriage with accused—Complaint dismissed—Fresh Complaint—If maintainable.

Where one complaint under S. 494 was dismissed on the ground that the complainant failed to prove his alleged marriage with the accused, another complaint by him cannot be entertained. 11 L.L.J. 197=1929 Cr. C. 87=A.I.R. 1929 Lah. 514.

## 4. Defence.

—S. 494—Defence.

In a charge under S. 494, the accused may plead in his defence that the first marriage was null and void, even though he has not obtained a declaration to that effect under S. 18, Divorce Act. A.I.R. 1945 Mad. 516=47 Cr. L.J. 421=(1945) 2 M.L.J. 80=58 L.W. 446=1945 M.W.N. 421=222 Ind. Cas. 328.

## 5. Duty of court to decide point of law.

—Necessity of coming to a decision on point of law.

Even though the Court before whom a charge of bigamy or the like is brought is of necessity a Criminal Court, that does not discharge the Judge from the necessity of coming to a decision on a point of law as regards the marriage. A.I.R. 1934 All.

589—1934 A.L.J. 387—35 Cr. L.J. 1053—3 A.W.R. 598—150 Ind. Cas. 139.

## 6. Essentials of offence.

—S. 494—Valid marriage existing—Legal dissolution not proved—Second marriage—Offence.

A marriage of a Roman Catholic with a Protestant woman is not invalid merely because it was solemnized in a Protestant Church. It is a legal and valid marriage and the husband would be committing an offence of bigamy under S. 494 if he marries during the existence of such a marriage, another woman. The fact that the husband had executed a release deed, in favour of the wife (which he claimed operated as dissolution of the marriage according to the custom of the community to which they belonged) would not operate as dissolution of the marriage. A.I.R. 1945 Mad. 516=(1945) 2 M.L.J. 80=58 L.W. 446=47 Cr. L.J. 421=1945 M.W.N. 421=222 Ind. Cas. 328.

—S. 494—Offence of bigamy—Essentials.

In order that an offence of bigamy may be committed, there must be at the time of the second ceremony of marriage, a previous valid subsisting marriage. A.I.R. 1942 Sind 92=L.L.R. (1942) Kar. 3=43 Cr. L.J. 647=201 Ind. Cas. 163.

—S. 494—Bigamy—Points to be proved—Mahomadan parties

In order that a prosecution for bigamy should succeed, the prosecution must show first of all that at the time of the second marriage, there was the first valid subsisting marriage. Where the parties are Muhammadans, it must be shown that the girl, after she had attained puberty acquiesced in or ratified the first marriage. A.I.R. 1936 Sind 189=38 Cr. L.J. 88=30 Sind L.R. 325=165 Ind. Cas. 745.

—S. 494—Muhammadan woman—Second marriage after exercising option of puberty.

Where a Muhammadan girl was given in marriage during her minority by her mother and when she was about sixteen years, before consummation of the marriage, she made an application to the Deputy Commissioner repudiating the marriage and married another person some time after this :

Held, that she was not guilty of an offence under S. 494, I.P.C. A.I.R. 1933 Lah. 88=34 Cr. L.J. 77=33 P. L. R. 1062=140 Ind. Cas. 617.

—S. 494—Second marriage without divorce and against wishes of first husband.

A second marriage during the life time of the first husband and without the first marriage being annulled



by divorce or in some formal manner recognized by caste usage as equivalent to divorce (the mere wish of the woman against that of her husband being insufficient) is an offence under S. 494. Such second marriages, though recognized by custom, are against public policy and cannot be recognized by the Courts. A.I.R. 1932 Mad. 561 = 36 M. L. W. 237 = 1932 M.W.N. 1082 = 33 Cr.L.J. 647 = 138 Ind. Cas. 518.

—S. 494—First marriage valid—Subsequent marriage with same woman—If offence.

In the charge of bigamy, where in the first marriage the giving away of the bride was with consent of the legal guardian who was in jail.

Held, that the first marriage was valid and hence the subsequent marriage with the same woman constituted bigamy. 100 Ind. Cas. 711 = 28 Cr.L.J. 327 = 7 A.I.Cr.R. 515 515 = A.I.R. 1927 Cal. 480.

#### 7. Evidence and Proof.

—Ss. 494, 497 and 498—Duty of Court - Duty of prosecution—Going through form of marriage recognised by law must be proved—Marriage need not otherwise be valid.

Judges should be particularly careful to see that Ss. 494, 497 and 498, Penal Code, are not abused for the purpose of private spite or prosecution. It is necessary for the prosecution under S. 494, Penal Code, to prove that the form of marriage was a form recognised by or known to the law, otherwise it would be open to the prosecution by mere assertion to constitute any mutual act on the part of the man and woman a form of marriage. When the word "marriage" is used in S. 494, it means marries by some form of marriage known to or recognized by the law. Section 494, when it uses the word "marries" does not, of course, refer to a valid marriage. A bigamous marriage cannot be a valid marriage, and apart from the bar of the first marriage, it may be that there may be some other legal impediment to the validity of the marriage of the man or woman, some legal impediment, personal to the man or woman such as consanguinity, yet if the second marriage be in a form recognised by or known to the law, that would be sufficient to satisfy this particular provision of the section. A.I.R. 1938 Sind 127 = 39 Cr.L.J. 656 = I.L.R. (1939) Kar. 95 = 175 Ind. Cas. 461.

—S. 494—Custom—Remarriage during life time of first husband—No strict proof of custom—Offence.

Sagai in the form of remarriage of widows is the normal condition in all except the five or six highest castes of Hindus in Bihar. But a custom of sagai, while the first husband is still alive is even assuming

the custom to be valid defence under S. 494, something which would require strict proof in respect of the particular caste in the particular area, and in respect of the conditions in which the custom operates. 96 Ind. Cas. 115 = 7 P.L.T. 443 = 27 Cr.L.J. 867 = A.I.R. 1926 Pat. 346.

—S. 494—Evidence of first marriage—Police report to prevent second marriage.

The making of a report to the police with a view to prevent the second marriage is a strong corroboration of the evidence of the first marriage. 21 A.L.J. 187 = 4 L.R.A. (Cr.) 73 = A.I.R. 1923 All. 329.

#### 8. Interpretation.

(a) "Marry".

(b) "Void".

##### 8. (a) Interpretation—"Marry".

—S. 494—"Marry", meaning of—Second marriage, whether should be valid.

The word "marry" in S. 494, I.P.C. means going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid. Consequently, the prosecution has merely to show that the accused went through a form of marriage :

Held, that there was sufficient evidence to show that the accused was a legally married wife.

Held, also that the accused went through a second marriage in a recognized form. A.I.R. 1936 Nag. 13 = 37 Cr. L. J. 161 = 159 Ind. Cas. 855.

—S. 494—Performance of rites by Sikh.

A Hindu professing the Sikh religion may have his marriage performed according to the Anand rites and such marriage would be valid for all intents and purposes including the purpose of an offence under S. 494. 82 Ind. Cas. 277 = 25 Cr. L.J. 1269 = A.I.R. 1925 Lah. 168.

##### 8 (b) Interpretation—"Void".

—S. 494—Void and invalid marriages—No distinction—Offence.

The word "void" which occurs in S. 494 is not used in the technical sense in which it is used in the Mahomedan law. Penal Code makes no distinction between a void and an invalid marriage and the term "void" used therein covers marriages of both classes.



A Mahomedan was prosecuted for bigamy. The accused knew of the former marriage of the woman married by him. It was argued that the marriage with the accused being only invalid and not void under Mahomedan law, the accused could not be said to have committed bigamy.

Held, that the accused was guilty. 110 Ind. Cas. 333=29 P.L.R. 533=10 A.I.Cr.R. 500=29 Cr.L.J. 701=A.I.R. 1928 Lah. 844.

#### 9. Jurisdiction to try offence.

— S. 494 — Acquittal — Refusal to commit to sessions.

Under the Code of Criminal Procedure, as amended, a magistrate of the First Class has jurisdiction to try an offence under Section 494, Penal Code, and dispose of the same without committing the case to the Court of Sessions. An order of discharge passed by such Magistrate in such a case, after the accused has been called upon to enter on his defence, is tantamount to an acquittal, and not discharge. 75 Ind. Cas. 727=25 Cr.L.J. 39=A.I.R. 1925 Oudh 60.

#### 10. Sentence.

— S. 494 — Sentence.

Where the prosecution of the accused was initiated only out of vindictive motives, a light sentence only was inflicted. 91 Ind. Cas. 250=8 N.L.J. 178=27 Cr.L.J. 74=A.I.R. 1926 Nag. 127.

— S. 494—Offence under—Tali tying by use of force—Does not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married.

The accused who wanted to marry a girl but was rejected, waylaid her and pushed her down and tied a tali round her neck. He was convicted of an offence under S. 496, I.P.C. On a perusal of the calendar by the High Court.

Held, that the act of the accused in tying the tali round the neck of the girl in the circumstances did not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married within the meaning of S.496, I.P.C. and hence

the conviction should be set aside. Moreover, the accused must be presumed to have known full well that according to the custom of the community that act did not constitute a ceremony of being married. 48Cr.L.J.842=A.I.R. 1947 Mad. 193 = 1946 M.W.N. 762 = (1946) 2 M.L.J. 428.

— S. 496, charge under Essentials to be proved.

To establish a charge under S. 496, I.P.C., it is not enough to show that the marriage may be set aside on the ground of fraud or declared a nullity, it is incumbent upon the prosecution to go further and to prove that the accused knew that there was no valid marriage and he has gone through a show of marriage with a fraudulent or ulterior object in view. A.I.R. 1937 Cal. 214 = 41 C.W.N. 540 = I.L.R. (1937) 2 Cal. 221 — 38 Cr.L.J. 577 — Ind. Cas. 708 (F.B.)

— Ss. 496 and 419—Accused misrepresenting himself to belong to same sub-caste as complainant marrying her daughter.

Where the accused who belonged to the Barna Sub caste of Brahmins representing himself to be a Barendra Brahmin went through the ceremony of marriage with the daughter of the complainant who was a Barendra Brahmin and who would not have given her daughter in marriage to the accused but for the misrepresentation and on account of the marriage, the complainant was ex-communicated and thus suffered harm to her mind and reputation :

Held, that the marriage not being invalid, the accused could not be convicted under S. 496, I.P.C., but was liable to conviction under S. 419, A.I.R. 1937 Cal. 214 = 41 C.W.N. 540 = 38 Cr.L.J. 577 = I.L.R. (1937) 2 Cal. 221 = 168 Ind. Cas. 708 (F.B.)

— Ss. 496 and 494—Marriage—Fraudulently going through form of—Essence of offence—Show of Marriage.

The essence of an offence under S. 496, is that the marriage ceremony should be fraudulently gone through and that there should be no lawful marriage. The accused must have the knowledge that there is no marriage. A case of bigamy is not contemplated by S. 496. Where it is intended that there should be a valid marriage and not that there should be only a show of marriage for some ulterior and fraudulent purpose the case does not come under S. 496. 10 C.W.N. 982 = 4 Cr.L.J. 152.



—S. 497.

**Synopsis.**

1. Applicability of section
2. Complaint by husband
3. Evidence and proof
4. Prosecution by Crown
5. Miscellaneous.

**1. Applicability of section.**

—S. 497—Applicability—Hindu wife—Conversion to Islam—If dissolves marriage tie—Sexual intercourse by another person with converted wife—Offence.

The conversion of a Hindu wife to Mahomedanism does not *ipso facto* dissolve the marriage tie with her husband, and she cannot, during his life time, enter into a valid marriage contract with another person. She continues to be the wife of her former husband in spite of her conversion, and if any one has sexual intercourse with her, he commits an offence under S. 497, I. P. Code, whether such intercourse be with or without her consent. I.L.R. (1947) Nag. 205=228 Ind. Cas. 1=48 Cr.L.J. 43=1947 N. L. J. 73=A.I.R. 1947 Nag. 121.

—S. 497—Applicability—Europeans.

The provisions of S. 497 of the Penal Code are not restricted in their application and applies to all classes of persons, including Europeans. Evidence that the accused took up his abode in the house of another man's wife, that both slept on the same bed for 15 days, and that there was considerable attachment between them is amply sufficient to prove adultery. 61 Ind.Cas. 238=22 Cr.L.J. 382=2 U.P.L.R. (All.) 419.

**2. Complaint by husband.**

—Ss 497, 366, 368—Complaint under Ss. 366 and 368—Requirements of S. 497 fulfilled—Conviction under S. 497, if legal.

If a complaint under Ss. 366 and 368, fulfils all the requirements of a complaint under S. 497 and clearly makes an accusation of an offence under that section, then, if the adultery complained of is proved, a conviction under that section will not be illegal on the ground that there has been no complaint as required by S. 199, Criminal P.C. A.I.R. 1934 Lah. 945=36 Cr.L.J. 789=36 P.L.R. 209=155 Ind. Cas. 595.

—S. 497—Dissolution of marriage — Right to complain—If affected.

The dissolution of the marriage does not take away from the complainant the right to lodge a complaint. The words in Section 199 "the husband of the woman" are simply intended to point to the particular person who has the right to start proceedings and that a man does not cease to be "the husband of the woman" within the meaning of Section 199, merely because the marriage tie has been dissolved. The right to start proceedings is given to him simply because he is the person aggrieved. 67 Ind.Cas. 731=16 P.W.R. Cr. 1922=23 Cr.L.J. 462=A.I.R. 1922 Lah. 477.

—Ss. 497 and 571 — Intention of attempt—Complaint.

12—F. Y. D.—37-A.

An intention exists before attempt. By itself it is no offence. An offence is complete when it is proved that intent is used to bring the particular act within the category of offences even though further intended acts were not even attempted. The offence of criminal trespass being completed, the complaint of a husband in respect of house trespass to commit adultery is unnecessary. 19 Cr.L.J. 881=47 Ind. Cas. 77 (Nag.).

—S. 497—Marriage—Desertion.

Mere desertion of the husband by the wife for one year does not dissolve the marriage, nor a complaint under S. 497, is liable to be dismissed on the above ground. 18 Cr.L.J. 321=38 Ind. Cas. 433 (L.B.).

**3. Evidence and proof.**

—S. 497—Adultery, evidence as to—Inference from circumstances — Inference that sexual intercourse took place.

Direct evidence of the fact of adultery can rarely be possible. It has to be inferred from circumstances but the circumstances must be such as to fairly justify the inference that sexual intercourse took place. A.I.R. 1935 Oudh 506=1935 O.W.N. 1015=36 Cr.L.J. 1298=11 Luck. 463=158 Ind. Cas. 6 (2).

—S. 497—Proof of adultery—Circumstantial evidence.

**Kulwant Sahay, J.**—It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because if it were otherwise, there is not one case in a hundred in which that proof would be attainable; It is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion. The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just mind to that conclusion. 111 Ind. Cas. 762=9 P.L.T. 397=A.I.R. 1928 Pat. 375.

—S. 497.

The mere birth of a child to a married woman after two years after she left her husband does not show necessarily that any one had committed adultery with her; adultery requires knowledge of her status as a married woman on the part of the person having intercourse with her. 1935 M.W.N. 478.

—S. 497—Marriage must be strictly proved—Evidence of husband and wife, whether sufficient—Proof of ceremonies.

In prosecution under S. 497, I.P.C., where marriage is an ingredient in the offence, the fact of the marriage must be strictly proved in the regular way. This implies that the marriage must be proved as an event which took place and not merely as the state in which the parties were living. No particular number of witnesses must be examined to prove the fact of marriage between two persons. It cannot be said that the evidence of a husband and a wife that a marriage in fact took place between them cannot be accepted as sufficient to prove that fact, nor will any presumption against the validity of such a marriage arise unless there is at least some suggestion that a particular part of the ceremony necessary to its validity was lacking.



every case depends on its own facts. A.I.R. 1937 Pat. 219=3 B.R. 159=38 Cr. L. J. 213=18 P.L.T. 166=166 Ind. Cas. 338.

—Ss. 497, 498—Strict proof of marriage, necessity of, for conviction under Ss. 497, 498.

Strict proof of marriage is necessary for conviction under Ss. 497 and 498, I. P. C. Under S. 498, I.P.C., marriage must be strictly proved and it is not permissible to base a conviction on the presumption of marriage arising from cohabitation for a number of years. A.I.R. 1934 Sind 10=35 Cr. L. J. 816=27 Sind. L. R. 482=148 Ind. Cas. 753.

—S. 497—Proof of marriage—Duty of prosecutor—Admission of accused—Effect.

In a prosecution under S. 497 the question of marriage must be proved strictly and any inference, tacit or otherwise, e. g., tacit admission on the part of the accused that the woman was the wife of the complainant, will not avail the prosecution if they fail to prove strictly the marriage between the complainant and the woman whose chastity has been violated. In case of this kind it is necessary for the complainant or some other person in his behalf to give strict proof of the marriage. In countries where a system of registration prevails, it is sufficient for the petitioner or the prosecutor, as the case might be, to give evidence of his marriage with the woman who is concerned and produce a certified copy of the register. But in a country like India where no registration prevails, it is necessary to set out the facts and circumstances surrounding the alleged ceremony of the marriage in order to enable the Court to determine the question whether the marriage in fact took place and whether the relationship of husband and wife in fact existed at the time of the prosecution. 112 Ind. Cas. 469=29 Cr. L. J. 1045=11 A.I.Cr.R. 364=A.I.R. 1928 Pat. 481.

—S. 497—Presumption of marriage—Man and woman living together as husband and wife—Factum valet.

Where a man and a woman lived together as man and wife, there is a presumption that they were legally married, and even though they belong to castes or classes which ought not to intermarry, nevertheless, *factum valet quod fieri non debuit* applies. 104 Ind. Cas. 708=6 Bur. L. J. 122=28 Cr. L. J. 868=A.I.R. 1927 Rang. 261.

—S. 497—What must be proved—Existence of marriage.

In a prosecution under S. 497 or S. 498 it must be proved to the satisfaction of the Court that there is in existence a legal marriage before conviction can take place. 100 Ind. Cas. 535=4 O.W.N. 172=28 Cr. L. J. 311=7 A.I.Cr.R. 436=A.I.R. 1927 Oudh 140.

—S. 497—Existence of marriage.

In all prosecutions for adultery under S. 497, Penal Code, the marriage must be strictly proved. 94 Ind. Cas. 603=27 Cr. L. J. 651=4 Bur. L. J. 107=A.I.R. 1925 Rang. 328.

—S. 497—Proof of marriage—Conduct—Evidence Act, S. 50.

Before an accused can be convicted under S. 497, the actual fact of the marriage must be proved. Evi-

dence that the complainant lived with the woman, on whom he alleged that the accused committed adultery, as man and wife, is not sufficient to prove the fact of marriage, for it is mere evidence of conduct. 17 Bom. L. R. 75=16 Cr. L. J. 213=27 Ind. Cas. 837.

—S. 497—Delay in complaining by husband—Delay, not explained—Inference as to connivance.

Where a husband was driven out from his house by a wife and the accused lived with her and the husband, though he saw this, did not prefer a complaint promptly but filed a complaint after 18 months and his silence for this period was not explained:

**Held**, that this led to the conclusion that he never meant to resent or take action against the accused for the adultery and might, therefore, have connived at it and that under the circumstances he was not the aggrieved husband who could have the adulterer convicted under S. 497, I.P.C. A.I.R. 1934 Sind 10=35 Cr. L. J. 816=27 Sind L.R. 482=148 Ind. Cas. 753.

—S. 497—Connivance of husband—Proof of mere negligence—If sufficient.

In order to establish connivance mere negligence or inactivity will not suffice. To constitute connivance the facts established must lead to a direct and necessary inference that adultery would be committed with the person charged, and that the husband acquiesced in by wilfully abstaining from taking any steps to prevent that adulterous intercourse which, from what passes before his eye or within his knowledge, he cannot but believe or reasonably think is likely to occur. They may not prove privity to the actual commission of the adultery. 91 Ind. Cas. 533=24 A.L.J. 155=6 L.R.A.Cr. 209=27 Cr. L. J. 101=A.I.R. 1926 All. 189.

—S. 497—Evidence—Letter written by complainant's wife to accused, but not proved to have been received by accused—Sufficiency.

Where, in the case of a charge for adultery, the only evidence was a letter written by the complainant's wife to the accused, which was not proved to have been received nor read by the accused.

**Held**: that conviction on such evidence must be set aside. A.I.R. 1928 Cal. 248.

#### 4. Prosecution by Crown.

—S. 497—Whether offence against public—Crown, if a prosecutor.

Although no Court may take cognizance of an offence under S. 497, I.P.C., except upon a complaint made by the husband as provided in that section, nevertheless, the offence referred to in that section is like all other offences described in the Penal Code an offence against the public in which the Crown, as always, is the prosecutor. The complainant may merely put the Crown in motion. Thereafter the issue is between the Crown and the accused. (36) 163 Ind. Cas. 224=39 C.W.N. 917=62 Cal. 1037=37 Cr. L. J. 825.

—S. 497—Prosecution under—Whether barred by S. 61, Divorce Act (IV of 1869).

Section 61, Divorce Act does not forbid the Crown to prosecute and punish an alleged adulterer under S. 497, I.P.C., when moved to do so by an injured



husband who is entitled to relief under the Divorce Act. What S. 61 forbids is a civil suit for damages. A.I.R. 1935 Oudh 506=1935 O.W.N. 1015=36 Cr. L.J. 1298=11 Luck. 465=158 Ind. Cas. 6 (2).

—S. 497—Prosecution by Crown—If permissible.

Section, 61 Divorce Act, is not intended to be anything more and does nothing more than preclude a civil suit for damages of the nature of the English common law action, for criminal conversation which lay at the suit of a husband to recover damages against an adulterer. There is no authority statutory or otherwise, warranting the view that S. 61 forbids the Crown to prosecute and punish an alleged adulterer under S. 497, I.P.C., when moved to do so by an injured husband. 108 Ind. Cas. 381=10 L. L. J. 250=29 Cr. L.J. 332=A.I.R. 1928 Lah. 50.

—S. 497.

The Court should do nothing to encourage successive prosecutions. 1941 N. L. J. 606.

5. Miscellaneous.

—S. 497 — Adultery — Damages — Right of husband against adulterer — Tort — Adulterer's conviction—Criminal Court—Effect.

Adultery is an actionable wrong. Want of knowledge that the woman is a married woman is a good defence to a suit for damages. The fact of the adulterer's conviction for adultery is a good ground for not punishing him over again by awarding damages against him unless there is a special reason for doing so. (1916) 225 Ind. Cas. 235=1946 N. L. J. 684=A.I.R. 1946 Nag. 392.

—S. 497 — Charge under — Dates of alleged commission of offence not definitely specified — Charge, if defective.

Where a charge for adultery under S. 497, I.P.C., was sufficiently definite as regards the places where the offence was said to have been committed but as regards the dates it was not possible to assign particular dates on which sexual intercourse took place in one of the places:

**Held**, that it was enough to specify the period within which the offence was alleged to have been committed and that the omission of the precise dates had not in any way prejudiced the accused. A.I.R. 1935 Oudh 506=1935 O.W.N. 1015=36 Cr. L. J. 1298=11 Luck. 465=158 Ind. Cas. 6 (2).

—S. 497 — Nature of offence—Continued intercourse.

Every act of sexual intercourse amounts to an offence of adultery, and if a person has several sexual intercourses with a woman, it cannot be said that the offence is a continuing offence. 113 Ind. Cas. 70=30 Cr. L. J. 54=53 Bom. 69=11 A.I.Cr.R. 510=30 Bom. L.R. 1435=A.I.R. 1928 Bom. 530.

—S. 498.

Synopsis.

1. Abetment
2. Complaint
3. Compounding

4. Essentials of offence
5. Evidence and proof
6. Intention
7. Interpretation
8. Jurisdiction to try
9. Procedure
10. Sentence
11. Miscellaneous.

1. Abetment.

—S. 498 — Enticing away a woman—Woman no abettor—Abetment.

When a man is convicted with "enticing away" a woman under S. 498, the woman cannot be guilty as an abettor. (1902) 26 M. 463.

—S. 498 — Abettor.

Where the principal accused is acquitted, the abettor cannot be convicted. 1935 M.W.N. 478.

2. Complaint.

—S. 498—Proceedings under—Requisites for—Held, there was no complaint by husband within meaning of S. 4 (h) Criminal P. C., and accused could not be convicted.

In order that there shall be proceedings under S. 498, I.P.C., it is necessary, first, that there shall be a complaint by the husband (or otherwise as specified in S. 499, I.P.C.), and secondly that a competent Court should take cognizance of the offence.

Proceedings under S. 366, I.P.C., were started against the accused on the information laid at the *thana* by a local schoolmaster. The schoolmaster stated in his information that the girl's relations were not taking action. The husband was at some distant place but however appeared subsequently in the committing Court when charge sheet had been submitted and cognizance had been taken by Court and deposed. In cross-examination the husband said that he had not personally lodged any complaint in Court against the accused with having enticed away his wife and that he had asked his brother to lodge a complaint to the police. He then added 'I am complaining of the enticement to day.' No charge was framed under S. 498 by the committing Magistrate, but when the case came before the Sessions Court, under the directions of the Judge such a charge was framed:

**Held**, that the Judge was not justified in framing the charge in the absence of a complaint by the husband. There was nothing which could be called a complaint within the meaning of S. 4 (h), Criminal P. C. and nothing to suggest that the Magistrate considered that there was any such complaint before him on which he could take cognizance nor did he purport to do so. Therefore the conviction under S. 498 could not be upheld. A.I.R. 1946 Cal. 493=47 Cr. L. J. 325=223 Ind. Cas. 44.

—S. 498.

Woman living with husband's father—Husband living away on service—Woman going temporarily to her father's house in another village and enticed away by accused from there—Husband's father, held person



having care of woman on her husband's behalf—Complaint by him held proper. A.I.R. 1942 Oudh 434=1942 O.W.N. 431=42 Cr.L.J. 643=1942 A.W.R. 274 (2)=201 Ind. Cas. 146.

—S. 498—Married woman discarded by husband living with her father and brother, not having care of her on behalf of her husband—Her elopement—Offence under S. 498, if made out—Criminal P.C., Ss. 199, 177—Complaint by brother.

It is an essential ingredient of the offence under S. 498, Penal Code, that the person concerned shall have been taken or enticed from a person having the care of her on behalf of the husband. Where therefore the accused is alleged to have enticed a married woman living with her father and brother having been discarded by her husband and the father and brother were taking care of her on their own account and not on behalf of her husband, a conviction under S. 498 cannot be sustained. In such a case, a complaint by the brother is not competent under S. 199 Criminal P.C., as the brother is acting on his own behalf and not under the authority of her husband. A.I.R. 1937 Bom. 186=39 Bom. L.R. 61=I. L. R. (1937) Bom. 244=38 Cr. L.J. 769=169 Ind. Cas. 526.

—Ss. 498 and 497—Complaint by brother and no necessary averments—Conviction, if proper.

For a conviction under S. 497 or S. 498 I.P.C. a complaint by the husband is an essential requirement which cannot be dispensed with. If a criminal charge of adultery is to be preferred, a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, the requirements of S. 199, Criminal P. C., will not have been satisfied. In the absence of a legal complaint for the offence of adultery and in the absence of necessary averments, no offence under S. 497 can be alleged against the accused. A.I.R. 1937 Bom. 186=39 Bom. L. R. 61=I. L. R. (1937) Bom. 244=38 Cr.L.J. 769=169 Ind. Cas. 526.

—S. 498—Absence of complaint as required by S. 199, Criminal P. C.—Charge under S. 498 added—Question, if charge was proper—Whether one of law—Charge under S. 498 without complaint—Jurisdiction to frame—Trial, validity of.

Where a case was committed to the Sessions Court under Ss. 366, 420 and 120-B, I. P. C., but though there had been no complaint by any person competent under S. 199, Criminal P. C., to make one, the Court added a charge under S. 498, I. P. C., and the charges under Ss. 366 and 498 being tried by jury, a verdict of guilty under S. 498 was brought against some of the accused:

**Held**, that whether the charge under S. 498, I. P. C., was or was not proper was a question of law; and under S. 298, Criminal P. C., it was the Judge's plain duty to decide that question himself instead of leaving it to the jury and that if the Judge was not really satisfied that the additional charge was not proper, there was no reason whatsoever why he should have treated it as question of fact and left it for the jury to deal with:

**Held**, also that the charge under S. 498 was framed and tried without any jurisdiction at all, having regard to the terms of S. 199, Criminal P. C., and that all the proceedings that followed upon that charge were equally without jurisdiction. A.I.R. 1935 Pat. 357=

16 P.L.T. 348=1 B.R. 504=36 Cr.L.J. 856=14 Pat. 717=155 Ind. Cas. 866.

—Ss. 498, 366—Complaint by husband under S. 366—Conviction under S. 498—Jurisdiction and test in such cases.

Where a complaint has been filed by a husband, it is a question of construction in each case as to whether it amounts to a complaint of an offence under S. 498. If a petition contains an allegation of facts which, if proved by evidence, would constitute an offence under S. 498, such petition is clearly a complaint by the husband of an offence under S. 498, for which he desires the accused named by him to be prosecuted. The fact that there are other allegations in the petition which, by themselves or in conjunction with those relating to an offence under S. 498, constitute a more serious offence, such as one under S. 366, will not make the complaint any the less a complaint under S. 498. The essence of the matter in such cases is that the husband complains of his wife being taken or enticed away from him, the knowledge and intention of the person accused being as required by the section. If force or fraud is also alleged or if the woman is alleged to be below a certain age, such additional facts may render the accused liable for prosecution for other offences in addition to an offence under S. 498 or in place of it. If such additional facts are not established by evidence but the evidence brings home to the accused an offence under S. 498, the Court cannot refuse to convict the accused merely on the ground that the initial complaint did not mention S. 498 or that it purported to be in respect of an offence under S. 366. The test which may be applied in a case like this is whether if the allegation of the use of force or fraud, misappropriation of ornaments and of the woman's age is eliminated, the remaining part of the complaint fulfils all the requirements of a "complaint" under S. 498. A.I.R. 1934 All. 472=36 Cr.L.J. 404=153 Ind. Cas. 697.

—S. 498—Complaint by father—Evidence recorded—Statement by husband that complaint filed with his consent—Conviction—Conviction under S. 498, Penal Code—If can be converted into one under S. 366-A or S. 373, Penal Code.

Complaint under S. 498, Penal Code, was filed by the father of the abducted girl. After all the evidence was recorded, the husband of the girl stated that the complaint was filed with his consent:

**Held**, that the conviction under S. 498 was bad in law in that the complaint and the evidence on which the petitioner was convicted had been made by a person who was not authorized in law to make such a complaint at all.

**Held further** that the High Court cannot alter a conviction on a charge under S. 498, Penal Code only to a conviction under S. 366-A or S. 373, Penal Code as these offences are major offences. A.I.R. 1934 Lah. 122=36 Cr.L.J. 423=153 Ind. Cas. 721.

—Ss. 498, 366-A—Report under S. 366-A—Conviction under S. 498.

The accused were prosecuted on a report under S. 366-A, I. P. C. They were convicted under S. 498, though there was no complaint by the husband of the woman, as required by S. 199, Criminal P. C.,



**Held**, that the conviction was bad and that the accused should be acquitted. A.I.R. 1933 All. 626 = 1933 A.L.J. 701 = 34 Cr.L.J. 1227 = 55 All. 871 = 145 Ind. Cas. 922.

—S. 498—Cr. P. C., 1898, Ss. 199, 537—Complaint by person other than husband of girl—Absence of leave of Court—Jurisdiction—Irregularity.

Section 199, Criminal P. C., was provided in order to discourage prosecutions under S. 498, Penal Code, unless the husband (or in his absence some one on his behalf) feels himself to be injured sufficiently to induce him to institute proceedings. In the absence of evidence to show that leave was obtained from Court under S. 199 allowing some one else to make a complaint under S. 498, in the absence of the girl's husband, the Court has no jurisdiction to try the case. The irregularity cannot be cured by S. 537, Criminal P. C. A.I.R. 1933 Cal. 880 = 34 Cr.L.J. 1092 = 38 C.W.N. 1113 = 145 Ind. Cas. 874 (2) (D.B.).

—S. 498—Complaint by second husband—Validity of marriage—Proof.

Where the husband of a woman absolutely abandons her, and she marries another man by a marriage which is recognised as valid among the people to which the parties belong, the second husband of the woman has full authority to institute complaints for enticing the woman away. 1930 Cr.C. 1137 = A.I.R. 1930 All. 834.

—Ss. 498 and 366—Adultery—Deposition of the husband as witness.

The wish in a deposition of the husband to prosecute the accused during the trial at the instance of Police amounts to a complaint, and the accused may be convicted. 38 All. 276 = 14 A.L.J. 233 = 17 Cr.L.J. 72 = 32 Ind. Cas. 664.

—S. 498—No complaint by husband or guardian—If conviction under S. 498, sustainable.

In the absence of a complaint to a Magistrate by the husband or guardian, a conviction under S. 498 is not sustainable. 4 P.R. 1888; 30 C. 910, Foll. 32 P.R. 1910, Cr. = 39 P.L.R. 1911 = 12 Cr.L.J. 50 = 8 Ind. Cas. 1160.

—S. 498—Complainant to establish his marital right.

A complainant cannot prosecute another man under S. 498 for enticing away a woman unless he establishes that he (the complainant) is her lawful husband. 22 P.W.R. 1909, Cr. = 12 P.L.R. 1910 = 11 Cr.L.J. 155 = 4 Ind. Cas. 1042.

### 3. Compounding.

—S. 498—Compounding—Husband not party—Legality.

Under S. 345 the only person who is authorised to compound an offence under S. 498 is the injured husband and hence an order of acquittal based on compromise entered into by any other person is erroneous. 74 Ind. Cas. 444 = 24 Cr. L. J. 780 = A.I.R. 1924 Lah. 330.

—S. 498 — Proceedings after compromise—Ultra vires.

Once a charge under S. 498 has been compounded before an Inspector of Police, and the complaint is withdrawn, proceedings before Magistrate on the complainant's statement that he was forced to enter into a compromise are *ultra vires*. 22 P.L.R. 1910 = 11 Cr.L.J. 366 = 6 Ind. Cas. 497.

### 4. Essentials of offence.

—S. 498—Gist of offence under—It must be shown that wife left by reason of act or assistance proceeding from accused.

It is not enough to constitute an offence under S. 498 that the woman left her husband's house or that she was afterwards seen passing along with the accused. It must be shown that she left by reason of any act or assistance proceeding from the accused. A.I.R. 1937 Cal. 460 = 41 C.W.N. 931 = 65 C.L.J. 421 = 38 Cr.L.J. 986 = 170 Ind. Cas. 903.

—S. 498—Complainant's wife choosing to leave her husband and live with accused of her own accord—Absence of evidence of concealment or detention—Offence.

Where, in a case under S. 498, Penal Code, it was found that the accused did not take or entice away the complainant's wife whom he knew to be such, but that she of her own accord chose to leave her husband's house and came to stay in the house of the accused and there was no evidence that he concealed or detained her against her will with the intention that she should have illicit intercourse with him;

**Held**, that the accused could not be held to be guilty under S. 498, Penal Code. A.I.R. 1934 Oudh 258 = 11 O.W.N. 672 = 35 Cr.L.J. 932 = 149 Ind. Cas. 228.

—S. 498—Renunciation of Muhammadanism, whether dissolves marriage—Enticement after renunciation.

A muhammadan marriage is immediately dissolved on one of the parties to that marriage renouncing the faith of Islam and hence where a muhammadan married woman renounces her religion and she is thereafter taken away by the accused, the latter cannot be convicted under S. 498, Penal Code. A.I.R. 1933 All. 433 = 34 Cr. L.J. 869 = 1933 A.L.J. 733 = 145 Ind. Cas. 156.

—S. 498—Offence under — Knowledge that woman was married, necessity of.

Before a conviction can take place under S. 498, Penal Code it must be established that the person accused knew or had reason to believe the person enticed away to be the wife of some other man. A.I.R. 1931 Lah. 194 = 32 Cr.L.J. 1210 = 134 Ind. Cas. 589.

—S. 498—Knowledge of accused that the enticed person is a married woman.

To sustain a conviction under S. 498, I.P.C., there must be evidence that the accused knew that the woman was the wife of another man; mere presumption that he must have known this is not sufficient. 61 Ind. Cas. 652 = 22 Cr. L.J. 412 = 14 M.L.W. 189 = 44 M. 913.



—S. 498—Essentials of offence.

To sustain a conviction under S. 498 it must be proved that the woman had been enticed or taken away from her husband's house and that she was detained for the purpose of illicit intercourse. The mere fact that she was seen outside the accused's house is not sufficient. 21 Cr.L.J. 383=2 U.P.L.R. (All.) 75=55 Ind. Cas. 863.

—S. 498—Enticing away married woman—Connivance.

A conviction under S. 498 is not bad merely because the husband connived at the taking away or concealing of the wife. 54 Ind. Cas. 619. (Pat.).

—S. 498—Remarried widow—Rajputs—Enticing away.

Among **Rathis**, one of the lowest sub-divisions of Rajputs of the Kangra District, a marriage with a widow is valid. A person abducting a woman, so married, with knowledge of the marriage, is guilty of an offence under S. 498, I.P.C. 10 P.R. 1919, Cr.=20 Cr.L.J. 554=51 Ind. Cas. 842.

—S. 498—Enticing away a discarded wife.

A person who entices away a married woman who had long ago been discarded, is not guilty of an offence under S. 498. 5 P.W.R. 1915 Cr.=129 P.L.R. 1915=16 Cr.L.J. 216=27 Ind. Cas. 840.

—S. 498—Voidable marriage—Sunnies.

A woman is not the wife of a man within S. 498 if their marriage is voidable. Consequently the enticement, etc., of such woman is not indictable under S. 498. A judicial order is not necessary to effect the cancellation of a voidable marriage among sunnies. 19 C. 79, Foll. 33 P.W.R. 1910 Cr.=11 Cr.L.J. 664=8 Ind. Cas. 494.

—S. 498—Enticing married woman—Consent of the woman—Husband deprived of control—Effect of offence.

The offence contemplated by S. 498 is complete if it appears that the accused went away with the woman in such a manner as to deprive her husband of his control over his wife;—the fact that the woman accompanied the accused of her own free will does not diminish the criminality of the act. (1902) 4 Bom.L.R. 435.

## 5. Evidence and proof.

—S. 498.

In proving an offence in which marriage is an essential ingredient, it is necessary that the fact of the marriage must be strictly proved. 100 Ind. Cas. 236=5 Bur.L.J. 190=28 Cr.L.J. 268.

—S. 498—Proof of marriage—Rule as to—Second marriage—Mere cohabitation—Sufficiency—Recognition by brotherhood and entry in "phant".

No hard and fast rule can be laid down as to what evidence will suffice to prove a valid marriage. In the case of a first marriage proof of ceremonies would generally be necessary. While the same may perhaps be also said of a second marriage, or re-marriage when

it is between strangers, it may not be said of a re-marriage between a widow and her husband's brother in the Punjab. Proof of cohabitation as husband and wife for a number of years and its recognition as a valid marriage by the brotherhood would be sufficient proof for the purpose of a criminal case. Entry in the "phant" of the village is another sure proof. 1948 A.W.R. (H.C.) 291=A.I.R. 1949 A. 237=50 Cr. L.J. 359.

—S. 498—Factum of marriage must be proved.

In a criminal case under S. 498, Penal Code, it is necessary for the prosecution to prove the factum of marriage strictly. A.I.R. 1941 Pat. 526=42 Cr. L.J. 653=7 B.R. 890=195 Ind. Cas. 126.

—S. 498.

For conviction under S. 498, marriage must be strictly proved, and it is not permissible to base the conviction on the presumption of marriage arising from cohabitation for a number of years. A.I.R. 1934 Sind 10=27 S.L.R. 482=35 Cr. L.J. 816=148 Ind. Cas. 753.

—S. 498—Proof of marriage, necessity of—Presumption.

In a case under S. 498, there must be proof that the marriage of the girl had been celebrated strictly in accordance with the requirements of custom and law applicable to the parties. Mere presumption that the accused must have known that the woman was married without proof of such knowledge is not enough. A.I.R. 1933 Cal. 880=38 C.W.N. 113=34 Cr.L.J. 1092=145 Ind. Cas. 874 (2).

—S. 498—Conviction—Marriage not proved but presumed from cohabitation—Legality.

In dealing with offences under S. 498, marriage must be strictly proved. There may arise a presumption that by co-habitation for a period of 13 years marriage took place, but persons cannot be convicted on a presumption of that kind. 119 Ind. Cas. 332=30 P.L.R. 643=30 Cr.L.J. 1051=A.I.R. 1930 Lah. 230.

—S. 498—Proof of marriage—Evidence that husband put vermilion on woman's forehead and feast—If sufficient.

A complaint under S. 498 was made by a low caste Hindu. He alleged that he had married the woman enticed away in **nika** form. The only evidence of marriage that was adduced was that the complainant put vermilion on the forehead of the woman and that there was a feast of the caste people.

**Held**, that the evidence of marriage was legally insufficient for a conviction under S. 498. 1930 Cr.C. 639=A.I.R. 1930 Cal. 447.

—S. 498—Admission of accused—If sufficient.

In a case of abduction under S. 498 the marriage ought to be proved like any other essential fact in the case. The mere admission of the accused that the woman abducted is the lawful wife of the complainant, though corroborated by the evidence of the woman is not enough to prove the marriage. 5 Cal. 566; 3 O.C. 342 and 5 All. 233, Foll. 89 Ind. Cas. 464=2 O.W.N. 586=26 Cr.L.J. 1376=A.I.R. 1925 Oudh. 701.



—S. 498—Evidence of marriage—Statement of complainant—Strict proof.

Where in the case of a conviction under S. 498, there was no better evidence of marriage between the complainant and the woman than the mere statement of the complainant that he was married to her, the conviction could not be sustained. 18 A.L.J. 411=21 Cr.L.J. 368=2 U.P.L.R. (All.) 87=55 Ind. Cas. 736.

—S. 498—Essentials—Proof of marriage necessary.

In a case under S. 498, the fact and the legality of a marriage are material elements and must be strictly proved; but no particular way of proof is necessary. 36 All. 1=11 A.L.J. 994=15 Cr.L.J. 78=22 Ind. Cas. 430.

—S. 498—Enticing away—Married woman—Proof of marriage—Statement of complainant.

The two essentials of an offence under S. 498 are, that the woman enticed away is the wife of the complainant and that the fact of marriage is known to the accused. The mere statement of the complainant that the woman is his wife is not sufficient evidence of marriage. 20 A. 166, 2 S.L.R. 22, Foll. 5 S.L.R. 270=13 Cr.L.J. 541=15 Ind. Cas. 813.

—S. 498—Voidable marriage—Marriage voidable being performed during the girl's minority—Non-consummation of marriage after she had attained puberty—Inference as to option to avoid marriage.

A girl whose marriage is voidable having been performed during her minority cannot be considered to have exercised the option and ceased to be the wife of her husband unless option has been exercised before the enticement and the mere fact that the marriage was not consummated after she had attained puberty and she had actually left her husband is not sufficient to infer that she exercised the option. 110 Ind. Cas. 794=11 A.I.Cr.R. 35=29 Cr.L.J. 762=A.I.R. 1928 Lah. 898.

—S. 498—Knowledge of marriage—Circumstances justifying presumption.

A person charged under S. 498 who lives in a neighbouring village and belongs to the same brotherhood as that of the girl who is alleged to have been enticed by him must be presumed to have the necessary knowledge that she is the lawful wife of her husband. 110 Ind. Cas. 794=11 A.I.Cr.R. 35=29 Cr.L.J. 762=A.I.R. 1928 Lah. 898.

—S. 498—Girl living in the same house as accused—If enough to prove offence.

The mere fact that the girl is living in the same house with the accused and his relatives does not prove that she was enticed away by any or all of them. A.I.R. 1934 Lah. 86=35 Cr.L.J. 1032=149 Ind. Cas. 1106 (1).

—S. 498—Absence of proof of kidnapping or abduction or of knowledge of accused that girl was married—No proof of illicit intercourse—Conviction.

Where there is no proof that the accused kidnapped or abducted a girl or that he detained her knowing that she was a married girl and it is not satisfactorily

proved that he had or intended to have illicit intercourse with her, a conviction under S. 498, Penal Code, is not justifiable. (1933) 146 Ind. Cas. 40=10 O.W.N. 833=34 Cr.L.J. 1196.

—S. 498—Evidence to support conviction—No cross examination.

Evidence of complainant and his wife even if not subjected to cross examination by the accused is sufficient to warrant a conviction under S. 498. 14 N.L.R. 28=18 Cr.L.J. 1016=42 Ind. Cas. 760.

## 6. Intention.

—S. 498—There must be abduction with intention of illicit sexual intercourse.

Where it is not established beyond all reasonable doubt that the woman was abducted from the custody of her husband for the purposes of carrying on sexual intercourse with her, conviction under S. 498, I.P.C., cannot be had. (1937) 172 Ind. Cas. 799=39 P.L.R. 191=39 Cr.L.J. 195.

—S. 498.

Married girl going away with real uncle. Intention necessary to constitute offence under S. 498 not proved—Conviction set aside. (1936) 38 P.L.R. 570.

—S. 498—Person assisting girl to leave house—Staying together at night at another house.

Where the accused not only provided the means by which the girl got away from her relation's house, namely the boat but he brought it to the house and himself went away with the girl in the boat from the house and both of them stayed in another house at night:

Held, that he "took" the girl away within the meaning of the section. The fact that the accused and the girl stayed together at night at a relation's house is sufficient to show that there was criminal intent within the meaning of the section. A.I.R. 1935 Cal. 677=39 C.W.N. 1280=37 Cr.L.J. 28=159 Ind. Cas. 140.

—S. 498—Offence under.

A person who entices away a married woman to dispose of her in marriage always commits an offence under S. 498, Penal Code. A.I.R. 1931 Lah. 194=32 Cr.L.J. 1210=134 Ind. Cas. 589.

—S. 498—Enticing away a married woman.

A person who entices away a married woman from her husband's house with intent that he may dispose of her in marriage to some one else commits an offence under S. 498. 13 A.L.J. 251=16 Cr.L.J. 315=28 Ind. Cas. 651.

—S. 498—Enticing away married woman—Intention.

For a conviction under S. 498, I.P.C., there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him or an intention that she should remain away indefinitely. 145 P.L.R. 1917=19 Cr.L.J. 441=44 Ind. Cas. 969.



## 7. Interpretation.

- (a) "Takes or entices away"
- (b) "Detains"
- (c) "Such woman".

## 7 (a). Interpretation—"Takes or entices away".

## —S. 498—"Takes away".

In order that a person should be made liable for an offence under S. 498, I. P. Code, it is not necessary that there should be any enticement. All that is necessary is that if any person "takes away" another man's wife with the intention that she may have illicit intercourse with him, then the offence is completed. Taking away implies that there must be some influence operating on the woman, or co-operating with her inclination at the time the final step was taken which caused a severance of the woman from her husband, for the purpose of causing such step to be taken. 1949 M.W.N. 278=62 L.W. 400=A.I.R. 1950 Mad. 13=51 Cr.L.J. 228=3 A.I. Cr.D. 652=(1949) 1 M.L.J. 610.

## —S. 498—"Taking away"—Physical or moral influence is necessary.

To bring S. 498, Penal Code, into operation there must be some influence operating on the woman, or co-operating with her inclination at the time the final step is taken which causes a severance of the woman from her husband for the purpose of causing such step to be taken. A.I.R. 1943 Bom. 179=45 Bom. L.R. 295=44 Cr.L.J. 534=207 Ind. Cas. 225.

## —S. 498—"Taking", whether means enticing or taking by force.

There is no definition in the Code of the word "taking". It apparently is intended to mean something different from "enticing". It cannot mean "taking by force," because this would amount to abduction. A case under S. 498, I.P.C., is sufficiently established, if it can be shown that the accused personally and actively assisted the wife to get away from her husband's house or from the custody of any person who was taking care of her on behalf of the husband. Of course, the "taking" must be with the "intention" stated in the section. A.I.R. 1935 Cal. 677=39 C.W.N. 1280=37 Cr. L.J. 28=159 Ind. Cas. 140.

## —Ss. 498, 497—Held, elopement was a joint adventure and there was no enticement.

Where a married woman discarded by her husband and living with her father and brother fell in love with her next-door neighbour and they eloped to another place:

**Held**, that the elopement was a joint adventure in which the motive force was mutual affection, and there was no enticement within the meaning of S. 498. A.I.R. 1937 Bom. 186=1 L.R. (1937) Bom. 244=39 Bom. L.R. 61=38 Cr.L.J. 769=169 Ind. Cas. 526.

## —S. 498—Girl taken away from mother's care with mother's consent.

Where the accused takes away a girl from the care of her mother with her mother's consent, it is not taking or enticing away within the meaning of S. 498, Penal Code. (1936) 165 Ind. Cas. 497=39 C.W.N. 1055=37 Cr.L.J. 1155.

## —S. 498—The fact that girl went of her free will, whether material.

In cases under S. 498, Penal code the fact that the girl went away of her own accord is immaterial. A.I.R. 1935 Cal. 677=39 C.W.N. 1280=37 Cr.L.J. 28=159 Ind. Cas. 140.

## —S. 498—Consent of woman, if material—Evidence of taking or enticing away of the woman by accused—Necessity of—"Benefit of doubt."

In cases under S. 498, Penal Code, consent is immaterial. But it is essential to see that there is evidence that the accused took or enticed away the woman within the meaning of the section. In such cases, the mere fact that the wife went away of her own accord from her husband's house, and was accompanied a part of the way by the accused, is not sufficient to show that the accused took or enticed the woman away within the meaning of the section. There must be some tangible evidence of taking or enticing. When there is considerable doubt in the case, the benefit of that doubt ought to be given to the accused. A.I.R. 1935 Cal. 345=37 Cr. L.J. 73=159 Ind. Cas. 314.

## —S. 498—Enticement, to be punishable, must be from control of husband.

The enticement of the wife must be from the control of the husband before the enticer can be convicted under S. 498.

Where it was not proved that there was any inducement of seduction by the accused at the initial stage and the wife, feeling a preferential fondness for the accused, drove her husband out of her house and permitted the accused to live with her:

**Held**, that he could not be held to have detained her in the sense in which the word is used in S. 498. A.I.R. 1934 Sind 10=35 Cr. L.J. 816=27 S.L.R. 482=148 Ind. Cas. 753.

## 7 (b). Interpretation—"Detains".

## —S. 498—"Detain"—Meaning of—Wedded wife staying away from her husband with another out of her own free will—If detention by the other person.

The word "detain" means to keep back and consequently implies some positive act on the part of the person accused of detaining. It is not necessary that detention should be brought about by physical restraint. It may be brought about even by blandishments and allurements, something akin to enticement mentioned in the first part of S. 498, I. P. Code. There must be either physical restraint or some influence exercised by the accused on the mind of the woman inducing her to keep away from her husband. But where a woman of her own free will desires to keep away from her husband and to stay with the accused, there can be no detention of her by the accused in any sense of that word. 1948 A.W.R. (H. C.) 205=1948 A.L.J. 486=A.I.R. 1949 All. 23=50 Cr. L.J. 82.

## —S. 498—"Detains" meaning explained.

The word "detains" in S. 498, Penal Code, means "keeps back." It need not necessarily be by physical force; it may be by persuasion or, by allurement.



and blandishment. But the use of the word does require that there should be something in the nature of control or influence which can properly be described as a keeping back of the woman. A.I.R. 1940 Cal. 477 = I.L.R. (1940) 2 Cal. 93=44 C.W.N. 702=41 Cr. L.J. 954=190 Ind. Cas. 632.

—S. 498—Man picking up woman in brothel and taking her to his house, if detains her.

It would obviously be extremely difficult to prove that a man who picks a woman up in a brothel and takes her to his house can be said to have detained her in any sense of the term. A.I.R. 1940 Cal. 477 = I.L.R. (1940) 2 Cal. 93=44 C.W.N. 702=41 Cr. L.J. 954=190 Ind. Cas. 632.

—S. 498—Word 'detains,' meaning of.

The word 'detains,' in S. 498, Penal Code, clearly implies some act on the part of the accused by which the woman's movements are restrained and this again implies unwillingness on her part. 'Detention' cannot include persuasion by means of blandishment or similar inducements, which would leave the woman free to go if she wished. The word 'detains' cannot be reasonably construed as having reference to the husband. A.I.R. 1939 Lah. 295 = I.L.R. (1939) Lah. 148=41 P.L.R. 487=40 Cr. L.J. 760=183 Ind. Cas. 318.

—S. 498—'Detention'—Married woman found living in accused's house and sexual intercourse taking place — Persuasion amounting to detention.

Providing shelter for a married woman is such an inducement as to amount to detention within the meaning of S. 498, Penal Code.

Where a married woman was found in the house of the accused where she was living for sometime and sexual intercourse between them had taken place:

**Held**, that there was persuasion amounting to detention within the meaning of S. 498. A.I.R. 1938 Pat. 432=39 Cr. L.J. 952=19 P.L.T. 795=5 B.R. 14=177 Ind. Cas. 706.

—S. 498—'Detains,' meaning of—Woman eloping and living with accused of her own will—'Keeping back,' if constituted.

The word 'detains' in S. 498, Penal Code, has its ordinary meaning of 'keeping back.' There may be various ways of keeping back. It need not necessarily be by physical force, but the use of the word does require that there should be something in the nature of control or influence which can properly be described as a keeping back of the woman, and it cannot properly be said that a man detains a woman if she has no desire to leave and on the contrary wishes to stay with him. Where, therefore, a married woman elopes with the accused, lives with him willingly and is not willing to leave him and is also a free agent, there is no 'keeping back' within S. 498. A.I.R. 1937 Bom. 186=39 Bom. L.R. 61 = I.L.R. (1937) Bom. 244=38 Cr. L.J. 769=169 Ind. Cas. 526.

—S. 498—Accused inducing wife of complainant to leave her husband—Previous long-standing intrigue—Providing her with shelter, whether inducement.

Where the accused who carried on an intrigue with the wife of the complainant for a number of years, entices her away one day and keeps her with him in

another town by providing her with a shelter, his providing a shelter for her is an inducement to her to withhold herself from her husband. This conduct on his part would be sufficient to bring him within the purview of S. 498, Penal Code. A.I.R. 1937 Lah. 617=38 Cr. L.J. 576=39 P.L.R. 488=168 Ind. Cas. 607.

—S. 498—"Detain," meaning of—Enticement and concealment.

"Detain" in S. 498, Penal Code, has to be interpreted *eiusdem generis* with enticement and concealment. There must be evidence to show that the accused did something which had the effect of preventing the woman from returning to her husband. A.I.R. 1936 Cal. 450=40 C.W.N. 996=38 Cr. L.J. 180 (2) = I.L.R. (1937) 1 Cal. 166=67 C. L.J. 141=166 Ind. Cas. 290 (2).

—S. 498—'Conceals or detains' if include enticing or inducing wife to withhold or conceal herself from her husband—Consent of wife.

Per **Rupchand, A. J. C.**—Words "conceals or detains" in S. 498, Penal Code, must be taken to extend to the enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so as well as to physical restraint or prevention of will or action.

The mere fact that the wife may have willingly gone to the accused or that she consented to live with him would not be sufficient to take the case out of the provisions of the section. A.I.R. 1934 Sind 72=28 Sind L.R. 140=35 Cr. L.J. 1254=151 Ind. Cas. 175.

—S. 498—'Detains,' meaning of—Woman allowed by accused to go wherever she liked—Offence, if made out.

The word 'detains' in S. 498, Penal Code means by derivation and according to the ordinary use of language, "keeps back." But there may be various ways of keeping back. It need not necessarily be by physical force; it may be by persuasion, or by allurements and blandishment. But the use of the word does require that there should be something in the nature of control or influence which can properly be described as a keeping back of the woman. Proof of some kind of persuasion is necessary to constitute detention.

The wife of the complainant, during the absence of the complainant from home, was taken away by a brother of hers and he married her by *natra* marriage to the accused and there after she lived with the accused as his wife. The accused was charged under S. 493, Penal Code:

**Held**, that as the woman was not prevented from going any where she liked, the accused was not guilty of the offence with which he was charged, *viz.*, detention of the woman under S. 498. A.I.R. 1933 Bom. 489=35 Bom. L.R. 1046=35 Cr. L.J. 376=58 Bom. 88=147 Ind. Cas. 43.

—S. 498—Accused detaining complainant's wife for illicit intercourse—Woman refusing to go to her husband—Offence.

Where the accused at first detained the complainant's wife in his house with a view to having illicit intercourse with her, and having been seduced by the accused she felt some natural reluctance to return to her husband and declined to do so;



**Held**, that the accused was rightly convicted of an offence under S. 498, Penal Code. A.I.R. 1933 Oudh 256=34 Cr. L. J. 729=10 O.W.N. 784=144 Ind. Cas. 213.

—S. 498—Willingness of woman—Detention—No offence.

There can be no detention where a woman is living with a man of her own free will and refuses to go back with her husband and the person with whom she thus lives is not guilty of an offence under S. 498, I.P.C., as the chief element which constitute the offence under the section is wanting. 18 A.L.J. 311, Foll. 107 Ind. Cas. 689=26 A.L.J. 403=9 A.I.Cr.R. 106=9 L.R.A.Cr. 15=29 Cr. L. J. 273=A.I.R. 1928 All. 194.

—S. 498—"Detained"—Meaning.

"To detain" means to keep back from some body or to restrain. Where a woman had left her husband, and is living with another to the knowledge of her husband for a period of six years, and the husband takes no steps to get her back, it cannot be said that she is "detained" by the other within S. 498. 103 Ind. Cas. 559=1 L.C. 235=28 Cr. L. J. 703=8 A.I.Cr.R. 415=A.I.R. 1927 Oudh 318.

—S. 498—No offence.

Where a girl of 16 years travelled with the accused from place to place and there was no evidence that she was unwilling to stay with them and she stayed with them for nearly six months:

**Held**, that there was no detention. 90 Ind. Cas. 156=7 L. L. J. 217=26 P.L.R. 517=26 Cr. L. J. 1500=A.I.R. 1925 Lah. 406.

—S. 498—Detention—Depriving husband of control of wife.

To constitute an offence under S. 498, it is not necessary that the woman should be physically restrained or that she should be actively prevented from the exercise of her free will or action. The gravamen of the offence consist in depriving the husband of his proper control over his wife for the purposes specified in S. 498, and a detention occasioning such deprivation may be brought about by means other than mere physical constraint, e.g. even by the influence of allurements and persuasions. 4 M.H.C.R. 20, Foll. 69 Ind. Cas. 458=23 Cr. L. J. 730=A.I.R. 1923 Lah. 45.

—S. 498—Detention—Woman living of her own free will—Refusal to go back to husband.

Where the woman was living with the accused of her own free will, and had no desire to return to the husband and when the husband went to the accused's house and claimed her, she deliberately turned her back on him and walked into the house and the accused did not then make her over to the husband; **Held**, that the accused could not be convicted of detaining her. 18 A.L.J. 311=56 Ind. Cas. 209.

—S. 498—Detention—Criminal intent.

A man detains a woman within S. 498, if she is kept under his protection in a house provided by him with the knowledge and intention specified in the section. 36 P.W.R. 1913 Cr. =319 P.L.R. 1913=14 Cr. L. J. 595=21 Ind. 467.

7 (c). Interpretation—"Such woman."

—S. 498—"Any such woman" meaning of.

The words "any such woman" in S. 498, I.P.C. refer to woman "who is and whom he knows or has reason to believe to be the wife of any other man." The words "whoever takes or entices away" cannot possibly be interpreted as an adjective describing the woman in question. A.I.R. 1940 Cal. 477=I.L.R. (1940) 2 Cal. 93=44 C.W.N. 702=41 Cr. L. J. 954=190 Ind. Cas. 632.

—S. 498—"Such woman."

The words "such woman" in S. 498, I. P. C. do not mean such a woman as has been so enticed as mentioned in that section, but mean such woman whom the accused knows or has reason to believe to be the wife of any other man. A.I.R. 1937 All. 353=1937 A.W.R. 203=1937 A.L.J. 547=38 Cr. L. J. 621=168 Ind. Cas. 833.

8. Jurisdiction to try.

—S. 498—Accused enticing married woman in Madras and taking her to Bombay—Jurisdiction—Offence, if continuing offence.

The 'taking' under S. 498 I.P.C. is not a continuing offence but is complete as soon as the person concerned is out of the keeping or control of the guardian. The same applies to enticing also. No doubt enticing in itself may be a continuous process, but enticing from a particular person cannot be so, i.e., it cannot continue after that person's control has ceased. The word 'ordinarily' in S. 177 means "except where provided otherwise in the Code." Consequently, where the accused entices and takes a married woman in Madras and brings her to Bombay, the Magistrate in Bombay has no jurisdiction to try the offence. A.I.R. 1937 Bom. 186=39 Bom. L.R. 61=I.L.R. (1937) Bom. 244=38 Cr. L. J. 769=169 Ind. Cas. 526.

9. Procedure.

—S. 498—Accused women—Summons should be issued in first instance.

Where in a case under S. 498, I.P.C., the accused are women, the Magistrate should ordinarily, in the first instance, issue summons instead of warrants upon all the women, and whether their attendance could be dispensed with, should also be considered. A.I.R. 1939 Sind 342=41 Cr. L. J. 310=I.L.R. (1940) Kar. 110=186 Ind. Cas. 391.

—Ss. 498, 366, and 376.

A person who is prosecuted under Ss. 366 and 376 cannot be held to be guilty of having committed an offence under S. 498, if the offences with which he was charged are not established. A.I.R. 1940 All. 201=1940 A.L.J. 97=41 Cr. L. J. 499=1940 A.W.R. 124=187 Ind. Cas. 690.

—S. 498—Complaint and charge implicating one person—Such person acquitted—Appellate Court finding that another person detained girl in his house—Such person, if can be convicted.

Where the complaint and the charge state that the girl was enticed away from her husband for the purposes of illicit intercourse with the accused A, and accused A



has been acquitted, another person who was found by the Appellate Court to have detained the girl at his own house cannot be convicted on a charge which he was not called upon to meet. A.I.R. 1937 Nag. 123 = 19 N.L.J. 158 = 38 Cr.L.J. 433 = 167 Ind. Cas. 569.

—S. 498—Charge—Accused not charged with knowledge of marriage—Effect.

Where in a prosecution under S. 498, Indian Penal Code, the accused were not charged with knowledge or reason to believe that the abducted woman was a married woman and the accused knew what they were charged with and what it was necessary for the prosecution to prove:

Held, that this fact by itself would not affect the case. 101 Ind. Cas. 451 = 28 Cr.L.J. 419 = A.I.R. 1927 Lah. 432.

—S. 498—Abduction and detention—Acquittal for abduction—If bar to trial for detention.

Where a woman has been abducted and detained, an acquittal on a charge of abduction is no bar to the trial of a charge of detention. 74 Ind. Cas. 444 = 24 Cr.L.J. 780 = A.I.R. 1924 Lah. 330.

—S. 498—Nature of offence—Detention—Continuing offence—Previous acquittal—If bar to subsequent prosecution.

Detention of a married woman is a continuing offence and a person committing such an offence is always liable to prosecution except for any period in respect of which he has been found innocent, and therefore a previous acquittal for detention on one occasion does not bar a subsequent trial under S. 403 of Cr. P. C. 73 Ind. Cas. 524 = 4 L.L.J. 535 = A.I.R. 1921 Lah. 186.

## 10. Sentence.

—S. 498—Abducted woman not returned to complainant—Sentence.

Where the accused, on being found guilty of an offence under S. 498, I. P. C., was sentenced to six months' rigorous imprisonment and it appeared that though the accused had promised to return the complainant's wife to the complainant, he had not done so.

Held, that the sentence was not excessive and that the imprisonment for one month and twelve days which he had undergone could not be regarded as adequate for the aggravated offence. A.I.R. 1933 Lah. 932 = 35 Cr.L.J. 16 = 34 P.L.R. 966 (2) = 146 Ind. Cas. 444.

—S. 498—Sentence.

When the woman is an active abettor in her own abduction, the sentence should be a light one. 99 Ind. Cas. 84 = 27 P.L.R. 642 = 28 Cr.L.J. 52 = A.I.R. 1927 Lah. 91.

—S. 498—Wife neglected by husband, both not being on good terms—Heavy sentence—If necessary.

Where in a case under S. 498 the husband and wife were not on good terms and the wife had a sheer contempt for her husband who did not care much about

her and took no action on the commission of the offence till the lapse of many months, it is not necessary to inflict a heavy punishment on the accused. 91 Ind. Cas. 1008 = 26 P.L.R. 429 = 27 Cr.L.J. 192 = A.I.R. 1926 Lah. 176.

—S. 498—Enticing away married woman—Woman abettor—Sentence.

A light sentence is enough where the abducted woman is an active abettor. 20 P.W.R. 1914 Cr. = 123 P.L.R. 1914 = 15 Cr.L.J. 524 = 24 Ind. Cas. 836.

—S. 498—Woman of bad character—Husband of immature age—Proper punishment—Value of first report to police.

Where a woman of undoubted bad character and married to an immature boy is abducted, and detained not against her wishes the accused should be awarded, a lenient punishment. 29 P.W.R. 1911 Cr. = 224 P.L.R. 1911 = 12 Cr.L.J. 500 = 12 Ind. Cas. 220.

—S. 498—Woman going to accused of her own accord—Sentence.

Where the accused is convicted of an offence under S. 498 and the woman not being on good terms with her husband is found to have gone to accused of her own accord, a sentence of one year's rigorous imprisonment is too severe. 33 P.L.R. 1910 = 11 Cr.L.J. 597 = 8 Ind. Cas. 226.

## 11. Miscellaneous.

—S. 498—Death of husband pending case—Abatement of prosecution.

S. 89 of the Probate and Administration Act has no application to a criminal prosecution. (44 M. 417 Foll.) And therefore criminal prosecution under S. 498 I.P.C., cannot abate merely on account of the death of the injured party, i. e., the husband. 71 Ind. Cas. 77 = 4 Lah. 7 = 24 Cr.L.J. 29 = A.I.R. 1924 Lah. 72.

—S. 498—Enticing away married woman—Khatiks—Low class Sudras—Divorce.

Among Khatiks, who are low class Sudras, a divorce can be carried out by a written deed. They do not follow strict Hindu Law. 181 P.L.R. 1914 = 31 P.W.R. 1914 Cr. = 15 Cr.L.J. 539 = 24 Ind. Cas. 947.

—S. 498—Enticing away married woman—Validity of marriage—Illegitimacy.

Illegitimacy of the female is no disqualification for marriage under the Hindu Law and a person can be convicted under S. 498 if he entices away such a woman after marriage. 34 All. 589 = 10 A.L.J. 82 = 13 Cr.L.J. 705 = 16 Ind. Cas. 513.

—S. 498—Jhanjara marriages in the Kangra district are not invalid—Cr.P.C., S. 197.

Held, that a strong proof of a custom would be required to justify a person after contracting a Jhanjara marriage with his brother's widow to divorce her and sell her to an outsider. The purchaser is not competent to bring a complaint under S. 498. 12 P.L.R. 1911 = 141 P.W.R. 1910 = 8 Ind. Cas. 814.



**—Ss. 499 and 500.**

See also: Tort—Defamation.

**Synopsis.**

1. Civil and Criminal Proceedings
- 1-A. Counsel's privilege. See Note 18 (c)
2. Defamation
3. Defence
4. English Law
5. Evidence and proof
6. Exception
7. Fair comment
8. Good faith
9. Imputation against company or association of persons
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11. Insult or abuse
12. Interpretation—"Imputation."
13. Printer's liability
14. Procedure
15. Publication
16. Sections 499 and 171-G
17. Sentence
18. Statement in suit or proceeding.

**1. Civil and Criminal Proceedings.****—Ss. 499 and 500—Civil and Criminal proceedings.**

The difference between a criminal case and a civil suit founded upon libel is a difference not merely of form but is one of substance. 115 Ind. Cas. 119=26 A.L.J. 760=A.I.R. 1928 All. 316.

**—Ss. 499 and 500—Distinction between civil and criminal liability.**

There is a distinction between criminal and civil liability for defamation. Civil liability is to be determined by the principles of English Law, but criminal liability is governed by the provisions of the Penal Code and by those provisions alone. 92 Ind. Cas. 429=24 A.L.J. 329=27 Cr.L.J. 253=7 L.R.A.Cr. 64=A.I.R. 1926 All. 287.

**1-A. Counsel's privilege.**

See Note 18 (c).

**2. Defamation.**

- (a) Essentials
- (b) What amounts to
- (c) What does not amount to.

**2 (a). Defamation—Essentials.****—Ss. 499 and 500.**

A person is not guilty of defamation unless he intends that the words spoken should harm a person or knows or has reason to believe that his words would harm such person. A.I.R. 1941 Pat. 9=41 Cr.L.J. 814=6 B.R. 888=190 Ind. Cas. 33.

**—S. 499 and 500—Defamation—Essence of offence.**

The essence of the offence of defamation is the publication of an imputation with the knowledge that it will harm the reputation of the person defamed. A.I.R. 1935 All. 743=1935 A.W.R. 698=36 Cr.L.J. 816=1935 A.L.J. 676=57 A. 1012=155 Ind. Cas. 638.

**—Ss. 499 and 500—Intention to cause harm to reputation.**

A person commits defamation within the meaning of S. 499 who publishes any imputation concerning any person intending to harm the reputation of that person whether harm is actually caused or not. A person who publishes defamatory matter against another in a case not covered by any of the exceptions cannot escape punishment on the ground that the reputation of the person attacked was so good or that of the persons attacking so bad, that serious injury to the reputation was not in fact caused. 83 Ind. Cas. 503=22 A.L.J. 639=5 L.R.A.Cr. 119=26 Cr.L.J. 23=A.I.R. 1924 All. 566.

**—Ss. 499 and 500—Intention to harm reputation—Actual harm, if necessary.**

For an offence under S. 499, I. P. C., there must be an imputation with reference to a person intending to harm the reputation against whom the imputation is made. It is not an essential part of the offence that harm should be caused to the reputation of the person against whom the imputation is made. 59 Ind. Cas. 202=22 Cr.L.J. 58=22 Bom. L.R. 1224.

**—S. 499—Essentials.**

It is not necessary in order to establish an offence under S. 500 to prove that actual harm was caused. Proof that harm was intended to the complainant's reputation or that the accused knew or had reason to believe that harm will be caused by the imputation is sufficient. 4 Bur. L. T. 48=12 Cr.L.J. 129=9 Ind. Cas. 775.

**—Ss. 499, 500—Defamation.**

To constitute an offence of defamation it is not necessary that there should be evidence to show that the complainant has been injuriously affected by such alleged defamation, it is sufficient that there should be an intent that the person who makes or publishes any imputation should do so intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person. (1900) 5 C.W.N. 819=28 Cal. 63.

**—Ss. 499, Expl. (4) and 500.**

When a complainant makes out a clear case of defamation, Expl. 4, S. 499, does not apply: 9 All. 420, Foll. 108 Ind. Cas. 690=26 A.L.J. 361=9 A.I.Cr.R. 298=9 L.R.A. Cr. 44=29 Cr. L. J. 451=A.I.R. 1928 All. 213.

**—Ss. 499 and 500—Defamatory publication—Proof of malice—If necessary.**

Malicious publication in the sense of active ill-will against the person defamed is not a necessary constituent of the offence of defamation. 117 Ind. Cas. 355=30 Cr.L.J. 766=26 A.L.J. 509=9 L.R.A.Cr. 104=10 A.I.Cr.R. 145=A.I.R. 1928 All. 321.



—Ss. 499 and 500—Statement made at the instance of a challenge by complainant—No privilege.

A defamatory statement made by accused in the presence of a number of persons though after he had been challenged by the complainant is not privileged. 92 Ind. Cas. 694=7 L.R.A.Cr. 22=27 Cr.L.J. 310=A.I.R. 1926 All. 237.

—Ss. 499 and 500—Finding as to accused's belief about truth or falsity of a statement.

In a case under S. 499 it is necessary to find whether the accused had reason to believe that the defamatory statement made by him was true, though there may be a finding that it was actually untrue. 76 Ind. Cas. 393=25 Cr. L. J. 169=A. I. R. 1924 Nag. 172.

—Ss. 499 and 500—Proof of publication.

For a number of persons to meet and resolve not to associate with a person is not defamation unless the resolution is published; nor does the sending a copy to the person in question make it defamation. 1 Bur. L. J. 39=A.I.R. 1923 Rang. 16.

## 2 (b). Defamation—What amounts to.

—Ss. 499 and 500—Use of the expression "topsy turvy" in relation to complainant in a newspaper article.

A newspaper editor wrote an article in his newspaper wherein he pointed out the inconsistencies of the complainant's conduct in regard to the question of acceptance of ministerial office. The writer drew and published the inference that the complainant was altogether inconsistent and "topsy turvy".

Held, that the use of such expression as "topsy turvy" was defamatory A.I.R. 1940 Rang. 21=41 Cr.L. J. 271=186 Ind. Cas. 226.

—S. 500.

False report by woman that her modesty was insulted by servants of complainant at his instigation—Offence of defamation is committed. A.I.R. 1936 Nag. 241=38 Cr. L. J. 189=I. L. R. (1937) Nag. 338=166 Ind. Cas. 282.

—Ss. 499 and 500—Statement of accused that complainant was turned out by officer at public auction—Whether defamatory.

Where, at a public auction of Government forest produce, the officer made some statement to the effect that the contractors who did not wish to bid should go away, and the accused said in the presence of witnesses that the complainant was turned out by the officer:

Held, that the words used by the accused 'nikal diya' to the effect that the complainant was turned out, were defamatory, and justification could not be pleaded within the meaning of Excep. 1 to S. 499, Penal Code. A.I.R. 1932 Nag. 158=34 Cr. L. J. 154=141 Ind. Cas. 438.

—Ss. 499 and 500—Imputation of insolvency.

Calling a person discharged bankrupt and gambler convict, in an affidavit, amounts to defamation. 96 Ind.

Cas. 499=27 Cr.L.J. 947=7 A.I.Cr.R. 21=A.I.R 1927 Sind 58.

—Ss. 499 and 500—Imputation of insolvency—Trader.

An imputation of insolvency against a person in the way of his trade is *per se* defamatory. 98 Ind. Cas. 124=21 S.L.R. 130=27 Cr. L. J. 1276=A.I.R. 1927 Sind. 54.

—Ss. 499 and 500—Proof of actual harm—If necessary.

Publishing an imputation intending to harm, and knowing and having reason to believe that such imputation would harm the complainant's reputation is enough. It is not necessary under S. 499 to prove that actual harm ensued. Davar. J., in 17 Bom. L.R. 82, Dissented from. 28 Cal. 63 and 22 Bom. L.R. 1224, Foll.

Where accused, in a petition to the Commissioner, called the complainant a discharged insolvent and a convicted gambler:

Held, that he was guilty under S. 499. 96 Ind. Cas. 116=27 Cr.L. J. 868=A. I. R. 1926 Sind 258.

—Ss. 499 and 500—Imputation of ingratitude.

It is a question of opinion in each case whether a charge of ingratitude is defamation. 81 Ind. Cas. 129=18 M.L.W. 718=33 M.L.T. 168=1923 M.W.N. 913=25 Cr.L. J. 641=A.I.R. 1224 Mad. 340=45 M.L.J. 754.

—Ss. 499 and 500—Plaintiff's Vakil questioning status of person signing defendant's written statement—Another person coming in and saying that status of the agent was higher than that of plaintiff's Vakil—Offence.

In a suit against a Municipal Board, the plaintiff's pleader questioned the authority of the Acting Secretary of the Board to sign and verify the written statement and added that his pay was only Rs. 10 to Rs. 15 a month. There upon the Chairman of the Board broke in and said that the Secretary's status was higher than the plaintiff's pleader. In a prosecution for defamation:

Held, that the case properly fell within S. 499 of the Penal Code. 63 Ind. Cas. 857=43 All. 497=19 A.L. J. 425=22 Cr.L. J. 715=A.I.R. 1921 All. 30.

—Ss. 499 and 500—Imputation of dishonesty—Defamation.

Where a notice published in a newspaper containing an imputation that the complainant has been dishonest in the management of the affairs of a Company and was trying to conceal that dishonesty by methods that were themselves dishonest, the imputation is defamatory. 97 Ind. Cas. 431=27 Cr. L. J. 1119=A.I.R. 1927 Nag. 17.

—Ss. 499 and 500—Assenting to report of defamatory statement—Offence.

The pleader advised the accused to compromise the civil suit between the accused and another P. Thereupon the accused replied: "There are other reasons for the dispute. I shall disclose them in private." Then a third party who was listening to the conversation, said "There is nothing else. It appears that there is intimacy between P's wife and the accused."



and hence the accused says that P has been trying to trouble the accused." And the pleader warned the accused that he should not give vent to such language since it was defamatory and he would be legally liable.

**Held**, that under the circumstances, defamation had been committed by the accused. 85 Ind. Cas. 361=26 Cr.L.J. 521=20 M.L.W. 921=A.I.R. 1925 Mad. 320=47 M.L.J. 746.

### 2 (c). Defamation—What does not amount to.

#### —Ss. 449 and 500.

Imputation of habit of changing opinions to suit circumstances cannot amount to defamation. 1931 M.W.N. 714.

#### —Ss. 499 and 500—Statement that public servant worked for money for candidate at election.

Statement that Government servant worked for money in favour of a candidate at an election is not charging him with bribery as such work is not in discharge of his official duty. It is on the contrary prohibited. 97 Ind. Cas. 354=6 Pat. 224=7 P.L.T. 608=1926 P.H.C.C. 314=27 Cr.L.J. 1090=A.I.R. 1926 Pat. 499.

#### —Ss. 499 and 500—Violent expressions in reply to attack—No offence.

Where in reply to a book written by the complainant the accused wrote a book in reply, matters dealt with being highly controversial religious matters, and in expressing his opinion the accused used very violent expressions but did not assail the personal character or the respectability of the complainant:

**Held**, there was no defamation. 85 Ind. Cas. 144=1924 M.W.N. 768=26 Cr.L.J. 464=A.I.R. 1924 Mad. 898=47 M.L.J. 664.

#### —Ss. 499 and 500—Moral maxim as to ingratitude on letter to complainant—No defamation.

It is a question of opinion in each case whether a charge of ingratitude is defamation. Where on an envelope sent by the accused to the complainant there is a strongly worded moral maxim against ingratitude but there is nothing in the writing to connect it with the complainant or to show that any people understood it in a defamatory light, it is not defamation.

Where A sends to the complainant a letter stating that he (A) had received it from the accused but A's covering letter is not produced and A was not examined and there was no other evidence that the accused had sent the letter except the complainant's alleged belief, **held** that there was no evidence sufficient to support complainant's case. 81 Ind. Cas. 129=18 M.L.W. 718=33 M.L.T. 168=1923 M.W.N. 913=26 Cr.L.J. 641=A.I.R. 1924 Mad. 340=45 M.L.J. 754.

#### —Ss. 499 and 500—Religious head—Order of interdict by, for taking part in all caste dinner—No mala fides proved—No offence.

Where the religious head of the sect issued a temporary interdict against a member of that sect for taking part in an all-caste dinner with pariahs, in order to prevent his taking part in a caste dinner which was to take place very shortly, and there was nothing to show that the Swami was not willing to hear the person aggrieved.

**Held**, that no offence under Section 499 was committed. 72 Ind. Cas. 165=24 Cr.L.J. 325=17 M.L.W. 500=A.I.R. 1923 Mad. 587=45 M.L.J. 116.

### 3. Defence.

See also: Note 6.

#### —Ss. 499 and 500—Cross-examination of complainant in regard to his general character and disposition—Permissible limits—Duty of Court in regard to.

While a complainant in a case of defamation is entitled to lead evidence to prove that the imputation must have been made with the intention of harming or with the knowledge or reason to believe that it would harm the reputation of the person concerning whom it is made, the accused is entitled to produce evidence, or put questions in cross-examination of the complainant or his witnesses to rebut it. He can do that by showing that the complainant's reputation was, in view of certain acts of omission or commission already at a low ebb. He is also entitled to show that the complaint was not *bona fide*. In so doing however he cannot lead evidence of or put questions relating to rumours and suspicions to the same effect as the defamatory matter complained of, or particular facts tending to show the general character and disposition of the complainant. That being so, an important duty rests upon the trial Court to see, on the one hand, that the accused is not prejudiced in any manner by shutting out evidence, which he is entitled to produce, or disallowing questions which he is entitled to put; and on the other hand, that the complainant, who complains of defamation, is not unnecessarily harassed. 1950 A.L.J. 787=1950 A.W.R. 481=51 Cr.L.J. 964=A.I.R. 1950 All. 455.

#### —Ss. 499 and 500—Accused denying making of statement—He can still prove that allegation is covered by some exception.

Even where the accused has denied having made the statement alleged to be defamatory, he is entitled to adduce evidence to prove that the allegation comes within one of the exceptions to the section. A.I.R. 1946 All. 146=1945 A.L.J. 425=1945 Oudh W. N. (H. C.) 334.

#### —Ss. 499 and 500—Inconsistent pleas.

It is open to an accused to raise different and inconsistent pleas. Hence, in a case of defamation, the accused can plead that the passage alleged to be defamatory was not defamatory because it bore a different significance or meaning from the one attributed to it by the complainant and also plead that if it was defamatory because it bore the meaning given to it by the prosecution, it was an honest expression of opinion made in good faith and for the good of the public. A.I.R. 1944 Mad. 484=1944 M.W.N. 322=46 Cr.L.J. 71=215 Ind. Cas. 254.

#### —Ss. 499 and 500—Denial of statement.

Even where the accused deny having made the statements alleged to be defamatory they are entitled to call evidence to prove that the allegations if made by them would bring them within one of the exceptions of the section. 113 Ind. Cas. 816=12 A.I.Cr.R. 144=30 Cr.L.J. 239=A.I.R. 1928 Rang. 167.



—Ss. 499 and 500—Justification can only be under exceptions to S. 499, or privilege.

No man can ever be justified in disseminating defamatory matter unless he can bring himself within one of the exceptions to S. 499, or unless his action is privileged in other respects. When it is held that he did not act in good faith, it must be wrong to say that he was justified in acting as he did. A.I.R. 1938 Rang. 394=1938 Rang. L.R. 125=178 Ind. Cas. 592.

—Ss. 499 and 500—Defence—Rumour.

Publication of a defamatory "rumour" is actionable as if the statement were published without qualification and it is no defence to a civil suit a criminal prosecution that the person who published the libel or slander did not originate it, but heard it or received it from another, nor is it a defence that it was a current rumour and the person publishing it *bona fide* believed it to be true, and, therefore, the editor of a newspaper is as much responsible for a defamatory letter published in his columns as if he had originally penned it. 117 Ind. Cas. 355=30 Cr. L. J. 766=26 A. L. J. 509=9 L.R.A.Cr. 104=10 A. I. Cr. R. 145=A.I.R. 1928 All. 321.

—Ss. 499 and 500—No publication to person mentioned in charge.

A plea that though there was publication of the statement, there was no publication to person mentioned in the charge is a highly technical plea and the defect in the charge is curable under S. 537, Cr. P. Code. 96 Ind. Cas. 499=7 A.I. Cr. R. 21=27 Cr.L. J. 947=A.I.R. 1927 Sind 58.

—Ss. 499 and 500 — Protection under S. 132, Evidence Act.

Ordinarily, it is for the witness to claim protection under S. 132 at the time of giving his self-criminating answer, and to prove it as a defence to a prosecution for defamation. 105 Ind. Cas. 820=28 Cr. L. J. 996=9 A.I.Cr.R. 204=A.I.R. 1928 Nag. 58.

—Ss. 499 and 500—No objection to question—Defamatory statement if protected.

Relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding are not protected by the proviso to S. 132 of the Evidence Act in cases where the witness has not objected to answering the question put to him 93 Ind. Cas. 151=50 Bom. 162=28 Bom. L.R. 1=27 Cr. L. J. 423=A.I.R. 1926 Bom. 141 (F.B.).

#### 4. English Law.

See also: Notes 1 and 18 (c) and (f).

—Ss. 499 and 500.

The question of privilege against the charge of defamation is one which has to be decided by the I. P. C. and by the Evidence Act and not by any maxim, however excellent that maxim may be, which has been universally recognised in England. A. I. R. 1934 Sind, 114=36 Cr. L. J. 78=28 S.L.R. 251=152 Ind. Cas. 346.

—Ss. 499 and 500—English Law—Doctrine of absolute privilege—Applicability.

The English common law doctrine of absolute privilege does not obtain in the mofussil in India. S. 499 is

exhaustive and if a defamatory statement does not fall within the specified exceptions it is not privileged. 40 Bom. 162; 40 Cal. 433 and A.I.R. 1921 Cal. 1 (S. B.) Foll. 105 Ind. Cas. 120=28 Cr. L. J. 996=A.I.Cr.R. 204=A.I.R. 1928 Nag. 58.

#### 5. Evidence and proof.

—Ss. 499 and 500—Good faith.

Plea of good faith may be negatived on the ground of recklessness indicative of want of care and caution if the imputation had been made as categorical statements of facts. A.I.R. 1944 Mad. 484=46 Cr.L. J. 71=1944 M.W.N. 322=215 Ind.Cas. 254.

—Ss. 499 and 500—Statement made in cross-examination—Precise question and answer not reduced to writing.

Where the accused, in his prosecution under S. 500 Penal Code, for a defamatory statement made by him in his cross examination in a previous proceeding, does not deny the words used by him when examined under S. 342, Criminal P.C.; it is not material that the precise question and answer had not been reduced to writing. A.I.R. 1913 Pat. 117=21 Pat. 778=9 B.R. 237=44 Cr.L.J. 391=205 Ind. Cas. 531.

—Ss. 499 and 500—Confidential enquiry—Accused asked by Police if had heard anything merely stating what he had heard—Whether defamation—Precise words not before court

Where, in a highly confidential Police inquiry a person being interrogated by the Police merely if he had heard anything, states in good faith merely what he had heard, the statement would not amount to defamation in such circumstances. In any event, it is difficult to base a conviction for a defamation when the precise words uttered by the accused are not before the Court.

Where a charge of defamation is based on an answer to a question, much turns upon the precise form of question and the precise form of the answer. If a Court is not satisfied on these matters, it is impossible to maintain a conviction. It is not sufficient for a Court to come to the conclusion that substantially something or other was said. The Court must be satisfied that certain words were used. A.I.R. 1941 Pat. 9=6 B.R. 888=41 Cr.L.J. 814=190 Ind. Cas. 33.

—Ss. 499 and 500

In construing an agreement (to which an ex-Prime Minister of a province was a party) Courts are not concerned with what the parties intended but with what they did and what they said, what was the meaning of the words actually used; for an agreement does not consist of intentions and mental reservations but rests on the words actually used and in the language actually employed. Therefore, what a party intended or thought is irrelevant in any event. Where he is not able to give the exact words used, Courts can only gather their import from the impressions left in the minds of those present. A.I.R. 1942 Nag. 117=43 Cr.L.J. 856=1912 N.L.J. 503=1.L.R. (1943) Nag. 347=202 Ind. Cas. 543.

—Ss. 499 and 500—Proof of language defamatory of the individual.

Per B. B. Ghose, J.—The words complained of as constituting the offence must be set out in the charge



and proved before the accused can be convicted. When there is a denial the evidence in support of the prosecution must be scrutinized. When spoken words are alleged to have constituted the offence, a very slight alternation of a word may give quite a different meaning to them.

**Per Buckland, J.**—The cardinal rule is that the offence consists in using language which others, knowing the circumstances, would reasonably think to be defamatory of the person complaining of and injured by it. 90 Ind. Cas. 387=29 C.W.N. 904=42 C.L.J. 178=26 Cr.L.J. 1539=A.I.R. 1925 Cal. 1121.

**—Ss. 499 and 500—Delay—Effect of.**

The delay in bringing the complaint is not by itself a ground for acquitting the accused. A.I.R. 1940 Nag. 283=41 Cr.L.J. 585=1940 N.L.J. 410=188 Ind. Cas. 413.

**—Ss. 499 and 500—Statement in praise of oneself—Whether implies reflection on others—Duty of complainant in defamation cases—Nature of proof required.**

A statement in praise, even exaggerated praise of oneself does not necessarily imply a reflection on some other. In a prosecution for defamation what the prosecution have to establish is not that the accused have indulged in exaggeration, or even falsehood in respect of their own position and importance, but that the matter alleged to be defamatory contains an imputation concerning the complainant calculated to harm his reputation.

**Held**, on the construction of the letter and advertisement complained of, that they were not defamatory. A.I.R. 1936 All. 143=37 Cr.L.J. 258=1936 A.L.J. 66=1936 A.W.R. 164=160 Ind.Cas. 230.

**—Ss. 499 and 500.**

Where, in a prosecution for defamation, the occasion of defamatory statements is found to be a privileged one, there should be no conviction even if this exception is not expressly relied on by the accused. A.I.R. 1936 Nag. 119=37 Cr.L.J. 1035=I.L.R. (1936) Nag. 85=164 Ind. Cas. 928.

**—Ss. 499 and 500.**

The accused, a caste leader signing a Telugu document at a caste meeting, according to which certain honours were not to be accorded to the complainant—Complainant filing complaint for defamation and filing two photographs in evidence, without calling any witness to prove the original document—Libellous passage not stated—Lower Court holding libel proved:

**Held**, that the unauthenticated photographs were not sufficient to charge the accused and that the accused should have been told what passages were libellous. 1931 M.W.N. 407.

**—Ss. 499 and 500—Woman alleged to have illicit pregnancy—Refusal to submit to medical examination—Value of.**

It is well settled that in a defamation case based on an allegation that a woman has had illicit pregnancy she cannot be compelled to submit to a medical examination against her consent and her refusal to do so is not evidence against her. 123 Ind. Cas. 841=31 Cr.L.J. 584=A.I.R. 1930 Lah. 159.

**—Ss. 499 and 500—Impressions of witnesses—Value of.**

**Per Mukerji, J.**—Where the question arises as to whether the words used were intended to harm or had the effect of harming the reputation, the Court must be put in possession not only of the words used but also the context in which they were used, in order to find the intention and the effect of the words. If the Court would accept instead of the words and the context, the "impression left on the minds of the witnesses" it will be yielding its duty to witnesses with the result that the accused person will have no benefit of the opinion of the Court itself. 113 Ind. Cas. 213=51 All. 313=26 A.L.J. 1324=10 L.R.A. Cr. 1=11 A.I.Cr.R. 49=30 Cr.L.J. 101=A.I.R. 1929 All. 1.

**—Ss. 499 and 500—Absence of printer in good faith at the time of printing seditious article—Value of.**

A declaration made by a person that he is the printer of a newspaper shall be sufficient evidence (unless the contrary is proved) as against that person that he was the printer of every portion of every issue of the newspaper named in the declaration. In order to escape liability the printer must prove that he was not the printer of any issue of the newspaper which may form the subject-matter of legal proceedings. Absence from the place of printing in good faith, and without knowledge of the seditious articles, would be sufficient evidence to the contrary, but not absence in bad faith. When the declared printer of a newspaper pleads absence in good faith, he should prove who was in fact the printer of the newspaper in his absence. 35 Cal. 945, Foll. 113 Ind. Cas. 742=30 Cr. L. J. 201=50 All. 806=26 A.L.J. 746=9 A.I.Cr.R. 533=9 L.R.A.Cr. 81=A.I.R. 1928 All. 400.

**—Ss. 499 and 500—Defamation of complainant.**

The first step that a complainant must take when commencing a prosecution or a civil suit for defamatory publication is to satisfy the Court that he is the person aimed at by the article. 117 Ind. Cas. 355=30 Cr. L. J. 766=26 A.L.J. 509=9 L.R.A.Cr. 104=10 A.I.Cr.R. 145=A.I.R. 1928 All. 321.

**—Ss. 499 and 500—Circumstances of hearers.**

**Per B. B. Ghose, J.**—All circumstances which were apparent to the by-standers at the time the words were uttered should be put in evidence, so as to place the jury as much as possible in the position of such by-standers, and then it is for the jury to say what meaning such words would fairly have conveyed to their minds. We should not construe the words as we would a document of title according to rules of construction of deeds, specially when the words spoken have not been proved with certainty, and we have to decide not merely whether the words are defamatory but also whether the words refer to the complainant. 90 Ind. Cas. 387=29 C.W.N. 904=42 C.L.J. 178=26 Cr. L. J. 1539=A.I.R. 1925 Cal. 1121.

**—Ss. 499 and 500—Plea of truth—Notes by accused of persons complaining against complainant.**

**Per B. B. Ghose, J.**—At the trial the accused is entitled to prove the notes of statements of complaints against the complainant taken down by him when he went to the locality as evidence of his good faith, and these are relevant on the question although



the persons who made the statements are not examined.  
90 Ind. Cas. 387=29 C.W.N. 904=42 C.L.J. 178=26  
Cr. L. J. 1539=A.I.R. 1925 Cal. 1121.

—Ss. 499 and 500—Evidence of general repute of the person defamed—Relevancy.

In an action for damages for libel or slander evidence may be given in mitigation of damages to show that the plaintiff had general bad character (8 Q. B. D. 491 and Odgers on Libel and Slander, 5th Edition, page 402). Similarly in criminal prosecution where it is essential, in order to constitute the offence of defamation, that the person who makes or publishes the imputation complained of, should intend to harm, or know or have reason to believe that the imputation will harm the reputation of the person concerning whom it is made or published, the question what reputation the complainant had is relevant. If it is proved that the complainant had a notoriously bad reputation as a bribe-taker, the imputation made as to his having taken a bribe on the particular occasion, even if false, could not damage his reputation as he had done to lose. 73 Ind. Cas. 805=4 Lah. 55=2 P.W.R.Cr. 1923=24 Cr. L. J. 693=A.I.R. 1923 Lah. 225.

—Ss. 499 and 500—Admissions of accused.

In a defamation case the prosecution must prove affirmatively the libel alleged and should not fill up the gaps by admissions of an accused in answer to questions put by the Court. The mere fact that the accused did not deny in his written statement does not justify the inference that he admitted the fact, since there are no pleadings in a criminal case. 36 Mad. 457=22 M.L.J. 73=10 M.L.T. 56=(1911) 2 M.W.N. 576=12 Cr. L. J. 585=12 Ind. Cas. 961.

—Ss. 499 and 500—Malice.

The question whether upon the facts found or proved, malice has been established is a question of law. 97 Ind. Cas. 354=6 Pat. 224=7 P.L.T. 608=1926 P.H.C.C. 314=27 Cr. L. J. 1090=A.I.R. 1926 Pat. 499.

—Ss. 499 and 500—Written defamation—Proof—Original must be produced.

In case of written defamation the Court should insist on the production of the original and should not easily admit certified copies. 81 Ind. Cas. 129=18 M.L.W. 718=33 M.L.T. 168=1923 M.W.N. 913=25 Cr. L. J. 641=A.I.R. 1924 Mad. 340=45 M.L.J. 754.

## 6. Exceptions.

- a. Burden of proof.
- b. Exception (1)
- c. Exception (2)
- d. Exception (3)
- e. Exception (4)
- f. Exception (8)
- g. Exception (9)
- h. Exception (10)

### 6 (a). Exception—Burden of proof.

—Ss. 499 and 500—Prima facie case of defamation made out—Accused should be found guilty.

Where a *prima facie* case of defamation is made out by the complainant, the Court should find the accused guilty under S. 500, I.P.C., unless he is able to bring himself within any of the exceptions to S. 499 of the Code. A.I.R. 1943 Cal. 478=45 Cr. L. J. 129=47 C.W.N. 555=209 Ind. Cas. 273.

—Ss. 499 and 500—Exception pleaded—Burden of proof.

A person who relies upon an exception to the general rule must prove his case, must bring it within the relevant section, and it does not help his case to change from one exception to another and finally to place upon the Court the burden, which, by law, is his, of placing the case for him under the exception which it thinks appropriate. A.I.R. 1941 Sind 92=I.L.R. (1941) Kar. 336=42 Cr.L.J. 684=195 Ind. Cas. 159.

—Ss. 499 and 500—Exception—Burden.

If the accused relies on the exceptions to S. 499, it is for him to prove that they applied. A.I.R. 1940 Nag. 249=1040 N.L.J. 309=I.L.R. (1942) Nag. 208=41 Cr. L. J. 734=189 Ind. Cas. 382.

—Ss. 499 and 500—Burden of proving exception.

In a trial for defamation, the burden of proving the exception lies upon the accused; the burden of proving that the accused really, honestly and in good faith believed the truth of the accusation which he made, is on him. A.I.R. 1939 Rang. 371=1939 Rang. L. R. 479=41 Cr. L. J. 48=184 Ind. Cas. 566.

—Ss. 499 and 500—Burden of proof—Plea of justification.

In a case under S. 500, Penal Code for slander, the burden lies on the accused to establish a plea of justification for the imputations made and not on the complainant to prove that the statements complained of are false. A.I.R. 1937 Nag. 122=39 Cr. L. J. 370=I.L.R. (1936) Nag. 217=173 Ind. Cas. 844.

—S. 499—Exceptional case—Burden of proof.

Although it is for the prosecution to make out a case for conviction, the accused person has under S. 105, Evidence Act, to prove the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or in cases of defamation under the special exceptions of S. 499, I.P.C. 105 Ind. Cas. 820=28 Cr. L. J. 996=9 A.I.Cr.R. 204=A.I.R. 1928 Nag. 58.

### 6 (b). Exception (1).

—S. 499, Exception 1—Applicability—Truth of allegations doubtful.

To say something of a person which holds him to contempt is defamatory. If what is said is true then that is a defence under Exception 1, S. 499, I.P. Code; on the other hand, if there is a doubt as to whether it is true or not there is no defence at all and as the matter tends to bring the person defamed into contempt, it is defamatory under S. 500, I.P. Code. 85 C.L.J. 144=51 Cr. L. J. 1288=A.I.R. 1950 Cal. 339.

—S. 499, Exception 1—Publication by accused in form of questionnaire—Questionnaire referring to defamatory allegations against complainant made in leaflet previously circulated—



**Questionnaire not making direct imputations and calling upon complainant to explain—Accused, if protected.**

The accused who was an editor of a newspaper published an article in the form of a questionnaire referring to certain defamatory allegations against the complainant contained in a leaflet distributed a few days prior to the publication by him. The questionnaire did not make any imputation against the complainant and merely stated that certain complaints had been received against the complainant and called upon him to remove all doubts in the minds of the public by stating as to whether such complaints were correct.

**Held**, that the questionnaire virtually amounted to a re-publication of the defamatory statements contained in the leaflet, and the accused would be guilty of the offence of defamation unless he was protected by the Exceptions mentioned in S. 499, I. P. Code. To get the benefit of Exception 1, the accused must prove that the statements contained in the questionnaire were substantially true (i.e.), true in regard to the material portion of the allegations and also of the insinuations. 85 C.L.J. 57=51 Cr. L.J. 1293=A.I.R. 1950 Cal. 343.

**—S. 499, Excep. (1)—Petition to Magistrate containing allegations of being a bad character and previous convict—Justification by truth.**

A petition before the Magistrate represented that a certain person was unfit for the office of *Mukhia* which he sought for, and was a bad character and a previous convict. It appeared that he had really committed adultery with his sister-in-law and had an illegitimate child by her.

**Held**, that even if there was a statement in the petition indicating that he had been convicted, the evidence which showed that he ought to have been convicted under S. 497, I. P. C., indicated that the statement was substantially true and that Excep. 1 to S. 499, I. P. C., applied to the case. A.I.R. 1934 All. 974=3 A.W.R. 243=36 Cr.L.J. 260=152 Ind. Cas. 1057.

**—S. 499, Excepts. (1) (vii) and (ix)—Truth of imputations and reasonable belief that imputations were true, whether relevant.**

Under the first Exception to S. 499, the accused has to establish not only that the imputation which he made was for the public good but also that it was true and the question as to whether the accused had good reason for believing the imputation to be true is relevant to the question of good faith in Excepts. (viii) and (ix) to S. 499. A.I.R. 1933 Sind 403=34 Cr.L.J. 667=144 Ind. Cas. 63 (1).

**—Ss. 499 and 500—Justification.**

The defendant in proceedings for defamation, whether in a civil suit or under S. 500, Penal Code, must for defence depend upon the facts of each particular case which the defendant is certain can be proved by him or his witnesses. If there is no substantial defence, an immediate apology in the widest and most unreserved terms may fairly be presumed to decrease the damages and lessen the punishment under S. 500, Penal Code. The facts may be so strong that occasionally it may happen that counsel can advise client to "justify". That most dangerous plea should never be put forward unless there is a practical certainty of success, and, if no justification can be

pleaded, no act shall be done and no question shall be put tending towards justification. 117 Ind. Cas. 355=30 Cr.L.J. 766=26 A.L.J. 509=9 L.R.A.Cr. 104=10 A.I.Cr.R. 145=A.I.R. 1928 All. 321.

**—S. 499, Excep. 1 — Public good—Brahmin providing liquor—Denunciation of.**

Denunciation of a Brahmin for providing liquor at a wedding reception to such of his guests as desire to partake of it, is not for the public good. In order that Excep. 1 may apply the statement must not only be proved to be true but it must also be proved that the publication was for the public good. 4 Bur. L.T. 48=12 Cr. L.J. 129=9 Ind. Cas. 775.

**—S. 499, Excepts. 1 and 9—Public good—Nature.**

Exceptions 1 and 9 codify those portions of the English law of libel and slander under the heads of justification and qualified privilege. In criminal cases it is a good defence that the words are, in fact, true and that it was for the public benefit that the matters charged should be published, though the actual motive of publication was mal-volence. The expression 'imputation on the character' in Exception 9 does not imply that allegations of definite acts are excluded. The exception covers also expressions of opinion and personal inferences. Exception 9 covers Exception 1 and the latter would only be relied on when for some purpose other than that of obtaining an acquittal, an accused person desires to prove the absolute truth of his words. Under Exception 9, the accused must show that he in good faith made the imputations in self-defence or for the public good. The accused published a letter in the local papers describing the *Panjibhai Jamayat* as a dangerous society, giving every encouragement to murder and assassination, and that the object of the notice given to him by the society was to incite and arouse the intolerance and murderous feelings of the ignorant, deluded and fanatic, members of the society for the express object of taking his life. **Held**, that the accused could not claim exemption under Exceptions 1 and 9. 4 S.L.R. 57=11 Cr.L.J. 588=8 Ind. Cas. 209.

**6 (c). Exception (2).**

**—S. 499, Excepts. 2 and 9—Article in newspaper consisting of imputations against public officer—Good faith—Test—Opinion of superior officer acquitting the officer concerned of blame—Effect.**

Where in an article in a newspaper imputations are made against a public officer, the writer will come under the exceptions 2 or 9 of S. 499 of the Penal Code, if the statements complained of were made in good faith or for public good. It cannot be said that the opinion of the superior officer who enquired into the allegations should be decisive as to the "good faith" of the accused. The fact that the superior officer on enquiry came to the conclusion that the allegations had not been proved does not mean that the allegations were not made "in good faith". It is for the Court to determine whether the writer acted without care and attention in making the allegations complained of. The fact that the accused did not wait before publishing the article till he received a reply to his petition, making almost the same allegations, from the superior officer enquiring into them does not negative "good faith". 1947 M.W.N. 607=60 L.W. 621=A.I.R. 1948 Mad. 266=49 Cr.L.J. 447=(1947) 2 M.L.J. 325.



—S. 499, Excep. (2) — Requirements — Due enquiry, what is.

Where an editor of a newspaper is prosecuted for defamation under S. 500, Penal Code, for publishing some defamatory statements complaining about the conduct of the Jail Superintendent towards the prisoners and about the defective feeding and sanitary and medical arrangements in the Jail, in order to come under Second Exception in S. 499, Penal Code, the accused must show that the opinion expressed by him was confined to the character of the official concerned so far as it appeared in his conduct in the discharge of his public functions and it might be taken to be so where the accused and the official concerned had no acquaintance with each other. But under the Second and Ninth Exceptions to S. 499, the opinion respecting conduct and (what is good faith, due care and attention, explained) character must be expressed in good faith. A.I.R. 1943 Oudh 1=1942 O.W.N. 530=44 Cr.L.J. 33=1942 A.W.R. 333=203 Ind. Cas. 143.

—S. 499, Exception 2 and 9—Remarks about conduct of public servant—Enquiry, nature of.

Where the accused accepted the allegations made by certain prisoners affected by the alleged conduct of the Jail Superintendent as true upon an *ex parte* enquiry, after hearing one party only, and that party, a very interested party, without giving the other party concerned an opportunity to refute them in publishing defamatory statements about the conduct of the superintendent towards the prisoners, he cannot be said to have acted with due care and attention and therefore, in good faith, so as to bring himself within the second and ninth exceptions to S. 499, Penal Code. A.I.R. 1943 Oudh 1=1942 O.W.N. 530=44 Cr.L.J. 33=1942 A.W.R. 333=203 Ind. Cas. 143.

—S. 499 — Public servant — Immunity from criticism.

Public men can claim no immunity from criticisms even when the positions they hold are official. It is the penalty they pay in free countries, for the honour and privilege of occupying posts of exceptional responsibility, power and advantage. But there are limits to the attacks which may be made upon them. They are not wholly without protection; it is for the person who has uttered these things to justify them, or under the Penal Code, to establish affirmatively that he believed them to be true, and that on reasonable grounds. A.I.R. 1912 Nag. 117=43 Cr.L.J. 856=1942 N.L.J. 503=I.L.R. (1943) Nag. 347=202 Ind. Cas. 543.

#### 6 (d). Exception (3).

See also Note 7.

—S. 499—Exceptions 3 and 9—Mis-statements of facts.

There is no difference in principle on the question of "good faith" between Excep. 3 and 9. Exception 3, cannot be used so as to justify a writer repeating in any circumstances with impunity the highly defamatory mis-statements of another based upon mis-statements of facts. A.I.R. 1941 Sind 92=42 Cr.L.J. 684=I.L.R. (1941) Kar. 336=195 Ind. Cas. 159.

#### 6 (e). Exception (4).

—S. 499 Excep.(4)—Statement that complainant was convicted—Statement in the interest of Trust property — Statement of Proceedings of Court,

Where a trustee of temple wrote a post-card to the complainant stating therein that some years previously the complainant had been sent to jail in connection with a case of theft of idols in another temple and the fact of his having gone to jail was admitted by the complainant to be true; **Held**, that it was no defamation. Per **Davies, J.**—There is no harm in the trustee publishing in the interests of the temple the fact in order to forestall the complainant from setting up his rights in regard to a joint archakaship. Per **Benson, J.**—The publication being of the result of proceedings in a court of justice is no defamation by reason of exception 4 to S. 499. (1902) 26 M. 464.

#### 6 (f). Exception (8).

—S. 499, Excep. 8—Applicability—Benefit of exception—Right to—What accused has to prove—Good faith.

In order to take advantage of Excep. 8 of S. 499, I. P. Code, an accused person need not prove that the allegations made by him and complained of as defamatory are true. It would be sufficient if he proves that on reasonable grounds he believed the allegations to be true and in that belief he made the accusation to the lawful authority mentioned in the Exception. All that the accused has to do is to show that there were reasonable grounds for believing in the allegations and that he acted in the *bona fide* belief that the allegations were true. The fact that a large number of persons made the same allegations would lend support to the plea of good faith by the accused and would entitle him to the benefit of Excep. 8 of S. 499, I. P. Code. 4 Cal. 124, Foll. 3 A.I.Cr.D. 131.

—S. 499, Excep. 8—Good faith—Onus.

If a complaint containing allegations amounting to an offence of defamation has been made in good faith, the person making the complaint will, of course, be protected by Excep. 8 to S. 499, Penal Code, but it is for the complainant to establish his good faith. A.I.R. 1942 Lah. 76 (78)=44 P.L.R. 7=43 Cr.L.J. 572=199 Ind. Cas. 543.

—S. 499, Excep. (8)—Publication of alleged defamatory matter to person in authority intended to give information about some offence with a view to get redress—If offence under S. 500.

Where the publication of the alleged defamatory matter was to a person in authority and was really intended to give information about some offences with a view to get redress or protection, the offence, if any, must be only the furnishing of false information or the making of a false accusation. It cannot be said that the offence of defamation is also committed simply because some part of the information or the accusation may be found to be defamatory and false. Such a case comes under Excep. 8 to S. 499, I.P.C. A.I.R. 1938 Mad. 904=1938 M.W.N. 871 (2)=48 L.W. 320=1938-2 M.L.J. 397=40 Cr.L.J. 69=178 Ind. Cas. 478.

—S. 499.

Defamatory statement in complaint to Police and on a question by Police Officer—Occasion privileged—No offence. 1936 M.W.N. 1383.



—S. 499, Excep. (8)—Petition to President of Union Board that candidate is disqualified for election on account of leprosy, whether amounts to defamation.

**Obiter.**—A petition to a Local Board President, however malicious, that a certain person was not qualified for election as a member of the Local Board on account of his suffering from leprosy, under S. 55, Madras Local Boards Act (XIV of 1920) does not amount to defamation, the case being covered by Excep. 8 to S. 499. A.I.R. 1931 Mad. 487=1931 M.W.N. 366=32 Cr.L.J. 767=131 Ind. Cas. 654.

—S. 499, Exceptions (8) and (9)—Finding by appellate Court—Interference in revision — Bona fide statement—Prosecution in respect of—Whether opposed to public policy.

Where the appellate Court found that the plea of good faith was made out so as to render Exceptions 8 and 9 of S. 499, I.P.C., applicable, held, that the High Court will not interfere with that finding in revision. Held also, that it is against public policy to prosecute complainants for statements contained in petitions presented in good faith for their protection. 1929 M.W.N. 598.

—S. 499.—Excep. (8) and (9)—Plea of good faith.

Where N was charged with having beaten P B before a panchayat and he made a statement that he had kept the complainant P B for 10 or 11 years, in a case by P B under S. 500:

Held, that the statement of the accused before the panchayat was made in good faith in order to explain his beating and therefore, was covered by Excepis. 8 & 9 to S. 499. 96 Ind. Cas. 394=27 Cr.L.J. 938=A.I.R. 1926 Nag. 504.

—S. 499, Excep. (8)—Report to police that a lost article was in accused's house—No defamation.

A buffalo of one S was lost. He reported the matter to the police and said he had been informed that the buffalo was in the house of one H. The police went to the village and searched H's house but did not find the animal there. H prosecuted S for defamation in respect of the report made at the thana and S was convicted:

Held, that the conviction should be set aside as S cannot be said to have made an imputation concerning H, even if the report that he made was *prima facie* defamation. The case is covered by the 8th Exception to S. 499, Indian Penal Code. 95 Ind. Cas. 480=27 Cr.L.J. 816 (Lah.)

—S. 499—Complaint bona fide to a proper officer—No offence.

"Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime or the security of public morals are privileged provided the subject-matter is within the competence of the person addressed". Where the communication was not addressed in good faith and was unfounded, malice in law must be presumed and the privilege disappears. 79 Ind. Cas. 649=22 A.L.J. 65=5 L.R.A.Civ. 95=A.I.R. 1924 All. 445.

—S. 499—Report to Police—Qualified privilege—Proof of honesty.

Statements made in the course of judicial proceedings are absolutely privileged. Information or a report made to the Police does not come within this principle. A report made at a police station though not within the rule of absolute privilege which covers judicial proceedings, is *prima facie* privileged, that is to say, the person making it has a right to make it if he honestly believes it, and the person receiving it has a duty to receive it. But qualified privilege, as the term indicates, provides only a qualified protection, and the person charged with the defamation must prove that he used the privilege honestly, and the onus of establishing that lies upon him. 77 Ind. Cas. 913=A.I.R. 1923 All. 167.

—S. 499, Excepis. 8 and 9—Statements to persons in authority—Defamation—Implications in letter—Recklessness.

Accused stated in a petition to the forest authorities urging an enquiry into the conduct of a Village Munsif that the Village Munsif was a very rich man, that he had gained over the Range Officer to his side and had been illicitly grazing goats in the reserve. Held, that the accused was guilty of the offence of defamation. The language employed by him was calculated to harm the Village Munsif and lower the Range Officer in the estimation of his subordinates and the public, and the exceptions 8 and 9 to S. 499 of the I.P.C. could not apply to the case inasmuch as the accused had acted recklessly and without due care and caution. 19 Cr.L.J. 115=43 Ind. Cas. 403.

—S. 499, Excepis. 8 and 9—Defamation.

A complaint to a police constable is not privileged. 17 Cr.L.J. 381=35 Ind. Cas. 813 (Mad.).

—S. 499, Excep. (8)—Statements to person in authority.

The benefit of Exception (8) to S. 499 applies to a person charged with defamation under S. 500, I.P.C., where there is a *bona fide* complaint of a grievance and not a wanton accusation maliciously made with the object of injuring another person.

Where a person with express malice makes a defamatory charge which he *bona fide* believes to be true, against one whose conduct has caused him injury, to one whose duty it is to enquire and redress such injury, the occasion is privileged, on the ground that the person making the charge has an interest in doing so and the person to whom the communication is made has a duty to hear it. 17 Cr.L.J. 213=9 Bur. L.T. 136=8 L.B.R. 440=34 Ind. Cas. 325.

—S. 499, Exceptions (8) and (9)—Statement to person in authority—Defamation—Imputation—When in good faith.

Where the accused in an appeal presented by him against an order of a *mamlatdar* to the Assistant Collector under the provisions of the Land Revenue Code stated that the *mamlatdar* acted towards him unjustly and spitefully actuated by personal ill-will and malice with a view to cause him loss and harassment and the *mamlatdar* charged the accused for defaming him on such grounds of appeal, Held, that the accused was protected by Exceptions (8) and (9) of Section 499, I.P.C. The *mamlatdar* having by his previous conduct given ample room for suspicion of



personal ill-will, the imputation was made in good faith. The care and attention required by law must have relation to the occasion and the circumstances. 'Due care and attention' imply genuine effort to reach truth and not ready acceptance of an ill-natured belief. Exception 4 describes quality of the imputation and not its effects. 16 Cr.L.J. 177=17 Bom. L.R. 82=27 Ind. Cas. 657.

—S. 499, Excep. 8 and 9—Good faith—Defamation—Imputation.

When the creditors accused a person of receiving stolen property, when they saw him leave the shop of an adjudicated insolvent with a bundle, **Held**, that the imputation was not made in good faith and that the creditors were guilty of defamation. 8 S.L.R. 55=15 Cr.L.J. 675=25 Ind. Cas. 1003.

—S. 499—Statement to persons in authority—Defamation—Imputation contained in a petition—When privileged.

A statement casting imputation on the character of a co-villager in a complaint to the higher authorities, is privileged only if the imputation is substantially true and made in good faith. 1 L.W. 239=15 Cr.L.J. 281=23 Ind. Cas. 489.

—S. 499, Exceptions (8) and (9)—Statements to persons in authority—Defamation—Good faith—Justification.

In a defamatory statement, intention to harm the reputation is not necessary but reasonable belief that the imputation would harm the reputation would suffice. To bring the case under Exceptions 8 and 9 good faith and absence of **prima facie** materials of malice must be shown. 34 P.W.R. 1913 Cr.=317 P.L.R. 1913=14 Cr.L.J. 606=21 Ind. Cas. 478.

—S. 499—Excep. (8) and (9)—Statement to person in authority—Libellous complaint to caste—Privilege.

Accused having suspected that the complainants were drinking liquor, made an application to the caste calling for an enquiry into their conduct. The application contained libellous allegations but it communicated to nobody outside the caste, **Held**, that the libel was a privileged communication protected by Excep. 8 and 9 to S. 499, I.P.C., because the accused had every right to do what he liked so long as he acted in good faith, with due care and attention, and for protection of the interests of the caste. A communication made by one member of a caste to the other members, inviting an enquiry into the conduct of person against whom the allegations are directed, is a privileged communication. 14 Bom. L.R. 585=13 Cr.L.J. 687=16 Ind. Cas. 335.

—S. 499—Defamation by police officer.

A police officer maliciously making a defamatory report about a person to his superior is guilty of defamation. No law protects police officers in this respect. 4 P.W.R. 1910 Cr.=11 Cr.L.J. 205=5 Ind. Cas. 714.

—S. 499, Excep. (8)—Defamatory communication made in official confidence—Malice in fact.

Where a defamatory statement is made on a privileged occasion, the complainant must show there was malice in fact. (1902) 7 C.W.N. 246.

6 (g). Exception (9).

See also: Notes 6 (b), (c), (f) and 7.

—S. 499, Excep. 9—Applicability—Communication of caste resolution of ex-communication by a member of the caste to another.

A communication made **bona fide** upon a matter in which the party communicating has an interest or in reference to which he has a duty is privileged, if it is made to a person having a corresponding interest and duty even though it contains incriminatory matter which would be otherwise slanderous and actionable. A caste resolution of ex-communication published to the members of the caste in the discharge of a social duty would normally fall within the above rule since the member who makes the publication is bound both in his interest and in the interest of his caste to publish it for saving himself and the caste from the defilement which would take place by acting against the verdict of ex-communication. A.I.R. 1950 All 619.

—Ss. 499, Excep. (9) and 500—Person refusing to part with his own property on pressure by community—Ex communication from caste—Publication of ex-communication.

A caste **panchayat** can no doubt deal with offences relating to caste usages and customs, but it has no jurisdiction to decide questions regarding private property or impose any sanction, such as loss of caste, on any member of the community who declines to part with his property.

It can hardly be argued that informing people even one's own community that a certain person has been ex-communicated from his caste does not harm that person's reputation in the eyes of his followers. Nor can it be said that such a consequence is not one which the person who made the publication could not have known to be likely.

The 9th Exception to S. 499, Penal Code, does not mean that in order to bring pressure to bear upon a person to part with his property which he is entitled in law to keep, a defamatory allegation that such person is ex-communicated by the caste can be made on the ground that it is for the protection, either of the person who made it or of the community to which he belongs. A.I.R. 1939 Mad. 382=1939 M.W.N. 127=49 L.W. 268=1939-1 M.L.J. 414=40 Cr.L.J. 385=180 Ind. Cas. 473.

—Ss. 499 and 500 — Ex-communication—Punchas—Privilege—Presumption.

Where the punchas communicated to the members of the community a resolution of the **Panchayat** ex-communicating the complainant who had not availed himself of an opportunity to answer the charge summons:

**Held**, that good faith must be presumed and in the absence of direct evidence of malice, the communication must be deemed to be privileged although the resolution was not worded in an absolutely regular and formal manner. (1932) 137 Ind. Cas. 499=1932 A. L. J. 75=33 Cr. L. J. 472 (2).

—Ss. 499 and 500—Ex-communication by sabha of community after notice to complainant—No malice—No defamation.

Where the facts were that the accused as the head of the Sabha, to which complainant was then subordinate, received notice of the charge against him



which he after due notice given made no attempt to meet and they then, according to the usual procedure when an accused party fails to appear to answer to a charge, passed an order of ex-communication and in accordance with the usual procedure imparted that fact to the heads of the community in other places in the usual form containing a brief and accurate statement of what had occurred, and there was no suggestion of any publication to any persons who had not a right by virtue of their caste position to know of the fact.

**Held**, that there was no malice however defective that procedure might appear to more judicial minds; that the accused were acting in good faith and in the interests of their community and that the accused were fully protected by the ninth exception to S. 499. 83 Ind. Cas. 999=19 M.L.W. 639=1924 M.W.N. 541=26 Cr.L.J. 215=A.I.R. 1924 Mad. 670=47 M.L.J. 8.

—Ss. 499 and 500—Informing caste people of ex-communication—No offence.

Where a person was out-casted and the accused informed some persons of his caste not to take water from the hands of that person and that if they did so they will be ex-communicated, **held**, that no offence was committed. 77 Ind. Cas. 824=22 A.L.J. 79=5 L.R. A. Cr. 55=25 Cr.L.J. 472=A.I.R. 1924 All. 694.

—S. 499, Excep. (9)—Public good—Ex-communication from caste—Good faith—Test—Publication of resolution of ex-communication in discharge of duty.

There is a dividing line between the passing of a resolution at a caste meeting and its communication by the authorities of the caste to its members in the discharge of their social duty. If any member of a caste publish to all its members a caste resolution in such discharge, the law will hold, the occasion of the publication to be privileged. The member who published it was bound to publish it and the members of the caste had an interest in hearing it. But then there must be good faith on the part of the member who published, that is, it must be proved that the publication was made with due care and attention. That is a question of fact. One test of good faith is whether the circumstances of the case show that the accused made the imputation having reasonable grounds to believe it to be true. 11 Bom.L.R. 638=10 Cr.L.J. 372=3 Ind. Cas. 744.

—S. 499, Excep. (9)—Scope.

The accused, on receiving an information that a theft had been committed at his house by the complainant and on satisfying himself about the truth of the information, communicated that information to the leaders of his caste, who eventually called a **panchayat** and outcasted the complainant. The complainant charged the accused with defamation:

**Held**, that the question whether the **panchayat** had jurisdiction or not was altogether immaterial.

**Held**, further that although the imputation was of an offence, it would nevertheless be an imputation on the character of complainant. If the accused believed in good faith, as he did, then there was nothing objectionable in his warning other people about the conduct of the complainant so as to put others on their guard against her. In reporting the matter to the **panchayat**, the accused was on a safer ground, since his action goes to show his anxiety to bring social pressure to bear on complainant and thus induce her to mend her

ways. The case fell under Excep. 9 appended to S. 499, I.P.C. (1936) 163 Ind. Cas. 452=18 N.L.J. 204=37 Cr.L.J. 845.

—S. 499, Exceptions (9) and (10)—Publication of resolutions of Pathare Samaj about complainant's criticisms of a member of Samaj—Conduct of accused, held did not concern public—Excep. 1, held not, therefore, applicable—Case, held came under Excep. 9 and 10—Publication, however, held excessive.

The complainant prosecuted the accused for defamation in respect of an article written by him and published in a weekly vernacular newspaper called "**Rashtratej**." The complainant and the accused were both members of the **Pathare Kshatriya** community, the members of which live mostly in Bombay and the Kolaba District. The complainant was a journalist, and in a magazine which he published called "**Udbhav**," he had made criticisms on one R, a member of this community. These criticisms were resented and there was a meeting of a society called **Pathare Kshatriya Vaktrutwottejak Samaj** which passed resolutions condemning the complainant. The article, which was the subject of the defamation case was published in the "**Rashtratej**" newspaper. It purported to give an account of the meeting of the **Samaj** and the resolutions passed there at. The accused claimed that his conduct in writing this article was privileged and covered by Excep. 1 to S. 499, Penal Code, that is to say, his contention was that the imputation made was true and for the public good:

**Held**, that assuming that the imputation was true, that is to say, that the newspaper article gave a substantially correct account of the resolutions passed by the **Samaj**, it could not reasonably be argued that the publication of these resolutions was for the public good. The conduct of the complainant was a matter which concerned the **Pathare Kshatriya** community and did not in any way concern the public. The exceptions which would properly apply to the case were Excep. 9 and 10. Those exceptions required proof of good faith. But, apart from the question of good faith, it would clearly be going too far to say that it was necessary for the protection of the interest of the accused or other members of the community in question that these resolutions should be published in a newspaper. It was clearly excessive publication which would take the case out of the privilege conferred by Excep. 9 and 10. A.I.R. 1941 Bom. 410=43 Bom.L.R. 737=43 Cr.L.J. 174=197 Ind. Cas. 502.

—Ss. 499, Exceptions 9 and 10 and 500—Accused refusing to attend panchayat of which complainant was member—Statement in explanation of refusal—Allegation that complainant had been out-casted—Statement, if falls within Excep. 9 and 10 to S. 499.

Where it was alleged that the accused used the following words in respect of the complainant while refusing to attend a **panchayat** of which complainant was a member: "**biradari ka mulzim hai Huqqa band hai. Biradri main khana khane ka qabil nahin hai. Ucha diya jae**", and the accused was convicted of the offence of defamation under S. 500, Penal Code:

**Held**, that the words only meant that the complainant had committed some offence against the rules of the caste, that he had been outcasted by a part of the caste and that he should be outcasted by the rest and that the allegation was made merely to explain the



fact that the accused and his followers were unable to take part in a panchayat to which the complainant was admitted, and that the conduct of the accused in making the statement came within the meaning of the 9th and 10th Exceps. to S. 499, Penal Code. A. I. R. 1933 Oudh 377=10 O.W.N. 778=35 Cr.L.J. 180=146 Ind. Cas. 821.

—S. 500—Privilege of caste panchayats—Limits—Defamatory statements made against a person before a panchayat of composite castes and outcasting—Claim of privilege—If available.

While a caste, like the Vannia caste, will have a customary right to go into the allegations of immorality made against a woman of their tribe, in order to safeguard caste purity and prestige, no such customary right has been given for a composite assembly consisting of various castes like barbers, pipers, washermen, yadavas and others to join with the Vannias in holding such an assembly wherein defamatory statements are made and acted upon and a Vannia is outcasted. Hence where some persons belonging to Vannia community assemble such a composite panchayat and institute an enquiry into the conduct of the daughter of a member of that community at which they make defamatory statements and that member is outcasted, a plea of privilege which could have been claimed by them had they confined the panchayat to members of the interested caste, namely, Vanniakula Kshatrias, will not be available to them as the panchayat was of different castes and tribes. 63 L. W. 145=1950 M. W. N. 155=51 Cr.L.J. 716=A.I.R. 1950 Mad. 409=(1950) 1 M.L.J. 194.

—S. 499 Excep. 9—Applicability—Lawyer putting questions containing imputations to witness—Offence committed by client.

If under instructions from his client a lawyer puts questions containing imputations to a witness in open Court, the publication is by the lawyer and the client cannot be charged directly with the offence of defamation because the client at most is an abettor. It may happen in a particular case that the lawyer has a good defence, whereas the client might be still liable for abetment. 50 C.W.N. 545=228 Ind. Cas. 13=48 Cr.L.J. 15=A.I.R. 1947 Cal. 278.

—S. 499, Exception 9—Scope—Social club—Committee—Honest freedom of expression must be preserved to committee.

It is extremely difficult in a social club for a committee faced with any form of disciplinary action against members or quasi-members to act with universal approval. It is for that reason that, even if wrong, committees deserve and are given that protection embodied in Expt. 9 without which it would be impossible for such a body to function. This is most especially so when a complaint has to be issued not to a member himself about his own conduct but to a member relating to the conduct of another person. Honest freedom of expression must be preserved unless committees are always to have the threat of criminal proceedings hanging over them.

Held, in the present case that the accused, viz., the Committee members of a club, acted in good faith even if they were mistaken, and did not act without due care and attention in writing a letter to the member of the club, the husband of the complainant regarding the breach of club rules by her, which letter was alleged to contain defamatory matter. A.I.R. 1946

Mad. 223=I.L.R. (1945) Mad. 749=1945 M.W.N. 249=(1945) 2 M. L. J. 435.

—S. 499, Excep. (9)—Protection under—Plea of good faith—How negated.

Where the accused has made certain imputations only as a matter of opinion in good faith and for public good after taking due care and caution, he is protected by exception 9 to S. 499, Penal Code though the imputations are baseless and incorrect. The plea of good faith may be negated on the ground of recklessness indicative of want of due care and caution if the imputations had been made as categorical statements of fact. A.I.R. 1944 Mad. 484=1944 M.W.N. 322=46 Cr.L.J. 71=215 Ind. Cas. 254.

—Ss. 499 Excep. (9) and 500—Press, position of.

The press and authors and publishers of books have no special privilege. They are in no better position than any other man. If they make assertions of facts as opposed to comments on them, and those assertions are defamatory, they must either justify those assertions, or, in the limited cases specified in the Ninth Exception to S. 499, I. P. C., show that the attack on the character of another was for the public good and that it was made in good faith. A.I.R. 1942 Nag. 117=43 Cr.L.J. 856=1942 N.L.J. 303=I. L. R. (1943) Nag. 347=202 Ind. Cas. 543.

—S. 499, Excep. 9 and 10.

Exceptions 9 and 10 to S. 499 both require the existence of good faith which implies the exercise of due care and attention. A. I. R. 1940 Nag. 249=I.L.R. (1942) Nag. 208=41 Cr.L.J. 734=1940 N.L.J. 309=189 Ind. Cas. 382.

—S. 499, Excep. (9)—Publication to lawyer—Question by lawyer on instructions—Objection—Question not insisted.

In the course of the trial of a civil suit, the Advocate of the petitioners in cross-examining one of the other party's witnesses, asked him whether his daughter had given birth to a child without having been married to a man. This question was entirely irrelevant to the proceedings and was objected to by the witness and disallowed by the Judge and the question was not pressed. The question had been put by the Advocate under instructions from his client and with a belief that it was permissible under S. 146 (1), Evidence Act. There was nothing to show that the petitioners made this imputation to any other person than their own lawyer and that they made the imputation, not in good faith with the belief that it was open for them to do so:

Held, that the accused could not be convicted under S. 500, I. P. C., in these circumstances. They were entitled to the benefit of Excep. 9 to S. 499, I.P.C., in the publication made by them of the defamation to their lawyer. A.I.R. 1937 Rang. 535=39 Cr. L. J. 229=172 Ind. Cas. 953.

—S. 499, Excep. (9)—Statement by witness in compromise talk—Protection.

A statement by a witness in the course of a compromise talk before the Judge in chambers that the complainant was heavily indebted and an insolvent is protected by Excep. 9 to S. 499, I.P.C. 1937 M.W.N. 884.



—S. 499, Excep. (9)—Election contest—Accused issuing poster against rival Barrister saying that hollowness of his capacity as Barrister is exposed—Protection under Excep. 9, if available.

In the course of an election contest, the accused issued and published a poster against his rival candidate, a Barrister-at-Law which contained the words: "The hollowness of Mr.—'s capacity as a Barrister has been exposed:"

Held, that these words meant that the unsoundness of the rival's knowledge or capacity as a Barrister had been exposed and the imputation undoubtedly was calculated to lower in the estimation of others the intellectual qualities and the aptitude for his profession as a Barrister in him.

Held, also that the accused had no justification whatever in dragging his rival's position as a Barrister into the limelight of publicity in a language which amounted to a serious aspersion upon his professional status and was calculated to lower him in the eyes of the public as a Barrister. The profession as a Barrister is a highly honourable one and to say that his position as a Barrister is hollow and has been exposed in a poster which was broadcast throughout the length and breadth of the constituency does not afford the protection laid down in Excep. 9 to S. 499. Penal Code. A.I.R. 1936 Lah 294=37 Cr. L. J. 1033=164 Ind. Cas. 809.

—S. 499—Report to Police.

If a person receives information that other persons are about to do him harm, he is surely entitled to go to the Police and ask for protection without himself being bound to conduct the enquiry himself. The Police are there to make such enquiries and to protect people in need of protection and if he can show that he did receive the information, it cannot be held that he did not act in good faith and was not acting in the protection of his own interest. Consequently, a prosecution for defamation for reporting to Police cannot be maintained. A.I.R. 1935 Rang. 297=36 Cr. L. J. 1307=158 Ind. Cas. 93.

—S. 499, Excep. (9).

The accused can claim the privilege of Excep. 9 of S. 499, if he proves that the imputations were made in good faith for the protection of the interest of the person making it or of any other person. 1935 M.W.N. 365.

—S. 499 Excep. (9)—Remarks by accused by way of protest and for protection of his interest—Words casting imputation on complainant's character—Accused, if protected by Excep. 9.

A had filed a criminal complaint against the servants of B. The Tahsildar of the place wishing to settle the matter called A and B and under protection from the Tahsildar A agreed not to press his complaint. B compelled A to appear before him whereupon A refused to settle the matter. Verbal altercation followed and in the heat of the moment, A told the Tahsildar that though B was an Honorary Magistrate, he had no faith in his justice. He further said that B was in the habit of telling lies and that he might get A murdered:

Held, that although these words cast an imputation on B's character, they were made in good faith and

as a protest against the conduct of the Tahsildar who was trying to use official pressure to bring about the compromise between A and the servants of B and as the remarks were uttered by way of protest and for the protection of his interest in the criminal charge, A was protected by Excep. 9 to S. 499, Penal Code. A.I.R. 1934 Oudh 169=11 O.W.N. 382=35 Cr.L.J. 703=148 Ind. Cas. 514.

—S. 499, Excep. (9)—Mere belief in good faith—If sufficient.

Exception 9, S. 499 only means that a man who makes an imputation in good faith and makes that imputation for the protection of the interest of himself or of any other person is outside the operation of S. 499, I.P.C. There is no justification for reading the exception as meaning that if the person making the imputation believes in good faith that he has been acting for the protection of the interest of himself or any other person, he is not liable. 3 All. 815, Appr. 113 Ind. Cas. 213=51 All. 313=26 A.L.J. 1334=10 L.R.A.Cr. 1=11 A.I.Cr.R. 49=30 Cr.L.J. 101=A.I.R. 1929 All. 1.

—S. 499, Excep. (9)—A European lady living with S. as wife and subsequently marrying him—She making attempts to murder her husband—Her father-in-law making statements that she was insane and likely to cause danger to her husband and that she was 'man-mad'—Applicability of exception.

Wife of certain Mr. Thomson became an intimate friend of certain military officer S, Rajput by caste, while he was at Allahabad, and afterwards in the life time of her husband the two met secretly. On the death of Mr. Thomson the two met openly and began to live as husband and wife. One illegitimate child also was born. When the officer was posted at Quetta she too followed him there. Thereafter S was sent to Moradabad for his training, having been transferred to the Political Department. Then the two were married secretly. The head of the training institution having come to know that S was living with a European lady who was reputed not to be his wife pressed for disclosure of their relationship and the fact of marriage was at last disclosed. Thereupon S was reverted to regular military department. In the meantime the couple was not living a happy life and it was found that the wife had made several attempts either for suicide or for murder of her husband. The couple then went to Delhi where the father of S then was living, and then again returned to Moradabad. The father of S then went to Moradabad and interviewed the head of the training institution and also the District Magistrate. During the interview he defamed wife of S firstly by saying that she was of unsound mind and, therefore, likely to murder her husband, and secondly that she was of loose moral character and the word used was a "man-mad". She then complained for defamation.

Held, that the first statement though defamatory was covered by Excep. 9 to S. 499 in as much as the statement was made in good faith and for the protection of his son's interest. While the second statement was not meant to serve any useful purpose and there was no justification for charging the complainant with sexual immorality, it did not, therefore, come within the operation of Excep. 9. 113 Ind. Cas. 213=51 All. 313=26 A.L.J. 1334=10 L.R.A. Cr. 1=11 A.I.Cr.R. 49=30 Cr.L.J. 101=A.I.R. 1929 All. 1.



—Ss. 499 Excep. (9) and 500—Good faith—Meaning—Ignorant and timid man preferring complaint to Magistrate—Object being to protect himself, not to injure others—Offence under S. 500, I.P.C., if constituted.

Good faith in the ninth exception to S. 499, I.P.C., requires not logical infallibility but due care and attention. In determining whether due care was taken by the accused allowances have got to be made, his capacity to reason, the circumstances under which he was placed and the occasion which necessitated his making the imputations. Where a comparatively ignorant and timid man apprehending harassment by the complainant presented a petition to a Magistrate and he was prosecuted for allegations contained therein, **held**, that the accused apparently acted more to protect himself than to injure others and that considering the circumstances under which he acted, the conviction under S. 500 was not sustainable. 51 C.L.J. 472=34 C.W.N. 1070=A.I.R. 1929 Cal. 779.

—S. 499, Excep. (9)—Interest in making allegations—Exception.

Where a lawyer's notice was sent on behalf of the widow of a deceased Hindu in which the accused was charged with criminal breach of trust and theft of the properties of the deceased and he was threatened with civil and criminal proceedings and the accused sent in his reply through a Vakil alleging that the widow was living an adulterous life and that she was discarded owing to her such conduct by her husband and that her daughter was not the daughter of the husband and that she had never lived with the deceased for about twenty-five years and the accused, who was the deceased's nephew, claimed under a Will by the deceased, **held**, that Exception 9 applied to the case. The accused being directly interested in making these allegations the terms employed were not too violent for the occasion or disproportionate to the facts. 85 Ind. Cas. 44=20 M.L.W. 779=26 Cr.L.J. 428=A.I.R. 1925 Mad. 246.

—S. 499, Excep. (9)—Absence of good faith—Effect.

Where on flimsy materials the accused charged a doctor with conspiracy in drugging a certain person so as to render him unconscious and to cause him to be taken to cremation and where the accused had not made any enquiries before the publication of the charge or had not at his disposal or within his knowledge any of the materials which he produced at the trial, **held**, that he was not protected by the 9th exception as he had not made it in good faith, and as good faith was not established it was not strictly necessary to consider if the public good was involved. Certain evidence produced at the trial cannot be used to establish due care and attention unless the evidence was in the possession of the accused when he made the statement. 83 Ind. Cas. 631=28 C.W.N. 579=26 Cr.L.J. 71=A.I.R. 1924 Cal. 611.

—Ss. 499 Excep. (9) and 500—Essentials for conviction—Plea of good faith.

It is dangerous to lay down as a rule of law that a person before publishing defamatory statements should, even as a matter of prudence, seek information as to the truth of the imputations from the person against whom they are made. The position of the person defamed would not make any difference, for however highly placed a person may be, he may not be above human frailties. The contrary view would make the

9th Exception to S. 499 superfluous. For if the person against whom the imputation is to be made admits the truth of it, protection is given by the first exception; if, on the other hand, he denies the truth of it, the defamer will not be entitled to plead good faith under the 9th Exception under any circumstances. Good faith under the 9th Exception requires not logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must in each case be considered with reference to the general circumstance and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning. It is conceivable that there may be mutual confidence or a code of honour even among criminals. 71 Ind. Cas. 792=27 C.W.N. 389=24 Cr. L. J. 248=50 Cal. 518=A.I.R. 1923 Cal. 470 (F.B.).

—S. 499, Excep. (9)—Failure of plea under—Applicability of exception to S. 79.

No case can be made out under the general exception of S. 79, I.P.C. when the plea under the ninth exception to S. 499, I.P.C. has failed, since "good faith" must be proved in either case. S. 79 of the Penal Code does not limit or expand the defence available under the 9th Exception; and it does not apply to a case where the Code expressly provides similar ground of exoneration in respect of a particular offence. In a case of defamation, the accused has to establish good faith, if he pleads it, as any other fact and the question whether he committed a mistake of fact or law does not arise. 71 Ind. Cas. 792=27 C.W.N. 389=50 Cal. 518=24 Cr. L. J. 248=A.I.R. 1923 Cal. 470 (F.B.).

—S. 499, Excep. 9 — Defamation—Pleader making imputations against prosecution—Witness in cross-examination—Presumption of good faith.

Questions which a pleader asks in cross-examination are presumed to be asked in good faith for the protection of his client. The presumption is, therefore, that a question in cross-examination making an imputation affords no ground for a criminal prosecution. To rebut this presumption of good faith, it must be clearly proved that the pleader was actuated by an improper motive personal to himself, and not by a desire to protect the interest of client. 41 Cal. 514=14 Cr. L. J. 528=18 C.W.N. 424=20 Ind. Cas. 1008.

—S. 499, Excep. (9)—Statement made to protect one's interest — Statement as to inference—Bona fides — Special damage — Civil action, proper remedy by.

K a creditor of J of the firm of J. S. and Co., found his claim against J resisted until he sued and got decrees against him. K came to know that V, a member of J's firm, had presented his petition of insolvency. K also knew that V at the time of filing his petition had claims against J's firm. R thereupon circulated amongst persons who had dealings with the firm of J. S. and Co., a letter warning them not to make payments to the firm and containing the following statements:—(1). That a member of the firm V, had filed his petition under the Insolvency Act, "the object being to collect the outstandings and defeat the creditors"; (2) that the other members were not entitled



ed to collect the outstandings and were not in a position to give an effectual discharge to persons making payments; (3) that K was taking steps to have all the other members declared insolvent. It was found that the firm of J. S. and Co., was without capital, and that subsequently to writing the letter K did file the petition of insolvency against the other members of the firm, though unsuccessfully; — **Held**, on the above circumstances, and taking the letter as a whole, that there was no defamation, the case falling under Excep. 9 to S. 499. That the statement that the object of V's filing the petition of insolvency was to defeat creditors was merely a statement of the reason which induced K to make the request he did to the recipients of the letters, and the insertion of this inference alone was not sufficient to take the letter out of the exception. It was observed that a libel of this kind being analogous to an action on a case for special damage (caused, as alleged, by reason of injury inflicted on complainant's business by specific allegations made with respect to that business) can more properly be dealt with in the civil than in the criminal court. (1904) 9 C.W.N. 195=2 Cr.L.J. 47.

#### 6 (h). Exception (10).

See also Note 6 (g).

—S. 499, Excep. (10)—Applicability—Caste meeting—Untrue allegation as to wife of member having been married before—Offence.

Exception 10 to S. 499, I.P.C., deals with cases for instance where one man wants another against employing a third person in his service saying that he is a dishonest person. Where at a caste meeting the accused was proved to have stated that the complainant's wife had been married before and a prosecution for the offence of defamation was launched against him, **held**, that exception 10 to S. 499 was inapplicable. 127 Ind. Cas. 553=34 C.W.N. 580=A.I.R. 1930 Cal. 645.

#### 7. Fair comment.

—Ss. 499 and 500 — Fair comment—Limits of.

In order that a comment may be fair, the following conditions must be satisfied: (a) It must be based on facts truly stated. (b) It must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticised, save in so far as imputations are warranted by the facts. (c) It must be the honest expression of the writer's real opinion.

Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say (not whether they agree with it, but) whether any fair man would have made such a comment. Mere exaggeration or even gross exaggeration would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said. A.I.R. 1942 Nag. 117=1942 N.L.J. 503=I.L.R. (1943) Nag. 347=43 Cr. L.J. 856=202 Ind. Cas. 543.

—Ss. 499 and 500—Wilful mis-representation or mis-statement without due enquiry—No fair comment.

There is a distinction between "fair comment" based on well known or admitted facts and the assertion of unsubstantiated facts for comment. Where comment is made on allegations of fact which do not exist, the very foundation of the plea disappears. A wilful mis-representation of fact or any mis-statement which an editor could have discovered to be a mis-statement if he had made proper enquiries cannot support the plea of "fair comment" as an editor must make due enquiries as to its truth before disseminating the statement of those facts. 116 Ind. Cas. 99=23 S.L.R. 216=30 Cr. L.J. 548=12 A.I.Cr.R. 365=A.I.R. 1929 Sind 90.

—Ss. 499 and 500—Comment based on mis-statement of facts—No fair comment.

Allegations on the ground of fair comment cannot be justified the moment it is shown that the criticism is based upon a mis-statement of facts. 98 Ind. Cas. 481=7 L.R.A.Cr. 201=27 Cr. L.J. 1361=7 A.I.Cr.R. 3=A.I.R. 1927 All. 116.

—Ss. 499 and 500—Imputing motive to conduct—No fair comment.

Every one has a perfect right to criticise a man's public conduct, to denounce its impolicy and even to denounce its folly or its absurdity or the mischievous consequences which will result from it. But a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced. 76 Ind. Cas. 230=25 Cr.L.J. 134=17 S.L.R. 245=A.I.R. 1924 Sind 129.

—S. 499—Fair comment—Defamation—Attributing motives—Denial of libel—Justification by truth.

To say of a person that he makes gifts to certain funds not out of charity but from self advantage is defamatory if the words used incite public contempt and ridicule. A fair comment must be based upon the facts and the writer is not entitled to invent facts nor can the conduct of public man or of a person in his public character be assailed as dishonest simply because the writer fancies such conduct is open to suspicion. An accused justifying his libel cannot both deny as well as justify it. 19 Cr. L. J. 129=43 Ind. Cas. 417.

—S. 499, Excep. (3)—Fair comment—Exception III—Privileged occasion—Exaggeration.

If the occasion is privileged, it is not necessary to justify every detail, provided the gist of the libel is correct. Where in a newspaper report the main assertion is true, mere exaggeration or departure from strict truth does not deprive the accused of the privilege given him by Exception III. Mere exaggeration or even gross exaggeration does not make the comment unfair, especially where the matter is one of public interest, provided, there is no misrepresentation or suppression of facts. 8 S.L.R. 143=16 Cr. L.J. 141=27 Ind. Cas. 205.

—S. 499, Ex. (9)—Fair comment—Magistrate—Imputation on character of—Journalist—Absence of reasonable grounds.

Where on a charge of defamation the accused sets up a defence under Excep. (9) to S. 499 of the Penal Code the question for the jury is whether in publishing the libels complained of, the accused acted in good faith and in the



belief of their being true, after giving due care and attention to their being so.

Where there is no defence (under the exception) to a substantial portion of the libellous matter a conviction under S. 499 is legitimate.

Where in the course of the trial, the evidence revealed that in writing the libel the accused had proceeded on a gross mistake of fact, the mistake should have been acknowledged and a prompt apology tendered. 41 Cal. 1023=41 I.A. 149=18 C.W.N. 785=26 M.L.J. 621=15 Cr.L.J. 309=1 L.W. 461=7 Bur. L. T. 167=(1914) M.W.N. 506=16 M.L.T. 79=12 A.L.J. 1042=20 C. L. J. 161=16 Bom. L.R. 544=8 L.B.R. 16=23 Ind. Cas. 661 (P.C.).

**—S. 499—Fair comment—Dishonest or corrupt motive.**

An article in a newspaper which is a fair comment on public affairs and merely an expression of opinion is not defamatory unless proved to be the outcome of a dishonest or corrupt motive. (1914) M.W.N. 351=15 Cr. L. J. 357=23 Ind. Cas. 725.

**—S. 499—Fair comment—Matter of public interest.**

In the matter of public interest, the Court must not weigh any comment on it, in a fine scale. Some allowance for intemperate language must be made if the writer keeps himself within the bounds of substantial truth. 13 Bom. L. R. 1187=12 Cr. L. J. 595=12 Ind. Cas. 971.

**—S. 499, Exceps. 3, 6, 9, Ss. 500, 52—Right of fair comment—Malice—Good faith.**

The word "malice" in the legal use of that term is not limited to hostility of feeling, but by virtue of its etymological origin, extends to any state of the mind which is wrong or faulty (whether evinced in action by excess or defect) such as would be unjustifiable in the circumstances and incompatible with thoroughly innocent intentions. It is not necessary that such impropriety of feeling should in all cases be established by evidence extrinsic to the comment which is the subject of the complaint. For whether fair comment is to be regarded as following under a branch of the law of privilege or not, it cannot excuse an enquiry arising not from the mere act of criticism but from a state of mind in the critic which is in itself unjustifiable and the excuse may be so forfeited either by reason of an evil intent in him or by reason of mere recklessness in making an unwarrantable assertion. For then the comment would not be fair comment at all. The right of fair comment involves two essentials; first, that the imputation should be comment on the work criticised, and second, that it should be 'fair,' that is to say if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. Good faith requires not logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning. At the same time it must be borne in mind that good faith in the formation or expression of an opinion, can afford no

protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment. The object of Exception 6 to S. 499 is that the public should be aided by comment in its judgment of the public performance submitted to its judgment. Comment otherwise defamatory is justified on this ground alone. The comment must, therefore, make it clear to the public that decision is invited only on such evidence as is supplied by the public performance. It follows that an imputation on an author made by a critic without reference, express or implied, to the work under criticism, if in terms so general as to be capable of conveying an unfavourable impression of him apart from what appears in his work, cannot be justified by the critic on the ground that his intention was to base his imputation solely on the work reviewed and that he had in his mind a passage there in supporting the imputation. The responsibility of the critic is to be gauged by the effect which his comment is calculated to produce and not by what he says was his intention. It is not enough that he should intend to form his opinion on the work before him. He is also bound in the words of the execution to express his opinion with due care and caution and to give the public no ground for supposing that he is speaking of anything but the performance submitted to its judgment. (1907) 9 Bom. L. R. 230=31 B. 293.

**8. Good faith.**

See also: Note 6.

**—Ss. 499 and 500—Enquiry before publication—Editor of a journal.**

The editor of a journal is in no better position than an ordinary subject with regard to his liability for libel. He is bound to take due care and caution before he makes a libellous statement. A.I.R. 1944 Mad. 484=1944 M.W.N. 322=46 Cr. L. J. 71=215 Ind. Cas. 254.

**—Ss. 499 and 500—Editor's duties.**

Before any editor publishes matter which is clearly defamatory on the face of it, he should take steps to have an inquiry made by some members of his staff or some reliable person on the spot, and he should only publish the matter if he considers that he has sufficient evidence available to bring himself within the provisions of one of the exceptions to S. 500, Penal Code.

It is certainly not using due care and attention to publish defamatory statements about a person and also to publish his denial and let the public take their choice. A.I.R. 1933 All. 434=34 Cr.L.J. 926=1933 A.L.J. 1493=145 Ind. Cas. 126.

**—Ss. 499 and 500—Enquiry before publication—Duties of editors.**

An editor should be most watchful not to publish defamatory attacks upon individuals unless he first takes reasonable pains to ascertain that there are strong and cogent grounds for believing the information, which is sent to him, to be true. 117 Ind. Cas. 355=30 Cr.L.J. 766=26 A.L.J. 509=9 L.R.A.Cr. 104=10 A.I.Cr.R. 145=A.I.R. 1928 All. 321.

**—S. 499.**

In dealing with the question of good faith, the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are, in substance, true, but whether he was informed and had good reason after due care and



attention to believe that they were true. A.I.R. 1943 Oudh 1=1942 O.W.N. 530=44 Cr. L. J. 33=1942 A.W.R. 333=203 Ind. Cas. 143.

**—S. 499—Persons acquitted of certain charge—Complainant repeating charge must show good faith.**

When a man is charged with something and acquitted after trial, the man who repeats the charge has to be on very sure ground if he wishes to plead that he repeats this charge in good faith. A.I.R. 1938 Rang. 232=39 Cr. L. J. 663=1938 Rang. L.R. 404=175 Ind. Cas. 915 (F.B.).

**—S. 499, Exceptions.**

If the pamphlet contains defamatory words but published in good faith it certainly comes under the exception under the section. 1935 M.W.N. 253.

**—S. 499—Defamation—Good faith, presumption as to—Repetition of offence—Absence of apology—Presumption, if destroyed.**

Where the offence of defamation is repeated and the accused has neither apologised nor is there any indication that he was acting solely according to his private opinion, the presumption of good faith is destroyed. A.I.R. 1932 Nag. 97=28 N.L.R. 106=33 Cr. L. J. 835=139 Ind. Cas. 401.

**—Ss. 499 and 500—Good faith—False claim in a post card.**

Putting forward a false claim in a post card to the effect that the addressee should pay the addressor a certain sum of money, does not *prima facie* amount to defamation as defined in S. 499, I. P. C. 3 P.W.R. 1909 Cr.=9 Cr. L. J. 154=1. Ind. Cas. 99.

**—S. 500—"Good faith"—Bona fides—Malice—Express malice.**

Where the accused told his friend E and subsequently at the instance of E wrote to the superior officer of the complainant to the effect that the complainant and the wife of E had been seen behaving on a certain night in such a manner and under such circumstances as to render unavoidable the conclusion that acts of impropriety took place between them and it was found that the accused honestly believed in the truth of the statements.

Held, (1) that the accused could not be convicted of an offence under S. 500, unless express malice was proved by the prosecution; (2) that though a person in a higher social position than the accused would have probably acted differently under the circumstances it did not follow that the accused was therefore actuated by malice in acting as he did. (1906) 11 C.W.N. 390=5 Cr. L. J. 160.

**—S. 499—Privilege.**

A finding of privilege is not a finding of good faith, 92 Ind. Cas. 1429=24 A.L.J. 329=27 Cr. L. J. 253=7 L.R.A.Cr. 64=A.I.R. 1926 All. 287.

**9. Imputation against company or association of persons.**

**—S. 499—Company—Imputation against calculated to harm reputation of officers—Offences**

**—Burden of proof—Duty of prosecution—Want of good faith.**

An imputation against a company, such as a Co-operative Bank, or an association or collection of persons as such, which is calculated to harm the reputation of the officers of the Bank would amount to defamation under S. 499, I. P. Code. The onus is, however, upon the prosecution under S. 501, I. P. Code, that not only is the matter complained of defamatory but also that it does not come under any one of the exceptions to S. 499, e.g., good faith, under exception 3. A.I.R. 1950 Pat. 545.

**—S. 499, Expl. (2)—Whether applies to complaint of an individual as such.**

If a collection or company of persons as such is defamed, one of their members may make a complaint on behalf of the collection or company of persons as a whole according to Expl. 2 to S. 499, Penal Code, but the defamation must be shown to be of all the persons in the association or collection as such; the defamation is of the collection or association as such. If, therefore, the complaint is one of an individual as such, Expl. 2 has no application. A.I.R. 1938 Sind 88=39 Cr. L. J. 518=1.L.R. (1939) Kar. 1=175 Ind. Cas. 9.

**—Ss. 499 and 500—Well-defined class defamed—Every member can file complaint.**

If a well-defined class is defamed, each and every member of that class can file a complaint. In other cases, the defamatory words must refer to some ascertained and ascertainable person and that person must be the complainant. Where the words reflect on each and every member of a certain number or class, each or all can sue. If the words reflect impartially on either A or B, or on some one of a certain number or class, and there is nothing to show which one was meant, no one can sue. If a person complains that he has been defamed as a member of a class, he must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation. A.I.R. 1937 All. 677=1937 A.L.J. 781=38 Cr. L. J. 1086=1937 A.W.R. 708=171 Ind. Cas. 534.

**—Ss. 499 and 500—Imputations against defined class—Right of each member individually to take action.**

Where certain articles published in a paper contained scandalous accusations against the girl students of a college and implied that the girls were habitually guilty of misbehaviour described in the article, the inevitable effect on the reader must be to make him believe that it is habitual with the girls of the college to behave in this way. As by the articles all the girls in the college collectively and each girl individually suffer in reputation, an action for defamation is competent by some of them. A.I.R. 1935 All. 743=36 Cr. L. J. 816=57 A. 1012=1935 A.L.J. 676=155 Ind. Cas. 638.

**—S. 499—Corporation, when can maintain action for libel.**

A corporation may maintain a prosecution or an action for a libel affecting its property, but not for a libel merely affecting personal reputation as a corporation has no reputation apart from its property or trade. The words complained of must reflect on the



management of its business and must injuriously affect the corporation, as distinct from the individuals who compose it. The alleged libel must attack the corporation in its method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. It cannot bring a prosecution for words which merely affect its honour or dignity. Moreover, it cannot maintain a prosecution for words which reflect, not upon it as a body, but upon its members individually unless special damage has thereby been caused to it. A.I.R. 1935 Rang. 108=36 Cr.L.J. 953=13 Rang. 297=156 Ind. Cas. 441.

—**Ss. 499 and 500 — Imputing deceit to company.**

The accused purchased a watch from company who executed a guarantee for two years. The watch having got out of order within 6 months, he took it to the company for repairs, and this they agreed to do on payment. Accused published an open letter in a newspaper warning the public not to be deceived in future. On a complaint for defamation:

**Held**, that the imputations were defamatory and that the mere fact that when the accused took the watch to the company and asked to have it repaired, they demanded a fee for repairing it did not justify him in imputing dishonesty to them. A.I.R. 1935 Rang. 509=37 Cr.L.J. 328=160 Ind. Cas. 746.

—**Ss. 499 and 500—Defamation of newspaper.**

A newspaper is not a person, and therefore it is not a criminal offence to defame a newspaper. Defamation of a newspaper may in certain cases involve defamation of those responsible for its publication. 99 Ind. Cas. 347=28 Cr.L.J. 139=4 Rang. 462=A.I.R. 1927 Rang. 43.

—**S. 499, Expl. (2)—Defamation of police force as a whole—Right of individual to complaint.**

Per **B. B. Ghose, J.** contra **Newbould, J.**—The words “the British Government themselves, and the superior officers, including from the District Magistrate down to the daroga and chowkidars were all beasts, etc.” are too wide to admit of the construction that any particular police officer was defamed.

Per **Buckland, J.**—Excep. 2 to S. 499, I.P.C., is intended to include a company or an association or collection of persons as such within the word “person” as used in the definition, so that the latter should not be limited to individuals. It is doubtful if the police force at a particular place is an association or collection of persons as is contemplated in Excep. 2, S. 499. The police force as such cannot complain of any imputation as regards its personal reputation. The true rule appears to be that if a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation is against him personally and he is the person aimed at, before he can maintain a prosecution for defamation. 90 Ind. Cas. 387=29 C.W.N. 904=42 C.L.J. 178=26 Cr.L.J. 1539=A.I.R. 1925 Cal. 1121.

—**S. 499—Imputation against Association.**

However reprehensible and morally unjustifiable the words complained of may be, they must, to be actionable, contain an imputation concerning some particular person or persons whose identity can be established. An imputation against an association or collection of persons jointly may also amount to defamation within

the meaning of the Section 499, I. P. C., but at the same time it must be an imputation capable of being brought home to a particular individual or collection of individuals as such. 67 Ind. Cas. 609=1 Pat. 414=1922 P.H.C.C. 117=3 Pat. L.T. 209=23 Cr.L.J. 433=A.I.R. 1922 Pat. 101.

—**Ss. 499 and 500—Reputation, damage to—Corporation — Unlawful preference — Loss — Damage to property rather than to reputation.**

A corporation cannot well suffer damage in mind or body. An incorporated company may have a reputation for the good conduct of the business or undertaking of the company and the company's reputation may be quite distinct from that of any of its officers however highly placed. Allotment of excess wagons to one colliery by malpractices of clerks of a railway company causes damage of its reputation but the damage is too remote. The damage is indirect and ulterior rather than the direct natural or probable consequence of the action which the company was deceived into taking. If a suit might have been brought against the company for damages for undue preference, such a possibility under S. 415 would come under the head of damage or likelihood of damage to property and not of damage to reputation. 84 Ind. Cas. 554=51 Cal. 250=28 C.W.N. 160=26 Cr.L.J. 330=A.I.R. 1924 Cal. 495.

**10. Imputation as to caste.**

See also: Note 6 (g).

—**Ss. 499 and 500—To say a man is outcaste when he has not been outcasted.**

To say a man is an outcaste when he has not been outcasted is to defame him. Such conduct is to be distinguished from the permissible course of bringing up an allegation before a caste **panchayat** for a decision whether the person complained against should be outcasted or not. It is also permissible to refuse personally to have anything to do socially with a caste-fellow of whose conduct one disapproves, but it is a different matter to dub him an outcaste and induce other persons to boycott him before there has been a decision of the caste in which the person accused has been given a fair hearing. A.I.R. 1940 Nag. 283=41 Cr.L.J. 585=1940 N. L.J. 410=188 Ind. Cas. 413.

—**Ss. 499 and 500—To say that a man is outcasted when he is not.**

To say that a man is outcasted when he is not outcasted is defamation.

The members of a caste cannot, as individuals, take the law into their own hands and declare a member to be outcasted and assert it to be so unless there has been a regular meeting of the caste **panchayat** and a decision on the subject. A.I.R. 1932 Nag. 97=28 N.L.R. 106=33 Cr. L.J. 835=139 Ind. Cas. 401.

—**Ss. 499 and 500—Imputation as to caste—Consequent ex-communication—Defamation.**

An imputation which leads to the ex-communication of a person from his caste is defamatory to him if he had not been guilty of committing the act. 34 C.W.N. 580=127 Ind. Cas. 553=A. I. R. 1930 Cal. 645.



## —Ss. 499 and 500—Outcaste.

Imputation to a Hindu that he is an outcaste is defamatory and is not covered by S. 95. 108 Ind. Cas. 690=26 A. L. J. 361=9 A.I.Cr.R. 298=9 L.R.A.Cr. 44=29 Cr. L. J. 451=A.I.R. 1928 All. 213.

## —Ss. 499, Expl. (4) and 500—Outcaste—Defamation.

A person making a statement without cause that a Mahomedan was ex-communicated or outcasted is guilty of the offence of defamation under S. 499.

Caste in S. 499, Expl. (4), is not confined entirely to Hindus and refers to any class who keep themselves socially distinct or inherit exclusive privileges. 99 Ind. Cas. 943=25 M.L.W. 357=28 Cr. L. J. 207=A.I.R. 1927 Mad. 397.

## —Ss. 499 and 500—Calling a person a sweeper by reason of his having associated with sweepers—Defamation.

Where an imputation made clearly suggested that a person was not fit to be associated with, as he had become a sweeper by reason of his having joined a procession or shaken hands with the sweepers:

**Held**, that the imputation is defamatory and is not privileged. It would be privileged if it had been a decision arrived at by a panchayat of the caste. 92 Ind. Cas. 584=24 A. L. J. 171=6 L.R.A.Cr. 207=27 Cr. L. J. 296=A.I.R. 1926 All. 306.

## —Ss. 499 and 500—Public good—Person outcasted—Statement that he was outcasted.

If a person really is out-casted a statement to the members of the brotherhood that he was out-casted is for public good. So long as caste prevails, any attempt to minimise, ignore or brush on one side existing regulations, existing sanctions or respect for existing decisions must be regarded from the Indian point of view as contrary to the public good. 77 Ind. Cas. 183=46 All. 64=21 A. L. J. 765=4 L.R.A.Cr. 221=25 Cr. L. J. 327=A.I.R. 1924 All. 299.

## —S. 499, Expl. 4—Imputation as to caste.

Defamation in S. 499 of the Penal Code is wide enough to include caste questions within it even when where these questions do not specify defect of character. To tell a Hindu that he is an outcaste will amount to defamation, unless the words used in respect of the caste of a Hindu amount to saying 'you are an outcaste or you have been excommunicated from your caste,' the words are not defamatory. 28 M. L. J. 58=17 M.L.T. 369=2 L.W. 446=26 Ind. Cas. 460.

## —S. 499—Imputation as to caste—'Kulabrashta' whether defamatory.

The term 'Kulabrashta' used in a book is 'Prima facie' defamatory and it should refer to a particular individual to warrant a conviction for defamation. (1911) 2 M.W.N. 8=10 M.L.T. 96=12 Cr. L. J. 497=12 Ind. Cas. 217.

## —S. 499—Imputation as to caste—Calling a Kaisth, a chamar.

A person, referring a 'Parsulia Kaisth' as 'Kori Chamar' with the result that the priests refused to attend the religious ceremonies at the person's house is guilty under S. 499.

To utter words having the effect of making little of a person is an offence under S. 499 I.P.C. 11 Cr. L. J. 413=6 Ind. Cas. 876 (All.).

## —S. 499—Imputation as to caste—False publication.

A person falsely publishing that a caste panchayat has decided upon the ex-communication of a certain person from his caste is guilty under S. 499. 6 A. L. J. 472=9 Cr. L. J. 535=2 Ind. Cas. 226.

## 11. Insult or abuse.

## —Ss. 499 and 500—Election meeting—Person belonging to rival candidate attending uninvited and calling the candidate on whose behalf meeting was called "liar, barbarous and ungentlemanly"—Offence, held one under S. 504 and not under S. 500.

In the course of the election campaign, a meeting was organised on behalf of the complainant or his adherents in the village which appertained to his estate. The complainant reached the village and was taken in procession to the place of the meeting. But he found that the accused and the rival candidate for whom he was working had already occupied the two chairs, although they were not invited to attend the meeting. When the complainant came near, the accused and his adherents shouted "Go back. Down with 'zamindari'" and tried to create a disturbance. The complainant thereupon wanted to leave the place as he thought that his presence would further annoy the accused who was bent upon creating a disturbance, but the raiyats requested the complainant not to go away. The zamindar then stood on the table to address the villagers numbering about two thousand. The accused then stood on a chair and said that the zamindar was a liar, ungentlemanly, barbarous and tyrannical:

**Held**, that there was clear intention to insult the complainant. The accused ought to have known that the insult would be likely to lead to a breach of the public peace, which was avoided owing to the most commendable behaviour of the complainant. Though the words used were not defamatory, they amounted to insult within the meaning of S. 504 and the conviction under S. 500 should be altered to one under S. 504. A.I.R. 1945 Pat. 450=11 Cut. L.T. 33.

## —Ss. 499 and 500.

Vulgar and abusive epithets are not sufficient in themselves to be the foundation of a criminal prosecution. A.I.R. 1936 Lah. 294=34 Cr. L. J. 1033=164 Ind. Cas. 809.

## —Ss. 499 and 500—Insult or abuse.

Complainant's counsel S cited an authority but he could not find his book at the time of argument. Complainant asked him to search for the book in the accused's books thinking that it might be mixed up with them. Accused who heard the suggestion resented it and said to S that he was not in the habit of stealing like him. S filed a complaint under S. 500.

**Held**, that the accused's reply was not defamation because he did not mean to call him a habitual thief. It is at the most akin to abuse. The matter was too petty to be brought into the Criminal Court. 115 Ind. Cas. 72=30 Cr. L. J. 379=A.I.R. 1929 Lah. 234.



**—Ss. 499 and 500.**

No doubt a mere abuse is not ordinarily a defamation, but the fact that the words used by the writer are of abuse does not of itself take the article out of the definition of defamation, if taken as a whole it is calculated to harm the reputation of the complainant. 112 Ind. Cas. 772=30 Cr. L. J. 4 (Lah).

**—Ss. 499 and 500—Inviting a person to dinner and asking him to leave place when he attends without any imputation—No offence.**

Criminal law is not meant to punish every insult, however grievous, offered by one person to another in the course of social relations, and, therefore, where a person invites another for a dinner and asks him when he attended, to leave the place without any sort of imputation, his conduct may be reprehensible from a social point of view, but there is no element of criminality in it. 98 Ind. Cas. 606=24 A. L. J. 893=7 L.R.A Cr. 164=27 Cr. L. J. 1390=A.I.R. 1926 All. 711.

**—Ss. 499 and 500—Calling a person a beast and a pig.**

Per B. B. Ghose, J.—General words of abuse may not be defamatory, but to speak of a person that he is a beast and a pig in his conduct is defamatory. 90 Ind. Cas. 387=29 C.W.N. 904=42 C. L. J. 178=26 Cr. L. J. 1539=A.I.R. 1925 Cal. 1121.

**—Ss. 499 and 500—‘Pichhlag’ and ‘Lawaris’.**

The words *pichhlag* and *lawaris* do not amount to defamation. 67 Ind. Cas. 589=23 Cr. L. J. 429=A.I.R. 1922 Lah. 452.

**—S. 499—Defamation—Obscene language—Street quarrel—Abuse.**

Using obscene and insulting language in speaking of a respectable man after an altercation is over is calculated to lower the reputation of the man spoken of and amounts to defamation under S. 500. *Obiter*.—Words *prima facie* defamatory when used in the middle of a street quarrel should be regarded as mere vulgar abuse and does not amount to defamation. 16 A. L. J. 498=19 Cr. L. J. 669=45 Ind. Cas. 1005.

**12. Interpretation—“Imputation”.****—Ss. 499 and 500—Report to Police—Imputation—Accusation—Suspicion.**

An imputation ordinarily implies an accusation or something more than an expression of a suspicion. An expression of a suspicion may have the same effect on the mind of the person to whom the suspicion is communicated as an accusation would have. So where a person makes a report to police that a theft was committed and that he suspects a certain person which results in the search of that person's house, the person must be deemed to have made an imputation within the S. 499. 96 Ind. Cas. 211=8 L. L. J. 97=27 Cr. L. J. 899=27 P.L.R. 171=A.I.R. 1926 Lah. 278.

**13. Printer's Liability.****—Ss. 499 and 500—Printer's Liability.**

A newspaper is in no better position in regard to the law for defamation than a private individual.

A printer is liable under the law for defamatory matter printed by him. A.I.R. 1933 All. 434=34 Cr. L. J. 926=1933 A. L. J. 1493=145 Ind. Cas. 126.

**14. Procedure.****—S. 499—Allegations against wife's character—Complaint of defamation by husband—If maintainable—Cr. P. Code, S. 198.**

A person may be defamed by a scurrilous attack upon the character of his wife although nothing against him personally is alleged, and he himself can file a complaint for defaming him, although no charge for defaming the wife would lie except upon a complaint made by her unless she can bring herself within the exception provided for in S. 198, Cr. P. Code. A.I.R. 1949 Cal. 567=50 Cr. L. J. 972.

**—Ss. 499 and 500—Complaint by aggrieved person.**

Where the facts alleged *prima facie* constitute an offence under S. 500, Penal Code, there is no reason why that offence should not be taken cognisance of on a complaint by the aggrieved person. A.I.R. 1942 Lah. 76=44 P.L.R. 7=43 Cr. L. J. 572=199 Ind. Cas. 543.

**—S. 499—Aggrieved party—Master and servant.**

In a case under S. 500 master is not the aggrieved party for defamation of servant. 11 Cr. L. J. 594=8 Ind. Cas. 220.

**—S. 499—Imputation of unchastity in respect of wife—Husband an aggrieved person.**

See Cr. P. C., S. 198. 15 M. L. J. 224.

**—S. 500—Sanction.**

Offence under Ss. 500, 504, 506, Penal Code, by Cane Inspector while investigating conduct of complainant in selling cane—Cognisance of the case without the sanction of the Local Government, cannot be taken. A.I.R. 1940 Pat. 97 (101)=6 B.R. 377=20 P.L.T. 947=41 Cr. L. J. 349=186 Ind. Cas. 627.

**—Ss. 499 and 500—Reports by Municipal Engineer and Municipal Commissioner about removal of road metal by contractor—Contractor's complaint for defamation—Absence of sanction—Case, if can proceed against Commissioner—Engineer, if entitled to benefit of Exceps. 7 and 8 to S. 499.**

Where, on the report of the Municipal Engineer and a Municipal Commissioner that some road metal had been removed, a committee of enquiry was formed and some of the members found the reports to be true while others found otherwise and thereupon the contractor who was named in the report as having removed the road metal complained against the Municipal Engineer and the Municipal Commissioner under S. 500, Penal Code;

Held, that the Municipal Commissioner was exercising his official functions in making the report and hence, in the absence of sanction under S. 197, Criminal P. C., the Magistrate had no jurisdiction to issue process against him, and that the Municipal Engineer was not entitled to the benefit of the provisions of S. 197, Criminal P. C., though if the report be made in good faith, he would be entitled to the benefit of the



seventh and eighth Exceptions contained in S. 499, Penal Code. A.I.R. 1934 Pat. 548=15 P. L. T. 507=1 B.R. 187=36 Cr.L.J. 285=152 Ind. Cas. 1029.

—Ss. 499 and 500—Sanction — Remark by member of Panchayat.

Remark by a member of village Panchayat made while delivering judgment—Complaint for defamation:

Held, that the member being a 'Judge' within the definition under Penal Code, a sanction of the Local Government under S. 197, Criminal P. C., is necessary. (1936) 160 Ind.Cas.=423(1) 18 N.L.J. 177=37 Cr.L.J. 294.

—S. 500.

Complaint under S. 500 cannot be dismissed even if same facts also constitute offence under S. 182 or S. 211 and sanction required by S. 195, Criminal P. C., is not obtained. A.I.R. 1938 Rang. 232=175 Ind. Cas. 915 (F. B).

[Overrules: A.I.R. 1935 Rang. 163=36 Cr. L. J. 970 =156 Ind. Cas. 598.]

—S. 500—Prosecution for statement in plaint—Sanction.

The ordinary remedy of the person who has had a false suit brought against him is to apply to the Court to prosecute the plaintiff under S. 209, Indian Penal Code. As a general rule it is undesirable that people should be hampered in their access to the Courts and in getting justice by the fear that if they are unsuccessful they may be prosecuted for defamation and therefore all Courts should be careful when a complaint of defamation is filed in respect of proceedings in a Civil Court to see whether the provisions of S. 209 and of the Criminal Procedure Code generally have not been evaded. 86 Ind. Cas. 1005=18 S. L. R. 83=26 Cr.L.J. 941=A.I.R. 1925 Sind 263.

—Ss. 499 and 500—Death of complainant—Abatement.

Complainant Police Officer alleging defamation against himself and Police in general—Complainant dying—Section 259, Criminal P. C., held applied and discretion in proceeding with case, held properly exercised A.I.R. 1941 Rang. 202=1941 Rang. L. R. 224=42 Cr. L. J. 801=196 Ind. Cas. 54.

—Ss. 499 and 500—Possibility that accused might have some defence, if ground for dismissal.

A complaint under S. 499, Penal Code, which is made on oath cannot be dismissed on the ground that there is a possibility that the accused might have some defence to the complaint, if true. The Magistrate should direct his attention to ascertain whether there is any reason for disbelieving the complaint. A.I.R. 1940 Pat. 179=6 B. R. 542=41 Cr.L.J. 504=21 P.L.T. 608=187 Ind. Cas. 721.

—Ss. 499 and 500—Complainant should go into witness box.

It is a case of defamation, it is always necessary that the prosecutor or the plaintiff, according to whether the case is a criminal or a civil one, should be ready to go into the witness-box and submit to the most searching cross-examination. In a vast number of these cases, the character of the complainant is the thing which requires to be most meticulously gone into. A.I.R.

1939 Rang. 371=1939 Rang. L.R. 479=41 Cr. L. J. 48=184 Ind. Cas. 566.

—Ss. 499 and 500—Bar to prosecution.

Defamatory allegations in application to Police against a person and his minor daughter—Both father and daughter can file separate complaints—Compromise and subsequent acquittal of accused in father's complaint is no bar to complaint by daughter. A.I.R. 1938 Lah. 739=40 Cr.L.J. 131=178 Ind. Cas. 791.

—Ss. 499 and 211.

Dismissal of complaint under S. 211—Second complaint alleging defamation is competent. A.I.R. 1934 Rang. 40=35 Cr.L.J. 802=148 Ind. Cas. 845.

—S. 500—Alteration of conviction.

Conviction of four accused under S. 500, Penal Code—Appellate Court holding misjoinder of charges—High Court can alter the finding from S. 500 alone to one under S. 500 read with S. 120-B. 1938 A. L. J. 769=1938 A.W.R. 467.

—S. 500—Altered conviction.

See 25 A. 534.

—S. 500.

Claim of accused to be tried in accordance with provisions of Chap. 33, Criminal P. C., allowed—Magistrate committing accused to Sessions Court for offence under S. 500, Penal Code—Accused convicted on verdict of jury believed to consist of three Europeans and two Indian British subjects—One of the alleged Europeans found to be an Anglo-Indian and thus not coming within category of "European" referred to in S. 275, Criminal P. C.;

Held, the Sessions trial was not legally constituted and conviction could not stand but retrial ordered as conviction was not unsound on merits. A.I.R. 1934 Pat. 200=15 P.L.T. 82=35 Cr.L.J. 827=13 Pat. 177=148 Ind. Cas. 933.

—Ss. 499 and 500 — Jurisdiction — Honorary Magistrates.

It is not desirable that Honorary Magistrates should try complicated cases of defamation involving difficult point of law. 1931 M.W.N. 407.

—Ss. 499 and 500—Charge.

In a case of defamation under S. 500, Penal Code, the alleged precise defamatory statements on which prosecution relies should be separately mentioned in the charge in order that accused may know exactly what case he has to meet. A.I.R. 1943 Cal. 478=47 C.W.N. 555=45 Cr. L. J. 129=209 Ind. Cas. 273.

—Ss. 499 and 500—Procedure—Allegations of defendant or accused—Opportunity to plaintiff or complainant to meet them.

It is the practice of the Allahabad High Court in appeal to give little or no weight to the allegations or charges of a defendant or accused if they ought to have been put to the plaintiff or complainant or his witnesses and have not been so put. A plaintiff or complainant has an absolute right to know exactly the allegations or charges upon which the opposite side are going to rely and they must be put to him or to his appropriate witnesses clearly, specifically and with the utmost plainness, so that he may have an



opportunity of admitting them wholly or in part, or denying them wholly or in part, and of calling witnesses to rebut such allegations or charges as he denies. 115 Ind. Cas. 872=26 A.L.J. 196=9 L.R.A.Cr. 90=10 A.I.Cr.R. 101=30 Cr. L. J. 530=A. I. R. 1928 All. 222.

**—Ss. 499 and 500—Opportunity to accused to explain.**

The greatest care ought to be taken to enquire into the circumstances and an opportunity should be given to the party accused of such offence to offer explanations before summons is issued.

Where the Magistrate made no enquiry into the matter before issuing summons and called upon the accused who was a respectable pleader to prove good faith although there was no allegation of malice or any private motive against him and although the statement made for a relevant purpose was under instructions from his client and when the responsibility was fully accepted by the client, the proceedings were quashed. A.I.R. 1927 Cal. 823, Foll. 111 Ind. Cas. 569=29 Cr.L.J. 889=11 A.I.Cr.R. 156. (Cal.).

**—S. 500—Complaint under Secs. 193 and 211, I.P.C.—Power of Magistrate to frame charge under Sec. 500, I.P.C.**

Where the complaint purported to be under Ss. 193 and 211, Indian Penal Code, but the Magistrate, after hearing the evidence, framed the charge of defamation under S. 500, Indian Penal Code, and convicted the accused under that section:

Held, it is quite sufficient that the complainant shall state the true facts in his own language, and it is for the Magistrate to apply the law to those facts. If, in the opinion of the Magistrate, the offence disclosed fell under S. 500, Penal Code, the Magistrate was at liberty to proceed and frame a charge under that section, provided the complainant satisfied the conditions of S. 198 of the Cr. P. Code whatever may have been the section of the Penal Code recited in the complaint. 10 All. 39; 27 Mad. 61; 29 Cal. 415, Dist. 23 P. R. (Cr.) 1895, Foll. 95 Ind. Cas. 305=6 Lah. 375=26 P.L.R. 552=27 Cr. L. J. 769=A. I. R. 1925 Lah. 631.

**15. Publication.**

**—S. 499—Letter sent to person defamed—Person defamed not knowing how to read getting it read by third person—Effect.**

Publication of defamatory matter involves the communication of it to some person other than the person to whom it is addressed. Normally there is no publication when a letter containing defamatory imputations is sent direct to the person defamed but when it is proved that the writer knew that the person defamed could not read when he sent the letter and the person defamed gets it read by a third person, it must be held that there is evidence of a publication to a third person, for, in such a case, the writer must have known that the letter would be read to the person defamed by some third person. A.I.R. 1943 Sind 196=45 Cr. L. J. 105=209 Ind. Cas. 234.

**—S. 499—Delivery of defamatory letter to complainant.**

The delivery of the letter containing defamatory matter by the accused to the complainant is obviously

not a publication such as would render the accused liable to punishment for defamation as the letter could not have injured the complainant in the estimation of others to whom they were not made known. A.I.R. 1935 Cal. 736=61 C.L.J. 205=37 Cr. L. J. 133=159 Ind. Cas. 527.

**—S. 499.**

The interpretation of word "publication" as used in S. 499, Penal Code, and S. 3 (1), Indian States (Protection against Disaffection) Act stated. A.I.R. 1935 Nag. 90=36 Cr. L. J. 744=155 Ind. Cas. 450.

**—S. 499—Notice issued by President of Notified Area to close windows and door of a building—Reply of accused defaming President—Reply read by members of committee in official routine—Publication—Offence—Sentence.**

A Notice under S. 185, U.P. Municipalities Act, was sent from the office of a Notified Area directing a person to close certain windows and a door. His reply to the notice contained an imputation that the President had sent the notice to him because he had refused to accede to a demand of illegal gratification of the President. In the ordinary course of official routine, the President put this reply on the records of the committee and it was read by members of the committee:

Held, that the reply was defamatory and was intended to harm the reputation of the President and that in as much as the President's act of putting it on the records had to be done in the official routine, the accused must have known that it would be communicated to others; there was publication within the meaning of S. 499, Penal Code, and that therefore, the accused was punishable under S. 500, Penal Code.

Held, also, that a sentence of rigorous imprisonment for the offence was illegal. A.I.R. 1933 All. 210=1933 A.L.J. 266=55 A. 253=34 Cr. L. J. 952 (2)=145 Ind. Cas. 392.

**—S. 499.**

If A and B conspire to draw up a document defaming Z and leave it with B, there is no publication. A.I.R. 1931 Mad. 487=1931 M.W.N. 366=32 Cr. L. J. 767=131 Ind. Cas. 654.

**—Ss. 499 and 500—Publication—Sufficiency of proof—Delivery of newspaper within the postal area over which Court has jurisdiction.**

To prove publication of a libel through newspapers it is sufficient to prove that the paper was delivered within the postal area over which the Court had jurisdiction and it need not be proved that the article was read by some particular person. The analogies of letters sent through the post to private persons and no proof tendered at the trial that the addressees had read the contents are not good analogies as newspapers are governed by a different rule. Newspaper is a commodity meant for reading and it should be assumed that it was so read. 15 Bom. 286, Foll. 115 Ind. Cas. 872=30 Cr. L. J. 530=26 A.L.J. 196=9 L.R.A.Cr. 90=10 A.I.Cr.R. 101=A.I.R. 1928 All. 222.

**—S. 499—Proof of act which had the quality of communicating to third persons.**

No doubt, one of the elements of the offence of defamation is that the imputation complained of should be made or published by the accused and the onus of



proving it is on the prosecution. In the case of a defamatory libel that element is however sufficiently proved when there is evidence that the accused intentionally did any act which had the quality of communicating to a third person or persons generally the alleged libel. And it is not necessary for the prosecution either to allege or to prove that the act of the accused was directed at communicating the libel, to any specified person or persons or that the libel, as a matter of fact, was brought to the notice of such person or persons. Swearing an affidavit containing libel and using it in Court is sufficient publication. 98 Ind. Cas. 124=21 S.L.R. 130=27 Cr. L. J. 1276=A.I.R. 1927 Sind 54.

—S. 499—Posting of letter—Place of publication.

A letter is deemed to be published both where it is posted and where it is received. 81 Ind. Cas. 129=18 M.L.W. 718=33 M.L.T. 168=1923 M.W.N. 913=26 Cr. L. J. 641=A.I.R. 1924 Mad. 340=45 M.L.J. 754.

—S. 499—Publication—Defamation—Privilege.

The accused made certain defamatory statements against the Government official in a petition to the higher authorities and on enquiry she repeated the same statements before the inquiring officials, which amounted to the publication of the original defamatory statements made in the petition. The accused was therefore guilty of three separate publications of the libel. 13 A.L.J. 681=16 Cr. L. J. 482=29 Ind. Cas. 322.

—S. 499—Publication—Meaning of.

Communication of matter defamatory of the client to his pleader is publication, though communication to the client himself is not. 6 P.W.R. 1910 Cr.=10 P.R. 1910 Cr.=11 Cr. L. J. 281=5 Ind. Cas. 892.

—S. 499, 500—Charge — Publication—Omission to apologise no proof of malice.

Where a collecting **Punchayat** gave a **chookidari** receipt to the complainant, in which he was described as **Brithial Bania**, held this was not a publication. Omission to apologise is no proof of malice. A charge that the defamation was committed on or about the 12th day of April and afterwards, by describing the complainant as a **Brithial Bania** was not proper, as it does not set forth the occasions on which the defamation was said to have been committed. (1902) 7 C.W.N. 74=30 C. 402.

—S. 499—Defamation—Exception—Public good — Publication to wider public.

A defamatory publication, justifiable if published for the benefit of a portion of the public, loses its justification if circulated to a wider public. A married woman having contracted a 'pat' marriage with a stranger, the head of the caste condemned it. The successor of the head declared it valid and certain members protested against the action of the head in vain. Thereupon the members published the adulterous nature of the connection in a newspaper which was circulated to a wider class of people than the members of the community. Held, that the publication was unjustifiable and the accused was guilty of defamation. 3 Bom.L.R. 188.

—S. 499.

Mere publication of an imputation concerning any person does not of itself constitute defamation. A.I.R.

1941 Pat. 9 (11)=6 B.R. 888=41 Cr.L.J. 814=190 Ind. Cas. 33.

16. Sections 499 and 171-G.

—Ss. 499, 500, and S. 171-G.

The prosecution under S. 171-G is not obligatory when the offence committed is also one under S. 500 A.I.R. 1940 Nag. 249=1940 N.L.J. 309=41 Cr. L. J. 734=I.L.R. (1942) Nag. 208=189 Ind. Cas. 382.

—Ss. 499 and 171-G.

It cannot be said that S. 171-G is a species of the more general offence of defamation or is carved out of S. 499. A.I.R. 1940 Nag. 249=41 Cr.L.J. 734=1940 N.L.J. 309=I.L.R. (1942) Nag. 208=189 Ind. Cas. 382.

17. Sentence.

—S. 500—Defamation extremely malicious and in cunning manner.

Where the defamation is an extremely malicious one and means of publication employed are chosen with great cunning, the sentence of fine of Rs. 400, in default six months' imprisonment, is not excessive. A.I.R. 1935 Rang. 484=37 Cr.L.J. 256=160 Ind. Cas. 215.

—S. 500—Sentence—Rigorous imprisonment.

A sentence of rigorous imprisonment for the offence under S. 500 was held to be illegal. A.I.R. 1933 All. 210=1933 A.L.J. 266=55 All. 253=34 Cr. L. J. 952 (2)=145 Ind. Cas. 392.

—Ss. 499 and 500—Publishing defamatory matter under guise of rumours—Accused not expressing regret but further aggravating the offence—Severe sentence.

At a time when Hindu Mahomedan differences were very acute a Mahomedan editor published an article under the guise of rumour containing defamatory matter against the complainant who was of perfectly good character, perfectly good reputation, respected in the town in which he lived, a man of position and a man very closely identified with the activities of the Hindu religion. In the article he was charged with having poisoned his own son and of having done that because the son had wished to become a convert to Islam. On being asked by several persons as to what the publication in the newspaper meant, the complainant wrote a letter to the accused in which he set out forcibly, but quite properly, his feelings of the false and malicious and defamatory attack which had been made upon him and the members of his family. He set out certain conditions upon which he would refrain from seeking his remedy against the accused in the civil and criminal Courts. Thereupon the accused instead of expressing at once by a personal letter and in his paper the utmost regret for its publication wrote a letter aggravating the magnitude of the offence.

Held, that the sentence of six months' simple imprisonment was not in any degree adequate for the offence committed and that a more severe sentence should have been passed. 117 Ind. Cas. 355=30 Cr.L.J. 766=26 A.L.J. 509=9 L.R.A.Cr. 104=10 A.I.Cr.R. 145=A.I.R. 1928 All. 321.



—S. 500—Article calculated to stir up communal feelings—Editor a tool in hands of proprietor bearing ill-will towards complainant—Light sentence.

An editor of a newspaper who at a time of intense communal tension first publishes a false and fabricated account of an innocent social function in terms calculated to stir up communal feelings and then maliciously and incorrectly gives out that the false information on which the publication was based, had been supplied by a person who had in fact never done so, cannot be lightly dealt with. But where the editor is a mere tool in the hands of a proprietor who bears ill will towards the complainant, and the proprietor admits that he wrote the article, lenient view should be taken in awarding punishment, though the mere circumstance that such an editor is not the writer of the article or is a dummy editor is no ground by itself for reduction of the sentence. 110 Ind. Cas. 236 = 10 A.I.Cr.R. 437 = 29 Cr. L.J. 684 = A.I.R. 1928 Lah. 865.

—S. 500—Words used in the heat of passion—Light sentence.

It is not a pleasant thing for one man to say to another that his father is an opium consumer and his mother a prostitute but, when these words are uttered in the heat of passion, it cannot be said that a serious case of defamation has arisen which calls for a severe penalty. 2 Bur. L.J. 10 = A.I.R. 1923 Rang. 148.

—Ss. 499 and 500—Extent of punishment.

A fine of Rs. 400 is wholly inadequate for the offence of defamation calculated to cause a breach of the public peace. But a publication published two years ago can hardly be supposed to threaten seriously the public order. 4 S.L.R. 86 = 11 Cr. L.J. 593 = 8 Ind. Cas. 218.

#### 18. Statement in suit or proceeding.

- (a) By accused
- (b) By complainant
- (c) By counsel
- (d) By Judge or Magistrate
- (e) By party
- (f) By witness
- (g) Private complaint

#### 18 (a). Statement in suit or proceeding—By accused.

—S. 499, Excep. 9 and S. 500—Scope of ninth exception—Good faith—Test—Defamatory statements made in written statement by accused in a rioting case—Statements made in good faith and for protection of themselves—No offence.

To secure the protection of the ninth exception to S. 499 of the I.P. Code it is necessary that the imputation should have been made in good faith and for the protection of the interest of the person making it or of any other person or for the public good.

There cannot be any rule of thumb to determine in any particular case whether an imputation is made in good faith or not. Good faith is relative to a great extent and must be determined by the circumstances under which the imputation is made, the social status

and level of education of the persons making the imputation and their reasoning capacity.

The petitioners were charged with an offence under S. 500, I.P. Code, in respect of defamatory statements contained in written statements filed by them in answer to a charge of rioting. It was part of the case of the petitioners that the prosecution for the offence of rioting was at the instigation of M who was described in the written statement as a rich and influential man. The Magistrate who tried the case found that this allegation was substantiated to some extent.

**Held,** (i) As it was an integral part of the case for the accused that the prosecution against them was foisted on them at the instance of M, any statements connecting any of the prosecution witnesses intimately with M and his agents should be deemed to be statements for the protection of the interests of petitioners.

(ii) As the petitioners were persons who were not well educated and faced with a serious charge for the offence of rioting and it was also not without reason that they suspected that the whole case had been foisted by a powerful man like M, any imputation that they made to attack the credibility of one or other of the prosecution witnesses, must be held to have been made in good faith. In the circumstances, the statements fell under Exception 9 to S. 499 of the Penal Code and the petitioners could not be convicted of an offence under S. 500, 1948 M.W.N. 413 (2) = A.I.R. 1948 Mad. 469 = 49 Cr.L.J. 724 = (1948) 1 M.L.J. 420.

—Ss. 499 and 500—Statements by accused.

The statements made by accused in judicial proceedings are not absolutely privileged. A person making a defamatory statement in a judicial proceeding is liable to prosecution for defamation. A.I.R. 1940 All. 246 = 1940 A.L.J. 79 = 41 Cr.L.J. 660 = I.L.R. (1940) All. 314 = 1940 A.W.R. 122 = 188 Ind. Cas. 699.

—Ss. 499 and 500—Cross-examination of complainant—Accused asking the question, whether complainant's husband is habitual offender—Question put out of malice.

Where an accused, in the course of cross-examination of the complainant, asked her whether her husband was not a habitual offender who was restricted under the Habitual Offenders' Restriction Act and this was not at all true nor necessary for testing the veracity of the witness but was made out of malice.

**Held,** that the accused was guilty under S. 500.

**Held also,** that the mere fact that the Pleader approved of the question did not affect the case. Because his pleader failed to appreciate his duties properly and failed to advise his client that such a question was an improper question, the question was not made any the less improper, nor did it excuse the intent of the accused in requesting the Pleader to put such a question. A.I.R. 1935 Rang. 293 = 36 Cr.L.J. 1309 = 158 Ind. Cas. 91.

—Ss. 499 and 500—Statement by accused—Evidence of good faith.

The Court in determining the question of good faith should have to take into account the intellectual capacity of the person, his predilections and the surrounding facts.

Where it was found that an accused acted with a desire to protect himself by an appeal to the Magistrate,



rather than to injure others the accused is protected by Excep. 8 and 9 of S. 499: 4 Cal. 124, Foll. 33 C.W.N. 446=56 Cal. 1013=A.I.R. 1929 Cal. 346.

**—Ss. 499 and 500—Petition to Court with defamatory allegations—Considerations—Intelligence of accused.**

In matter of a case under S. 500 when it is said to rest upon allegation made in petition to a Court, in determining whether due care was taken by the accused allowances should be made for the intelligence of the accused, his capacity to reason, the circumstances under which he was placed, and the occasion which necessitated his making the imputation. When the facts seem to show that the accused being a comparatively ignorant and timid man apprehending harassment by the complainant did what a man of superior intelligence and knowledge could not have done, namely presented a petition, there can be little doubt that he acted with a desire to protect himself by an appeal to the Magistrate rather than to injure others and he should not be convicted. A.I.R. 1929 Cal. 779.

**—Ss. 499 and 500—Accused—Defamation in answer to question—No offence.**

In a prosecution under S. 499, where the accused's answer, alleged to be defamatory, was relevant to the matter in issue and arose out of a question put by the Court in a previous criminal proceeding against him:

**Held:** that the provisions of S. 342 (2) applied and that the accused was not at any rate punishable for making such statement. 8 L.R.A.Cr. 128=8 A.I.Cr.R. 211=25 A.L.J. 855=A.I.R. 1927 All. 707.

**—Ss. 499 and 500—Accused—No absolute privilege.**

Relevant statements made by an accused person under S. 342 Criminal P.C., or contained in a written statement filed by him with the Court's permission are not absolutely protected from being the subject of a prosecution for defamation under S. 500, I.P.C. on grounds of public policy or exceptions derived from the Common Law of England: 48 Cal. 388 (S.B.). Foll. 93 Ind. Cas. 151=50 Bom. 162=28 Bom. L.R. 1=27 Cr. L. J. 423=A.I.R. 1926 Bom. 141 (F.B.).

**—S. 499, Excep. (9)—Objectionable remarks about the character of complainant, while showing cause against prosecution under S. 188, Penal Code—Plea of good faith.**

Objectionable remarks, made against character of the complainant while showing cause why prosecution under S. 188, Indian Penal Code should not be started would come within the 9th exception of S. 499, Indian Penal Code, if it is shown that the imputations were made in good faith and for the protection of the party making them; there is no absolute privilege. 69 Ind. Cas. 269=35 C. L. J. 527=23 Cr. L. J. 685=A.I.R. 1922 Cal. 76.

**—S. 499—Statement in good faith—Police enquiry.**

Calling a complainant with previous conviction a rogue, for the *bona fide* protection of one's own interests in the course of a police enquiry falls within the exception. 20 Bom. L. R. 601=19 Cr. L. J. 731=46 Ind. Cas. 411.

**—S. 499—Written statement under S. 488, Cr.P.C.**

S. 499 is exhaustive of the Criminal Law of Libel in India and a written statement filed by a respondent in maintenance proceedings is not privileged. 18 Cr. L. J. 1019=11 Bur. L.T. 104=42 Ind. Cas. 763.

**—Ss. 499 and 500—Defamation—Privilege—Accused's status.**

The statement of a person charged with an offence in answer to a question put by the Court trying him, is absolutely privileged and he cannot be punished under S. 499 in respect of it. Opinion of Richards, J. in 29 A. 685, Appr. 36 Mad. 216=23 M.L.J. 39=11 M.L.T. 416=(1912) M.W.N. 476=13 Cr.L.J. 275=14 Ind. Cas. 659 (F.B.).

**—S. 499, Excep. 9—Statements by accused.**

The statements of a defamatory character made by an accused person in the course of a statement which he is invited to make under S. 342, Cr.P.C., are privileged. 5 M.L.T. 256=9 Cr. L. J. 276=1 Ind. Cas. 248.

**—Ss. 499 and 500—Statement by accused to his pleader.**

A statement made by an accused person to his pleader during the subsistence of his relationship of pleader and client, without any intention of harming the reputation of any person is not an offence under S. 499 of the Code. 13 C.W.N. 1087=10 Cr.L.J. 475=4 Ind. Cas. 27.

**18 (b). Statement in suit or proceeding—By complainant.**

**—S. 499, Excep. 9—Complaint in respect of allegation in petition to Magistrate—Plea of privilege based upon Excep. 9—Duty of Court—Matters to be considered.**

When a complaint of defamation is made in respect of allegations made in a petition made to a Magistrate, it is necessary for the Court first to see whether the allegations complained of are of defamatory nature. If they are such the Court has then to consider what exception in particular will apply to the case when the accused pleads privilege. If the Court thinks that Excep. 9 to S. 499, I.P. Code, would apply, the Court will decide what interest the accused was protecting by his petition to the Magistrate and whether it was made in good faith. The Court has to consider whether for the protection of his interest the recourse to the Magistrate was proper, and whether it was proper or necessary for the accused to make the allegations made by him, and also whether he acted with due care and caution. Without considering all these matters, it will not be possible for the Court to come to a finding one way or the other on the merits. 3 A.I.Cr.D. 225=A.I.R. 1949 Cal. 292=50 Cr. L. J. 544.

**—Ss. 499 and 500—Complaint containing libellous statements—No absolute privilege—Exceptions if exhaustive—Effect of good faith.**

The privilege defined by the exceptions to S. 499 must be regarded as exhaustive as to the cases which they purport to cover and recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute. A complainant making libellous statements in his complaint is



not absolutely protected so far as criminal proceedings are concerned. Under the 8th exception and the illustration to S. 499 the statements are privileged only when they are made in good faith; 36 Mad. 216 and 37 Mad. 110 Overruled. 96 Ind. Cas. 978=49 Mad. 728=1926 M.W.N. 606=27 Cr.L.J. 1026=25 M.L.W. 207=A.I.R. 1926 Mad. 906=51 M.L.J. 112. (F.B.).

—**Ss. 499 and 500 — Defamatory statement by complainant, when examined by Magistrate—No privilege.**

A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding. But the protection which may be given upon principles of public policy to a witness cannot be given to a complainant who when asked by the Magistrate to state his grievance deliberately makes a defamatory statement without the slightest justification. 69 Ind. Cas. 94=24 Bom. L. R. 400=47 Bom. 15=23 Cr. L. J. 654=A.I.R. 1922 Bom. 381.

—**Ss. 499 and 500 — Complaint to magistrate with defamatory allegations — Offence — Applicability of exception—Burden of proof.**

Several persons presented a defamatory petition to the District Magistrate complaining of various acts of oppression against the mukhia of a village. An inquiry was held and certain persons were examined as witnesses with the result that the petition was dismissed. The mukhia then filed a complaint under S. 500, Penal Code, against sixteen persons including those who had signed the petition, but the complaint was dismissed under S. 202 of the Criminal Procedure Code. Held, that the complaint being not only against such persons as were called and examined by the District Magistrate but against all the signatories to the petition to the District Magistrate the order dismissing the complaint could not be sustained.

A witness has no greater protection against a charge of defamation than any other person.

A witness in order to be protected from a statement *prima facie* defamatory made by him must bring himself within one or more exceptions to S. 499. 59 Ind. Cas. 863=3 U.P.L.R. (A.) 35=22 Cr.L.J. 159.

—**S. 499—Information given to police officer—Statement made in course of—Privilege—Dead persons—English and Indian Law—Difference.**

Statements made to a police officer under Ss. 154 and 155 of the Cr. P. Code in the course of information given to him are privileged and cannot be made the foundation of a charge of defamation. There is a marked difference between criminal liability for defamation under the English law and under the Indian law. The English Criminal Law has mainly to consider whether the defamation is such as would result in a breach of the peace and not the question whether the person was aggrieved by the statements made. In India the defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow creatures and in those inconveniences to which a person who is the object of such unfavourable sentiment is exposed. 41 All. 311=17 A. L. J. 214=20 Cr.L.J. 231=49 Ind. Cas. 855.

—**Ss. 499 and 211—Complainants and witnesses.**

Where on the facts, the offence was clearly under S. 211, I. P. C., and the application for sanction to

prosecute under S. 211, I. P. C., was rejected, the petitioners could not be proceeded against under Ss. 500 109, I. P. C., on the same facts. It is doubtful whether complainants and witnesses in this country are absolutely privileged as in England. 44 Cal. 970=21 C. W. N. 253=25 C. L. J. 445=18 Cr.L.J. 377=38 Ind. Cas. 761.

—**S. 499—Petition of complaint to Magistrate.**

A defamatory statement in a petition of complaint presented to Magistrate concerning the person charged therein is absolutely privileged and no prosecution lies under Ss. 499 and 500, against the person making it. 37 Mad. 110=11 M.L. T. 431=13 Cr.L.J. 293=14 Ind. Cas. 757.

—**S. 499—Complaint—Statement in — If privileged.**

The Statement of the complainant contained in his complaint is absolutely privileged. 38 Cal. 880=15 C.W.N. 917=11 Ind. Cas. 311.

**18 (c). Statement in suit or proceeding—By counsel.**

—**Ss. 499 and 500—Privilege of advocate — English law.**

Under the English Law, advocates have absolute and unqualified privilege in respect of questions asked in cross-examination. Advocates in India have not such unqualified and absolute privilege. 104 Ind. Cas. 717=55 Cal. 85=28 Cr.L.J. 877=46 C.L.J. 227=A.I.R. 1927 Cal. 823.

—**Ss. 499 and 500 — Privilege of advocate—English law.**

Under the Common Law of England an advocate can claim an absolute privilege for words uttered in the course of his duty as an advocate. But an advocate in India is not entitled to an absolute privilege, and in cases of prosecution for defamation his liability must be determined on reference to the provisions of S. 499. 97 Ind. Cas. 354=6 Pat. 224=7 P. L. T. 608=1926 P. H. C. C. 314=27 Cr. L. J. 1090=A.I.R. 1926 Pat. 499.

—**S. 499. Excep. 9—Scope and extent of immunity enjoyed by Advocates for words said in his capacity as such.**

The immunity which an advocate or pleader enjoys in a criminal proceeding for words uttered or written in the performance of his functions as an advocate is not in the nature of an absolute but of a qualified privilege and it is for the prosecution to prove absence of good faith in such a case. Gratuitous remarks reflecting on the conduct of a party, if made with a malicious intent to lower the person concerned in the estimation of his fellowmen in a case where the party's character is not in issue or relevant for the purposes of a right determination of the case, would not protect an advocate from criminal defamation. I.L.R. (1948) All. 370=1948 A.L.J. 540=1948 A.W.R. (H. C.) 140=A.I.R. 1948 A. 409=1948 O. A. (H. C.) 140=49 Cr.L.J. 701.

—**S. 499, Excep. 9—Good faith—Presumption—Questions to witness in cross-examination on instructions—Charge of defamation—Liability of party and advocate.**

The liability of an advocate or party for whom he appears, in respect of words spoken or written in the



performance of professional duty such as cross-examination of a witness of the opposite party depends upon S. 499, I. P. Code; there is only a qualified privilege under the 9th Exception to S. 499, and there is no absolute privilege as under the English common law. It depends on good faith, and good faith will be presumed unless there is cogent proof to the contrary.

Where it is not possible to assume that the questions were put by the advocate upon definite instructions given by the party, the party cannot be prosecuted for defamation in respect of instructions which he might have given to his Counsel. It is the advocate's business to decide whether he could properly act upon the instructions and whatever responsibility might ensue from acting upon those instructions would be his and not the party's. 48 Cr. L. J. 997=A.I.R. 1948 Pat. 56.

—Ss. 500, 499, Exception 9—Pleading signed by Counsel containing defamatory matter—No defamation, unless statement is made in bad faith or maliciously.

A Counsel owes a duty to his client and he must carry out faithfully his client's instructions. If his client makes serious allegations against another party in a suit, it is Counsel's duty to plead those allegations in the plaint or written statement or other pleading. A Counsel, however, must perform his duty with discretion; he should not plead what are obviously irrelevant, wanton, wild and reckless allegations. On the other hand, a Counsel is not a judge in the case and it is not for him to decide whether the allegations made by his client are true or false. He is bound, except in very exceptional circumstances, to accept his client's word. But as Counsel cannot claim absolute privilege, a Counsel who signs a pleading containing serious allegations, lays himself open to a prosecution for defamation. However, he cannot be prosecuted successfully unless it is shown that he acted in bad faith or maliciously. A Court must presume that Counsel who has signed a pleading has acted *bona fide* and without malice and no Counsel should be called upon to answer a complaint for defamation merely because he has signed a pleading which contains defamatory matter. It must be presumed that the Counsel acted honestly and without malice, in which case he can never be convicted; otherwise Counsel could not possibly discharge their duties to their clients. No summons should, therefore, be issued against a Counsel for defamation unless the Magistrate who directs the summons to issue has some facts before him which suggest that Counsel has acted in bad faith or maliciously. It is not enough that the pleading contains defamatory matter. A.I.R. 1945 Lah: 97=47 P.L.R. 8=46 Cr.L. J. 530=219 Ind. Cas. 48.

—Ss. 499 and 500—Pleader — No defamation unless remark is made wantonly or malicious or private motive.

The Court should presume, when a complaint is made against a legal practitioner for defamation that the remark was made on instructions and in good faith, and there can be no defamation unless the circumstances show that the remark was made wantonly, or from a malicious or private motive. A.I.R. 1940 Rang. 77=41 Cr. L. J. 480=187 Ind. Cas. 463.

—Ss. 499 and 500.

Question by counsel in cross-examination. The presumption is that a question asked by a counsel in

cross-examination is one asked under instructions and in good faith and hence is privileged. 1937 M.W.N. 1195.

—Ss. 499, Expl. 9 and 500 — Questions by counsel.

When there is no proof that the Pleader, in putting the questions, was actuated by any motive of private malice, the Pleader is entitled to the benefit of Exception 9 to S. 499 and the charge under S. 500, I. P. C., cannot stand. 1934 M. W. N. 481.

—S. 499 and 500—Pleader cross-examining under instructions in client's interest.

The presumption in the case of a Pleader asking questions in cross-examination is that such questions are put in good faith for the protection of his client's interests within the Exception to S. 499.

Where a Pleader, in cross-examination, asks a question under instructions and in the interest of his client, he should not be convicted under S. 500, I. P. C., especially when it is admitted by the aggrieved party that the Pleader has no malice or grudge against him. A.I.R. 1933 Cal. 185=34 Cr.L. J. 865 (2)=144 Ind. Cas. 935.

—Ss. 499 and 500 — Defamation — Advocate—Privilege—Imputations on a person neither party nor witness—Advocate's duty to withdraw remark—Malice—Burden of proof.

A member of the bar in India has no absolute privilege. An Advocate who makes defamatory statements in the conduct of a case has no wider protection than a layman; that is to say, he has to bring his case within the terms of Excep. 9 to S. 499, and under S. 105, Evidence Act, the burden of proof would normally be upon him. But in practice, the Courts have held on grounds of public policy that an Advocate is entitled to special protection, and that if an Advocate is called in question in respect of defamatory statements made by him in the course of his duties as an Advocate, the Court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice.

Per **Broomfield, J.**—An Advocate's privilege is limited where the person against whom the imputations are made is neither a party nor a witness. Where an Advocate makes imputations about another on the strength of instructions from his client, and the instructions turn out to be untrue, the Advocate is bound to withdraw the imputation. A.I.R. 1932 Bom. 490=34 Bom. L. R. 910=33 Cr. L. J. 740=139 Ind. Cas. 275.

—Ss. 499 and 500.

When a complaint is made against an Advocate for defamation, it is the duty of the Court to presume that the statement complained of was made on instructions and in good faith and unless circumstances clearly show that it was made wantonly, or from malicious or private motives, the complaint should not be entertained. But no such special presumption can be made in favour of a party or a witness and if a party or a witness makes a statement which *prima facie* defamatory, the burden will be upon him of proving that the statement is covered by one of the exceptions to S. 499, Penal Code, the exceptions ordinarily applicable to such cases being Exceptions 8 or 9. A.I.R. 1931 Rang. 83=32 Cr. L. J. 934=132 Ind. Cas. 553.



**—Ss. 499 and 500—Presumption of instruction and good faith.**

It is the duty of a Court, when complaint is made against an advocate for having used defamatory words to ordinarily presume that the remark or question was made on instructions and in entire good faith. A.I.R. 1927 Cal. 823, Foll. 111 Ind. Cas. 569=29 Cr.L.J. 889=11 A.I.Cr.R. 156 (Cal.).

**—Ss. 499 and 500—Imputation on character of witness—Presumption of instruction.**

It is not defamatory to make an imputation on the character and position in life of a witness, provided that the imputation is made in good faith and for the protection of the client who has engaged the Advocate. The presumption therefore is that a question asked in cross-examination making an imputation as regards a witness affords no ground ordinarily for a criminal prosecution and that it is the duty of a Court when a complaint is made against an advocate for having used defamatory words that it should ordinarily be presumed that the remark in question objected to was made on instructions and in entire good faith. No doubt there may be circumstances which may show that the question or remark objected to was made wantonly or from malice or from private motive, but the greatest care ought to be taken to enquire into the circumstances and an opportunity should be given to the party accused of such offence to offer explanations before summons is issued. 104 Ind. Cas. 717=55 Cal. 85=28 Cr.L.J. 877=A.I.R. 1927 Cal. 823.

**—Ss. 499 and 500—Questions to witness without good faith.**

A pleader must use a certain amount of common-sense and caution in asking a defamatory question. There may be cases where, under proper instructions, he is entitled to ask questions which are defamatory to the person, so as to impeach his credit.

But where the questions were asked with utter recklessness, and without regard to seeing whether there was any truth in them, and with absolute disregard of whether he was entitled to ask them or not and they were asked not for the good of the case but with no other view than publicly to injure the reputation of the witness.

**Held:** that the questions were asked in absolutely bad faith. 101 Ind. Cas. 600=54 Cal. 137=28 Cr.L.J. 472=A.I.R. 1927 Cal. 303.

**—Ss. 499 and 500—Privilege—Presumption of good faith.**

Utterances calculated to be defamatory by a lawyer in the course of his professional duties and required by his duty to his client are absolutely privileged: 10 Mad. 28 (F. B.) Foll.

When a lawyer acting in the course of professional duties makes a *prima facie* defamatory statement, good faith is to be presumed and bad faith is not to be assumed unless there is independent allegation or proof of private malice.

Even the presence of malice will not override the presumption of good faith where the statement made was obviously necessary in the interests of the client and when the lawyer could not omit to make it without gravely imperilling the interests of his client

and would in fact not be discharging his duty to his client unless he made it.

Where the pleader defending an accused against a charge of making a defamatory statement against the complainant that the latter had infected his wife with venereal disease, made an oral statement in arguments that the defamatory statement was in substance true and had been set out as a fact in a reported judgment of the High Court and put the same statement in the written notes of arguments and thereupon a complaint of defamation was preferred against the pleader.

**Held,** that as the publication complained of was imperatively necessary for the conduct of the cases in which the pleader was appearing professionally, the statements were made in good faith and could not be made the subject of a charge of defamation. 100 Ind. Cas. 537=50 Mad. 667=25 M.L.W. 295=38 M.L.T. 130=1927 M.W.N. 164=28 Cr.L.J. 313=A.I.R. 1927 Mad. 379=52 M.L.J. 269.

**—Ss. 499 and 500—Privilege—Duty of prosecution to prove malice.**

The liability of a pleader charged with defamation in respect of words spoken or written in the performance of his professional duty depends on S. 499 and the court would presume good faith unless there is cogent proof to the contrary. The privilege is not absolute but qualified, and the burden is cast upon the prosecution to prove absence of good faith.

Where express malice is absent the Court, having due regard to public policy, would be extremely cautious before it deprives the Advocate of the protection of Exception 9. The Court ought to presume his good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose. 19 Bom. 340, Foll. 97 Ind. Cas. 354=6 Pat. 224=7 P.L.T. 608=1926 P.H.C.C. 314=27 Cr.L.J. 1090=A.I.R. 1926 Pat. 499.

**—Ss. 499 and 500—Qualified privilege—Presumption of good faith—Proof of malicious or improper motive.**

Section 499 of the Penal Code is meant to be universal in its application. The English Law of absolute privilege does not apply in India to statements of advocates in judicial proceedings. But a counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the acts with which he is dealing are true or false. What he has to do is to argue as best as he can without degrading himself in order to maintain the proposition which shall carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform; [*Munster v. Lamb*, L. R. 11 Q. B. D. 588. Foll.] Therefore when a pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose. To rebut the presumption in



the pleader's favour it is not sufficient merely to allege that the client knew the imputation to be untrue for the duty of the pleader is to present his client's case. So far, at any rate, as the purposes of a prosecution for defamation are concerned, it would be wholly unreasonable to say that it is the duty of the pleader to enquire whether his client's case is true or false. To rebut the presumption of good faith in such a case there must be convincing evidence that the pleader was actuated by a malicious or an improper motive personal to himself and not by a desire to protect or further the interests of his client in the cause; [9 Bom. L.R. 1287 and 36 Cal. 375, Foll.] It is the duty, therefore, of a Court when a complaint is made against an advocate or legal practitioner for defamation that it should presume that the remark was made on instructions and in good faith; and unless circumstances clearly show that it was made wantonly, or from malicious or private motives, the complaint should not be entertained. Even if the circumstances suggest recklessness or malice, further enquiry should be made and an opportunity, if possible, should be given to a legal practitioner to offer an explanation before summons is issued. 92 Ind. Cas. 737=27 Cr.L.J. 321=4 Bur. L.J. 147=3 Rang. 524=A.I.R. 1925 Rang. 345.

—S. 499 Exc. 9, S. 52 — Counsel or Pleader—Privilege—Questions in cross-examination, if to be limited to instructions—Questions based on recollection—Good faith—Presumption—Due care and attention—Wrong inference—Express malice.

A pleader, especially in the mofussil of this country, where instructions are very commonly inaccurate and misleading, would certainly be at least as much justified in acting on his own recollection as on specific instructions in putting question to a witness in cross-examination; and because he has merely drawn a wrong inference from a fact recollected, that of itself, in the absence of express malice, should not take him out of the 9th Exception to S. 499. When a pleader is charged with defamation in respect of words spoken to or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose. 19 A. 340 foll. (1909) 13 C.W.N. 340=1 Ind. Cas. 147=9 Cr.L.J. 165=9 C. L.J. 259=36 C. 375.

—S. 499—Pleader—Privilege.

Where a pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose. A pleader representing a complainant wrote to the trying Magistrate to enquire when the latter would take up the case for trial; and in the letter described the accused as a "notorious wrong-doer." A complaint then filed against the pleader for defamation; and the Magistrate finding that the pleader was not then acting as a pleader, convicted him of defamation. Held, affirming the conviction that the imputation was not made by the accused at a pleader. (1907) 9 Bom. L.R. 1287=6 Cr.L.J. 387.

18 (d). Statement in suit or proceeding—By Judge or Magistrate.

—Ss. 499—Remarks in judgment.

The existence of exceptions to S. 499 indicates that the provisions of S. 77 cannot by themselves cover the

case of remarks made by a Judge or Magistrate in the course of his office, so as to exempt him from any liability under S. 500. Where the words complained of are themselves *prima facie* defamatory and do not bear directly on the matter in hand, there is a *prima facie* case and the complaint should be admitted even if S. 77 were held to apply. A. I. R. 1934 Nag. 123=35 Cr. L.J. 947=17 N. L. J. 43=30 N.L.R. 234=149 Ind. Cas. 140.

18 (e). Statement in suit or proceeding—By party.

—Ss. 499—Statement made by party—Privilege.

In a criminal prosecution, the question whether a statement was made on a privileged occasion or not must be decided with reference to S. 499, I. P. C., and S. 105, Evidence Act.

A defamatory statement on oath or otherwise by a party to a judicial proceeding falls within S. 499, I.P.C., and is not absolutely privileged. A.I.R. 1931 Rang. 83=32 Cr. L.J. 934=132 Ind. Cas. 553.

—S. 499—Prosecution on basis of statement in affidavit—Plea of privilege.

Where a prosecution for the offence of defamation was launched on the basis of certain affidavits filed in Court:

Held, that the English doctrine of absolute privilege was inapplicable but that the party could rely on the exceptions to S. 499, I. P. Code. 8 Rang. 359=128 Ind. Cas. 371=1931 Cr. C. 369=32 Cr. L. J. 132=A.I.R. 1931 Rang. 81.

—Ss. 499 and 500—Party—No absolute privilege.

A defamatory statement on oath or otherwise, by a party to a judicial proceeding falls within S. 499 of the Penal Code, and is not absolutely privileged. The Court cannot engraft on the provisions of the Code exceptions derived from the Common Law of England or based on public policy: 48 Cal. 388 (S. B.) Foll. 17 Bom. 127 and 17 Bom. 573, Overruled. 93 Ind. Cas. 151=50 Bom. 162=28 Bom. L.R. 1=27 Cr.L.J. 423=A.I.R. 1926 Bom. 141 (F.B.).

—S. 499, Excep. (9)—Party stating that his witness was won over hence not examined—No defamation.

The law of absolute privilege is not applicable in India. But where a party to a civil suit stated in his evidence that a particular witness though cited by him was not examined, as he suspected that the witness was won over by the opposite party:

Held, that what he said was said *bona fide* in the protection of his own interests, and that he would therefore be protected by the provisions of the ninth exception to S. 499. 94 Ind. Cas. 600=27 Cr. L. J. 648=4 Bur. L. J. 181=A.I.R. 1925 Rang. 360.

—Ss. 499 and 500—Statements in judicial proceedings—No absolute privilege.

In a criminal prosecution for defamation no absolute privilege exists in favour of statements in course of judicial proceedings as such. 84 Ind. Cas. 977=2 Rang. 333=A.I.R. 1925 Rang. 15.



**—Ss. 499, Excep. (9) and 500—Statement by applicant in revenue case.**

S. 499, Exception 9 would be applicable to the case of a *bona fide* applicant making defamatory statements to support his application in proceedings before revenue authorities. 67 Ind. Cas. 589=23 Cr. L. J. 429=A.I.R. 1922 Lah. 452.

**—S. 499—Party to judicial proceeding—Statements filed in Court—Civil and criminal proceedings.**

Questions of civil liability for damages for defamation and questions of liability to criminal prosecution do not, for purpose of adjudication stand on the same basis. If a party to judicial proceedings is prosecuted for defamation in respect of a statement made therein on oath or otherwise, his liability must be determined under S. 499, I.P.C. The Court cannot engraft thereupon exceptions derived from the common law of England or based on ground of public policy. Consequently a person in such a position is entitled only to the benefit of the qualified privilege mentioned in S. 492, I. P. C. If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise his liability in the absence of statutory rules applicable to the subject must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the correspondent relevant rules of the common law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules in the Penal Code. To take a case out of the primary rule enunciated in S. 499 of the Penal Code and to bring it within either Exception 8 or 9, good faith on the part of the person who makes or publishes the imputation must be established. 48 Cal. 388=A.I.R. 1921 Cal. 1=22 Cr. L. J. 31=24 C.W.N. 982=32 C.L.J. 94=59 Ind. Cas. 143 (S.B.).

**—S. 499—Statement by party.**

In India the English doctrine of privilege does not apply. A defamatory statement by a party to a judicial proceeding is not privileged. The privilege in such case refers to words spoken in ordinary course of proceedings before the Court. 3 U. B. R. (1918) 101=20 Cr. L. J. 125=49 Ind. Cas. 109.

**—S. 499—Statement by party in a suit.**

A relevant statement of a party to a suit made in good faith without express malice is privileged. 19 Cr. L. J. 641=45 Ind. Cas. 833 (Nag.).

**—S. 499—Statements in application for transfer—Absolute privilege, if applies to Indian Moffussil.**

English Common Law doctrine of absolute privilege does not apply to Indian Moffussil. S. 499, I. P. C. is exhaustive and a defamatory statement not coming within the specified exemptions is not privileged. Statements made in bad faith in an application for transfer of a case are not protected. 49 Cal. 433=14 Cr. L. J. 100=17 C.W.N. 297=18 Ind. Cas. 660.

**—S. 499—Defamation—Privilege—Defamatory statement in an application for transfer of criminal case.**

12—F. Y. D.—40.

A conviction for a defamatory statement in an application for transfer of a criminal case should be set aside as the propriety of the conviction is open to serious doubt. 40 Cal. 441 Note=17 C.W.N. 449=14 Cr. L. J. 61=18 Ind. Cas. 349.

**—S. 499—Defamatory statement by party opposing registration of will—Privilege.**

A defamatory statement made by a person opposing the registration of a will in his petition to the Registrar, is not absolutely privileged, so as to exempt the party making it from liability to be punished for an offence under S. 499 I. P. C. The Registrar in such proceedings is not a Court. (1912) M. W. N. 473=23 M. L. J. 50=13 Cr. L. J. 508=15 Ind. Cas. 652.

**—S. 499, Excep. (9)—Statements in petition for divorce.**

Allegations made by an accused *bona fide* in a petition for divorce after his wife left his house fall within Exception 9 to S. 499. 5 S. L. R. 133=13 Cr. L. J. 25=13 Ind. Cas. 217.

**—Ss. 499 and 500—Statements by party or witness in a suit or proceeding.**

A person making a defamatory statement as a party or as a witness in a judicial proceeding, which is *prima facie* defamatory, is liable to be charged under S. 500, I. P. C., irrespective of the question of perjury. Such person can be protected if he pleads and succeeds in applying any of the exceptions mentioned in S. 499. 7 P. W. R. 1911 Cr.=12 Cr. L. J. 193=10 Ind. Cas. 682.

**—S. 499, Excep. (9)—Party to suit—Privilege.**

Plaintiff to a suit is not privileged under Exception 9 to S. 499 of the I. P. C. unless the allegations in the plaint were made in good faith. 11 Cr. L. J. 594=8 Ind. Cas. 220 (All.).

**—Ss. 499, 500—Tort—Libel—Privileges of parties.**

See Tort. 19 M. L. J. 217=9 Cr. L. J. 385=1 Ind. Cas. 799 (1).

**—S. 499—Statement made by a party under S. 118, C. P. C.—Privilege.**

A party to a suit making a statement under S. 188 C. P. C. is privileged and is not liable to a prosecution for defamation on grounds of public policy. (1906) 30 M. 222.

**—Ss. 499, Excep. (9) 500—Statement made in an affidavit—Privilege.**

A person would be rightly convicted under S. 500 for making a defamatory statement *sua motu* in an affidavit if the statement made was wholly irrelevant to the enquiry to which the affidavit related. (1903) 8 C.W.N. 292.

**—Ss. 499 and 500—Plaint with defamatory statement—No absolute privilege.**

The rules of the English Common Law apply to questions of civil liability for defamation in India, but criminal liability is determined exclusively by the Penal Code. A defamatory statement whether on oath or otherwise, e.g., one contained in a plaint, falls



within S. 499 and is not absolutely privileged. 48 Cal. 388 and 40 Cal. 433, Foll. 98 Ind. Cas. 392=7 P. L. T. 587=27 Cr. L. J. 1320=A. I. R. 1926 Pat. 425.

**—Ss. 499 and 500—Defamatory pleadings—No absolute privilege.**

There is no absolute privilege in respect of defamatory statements in pleadings in India, 23 C. 867, Foll. 65 Ind. Cas. 204 (Cal.).

**—S. 500—Statement in pleadings—Privilege.**

Statements made by parties to the suit in the pleadings are not privileged and a charge for defamation is maintainable in respect of them. 23 C. 867, Foll.; 14 B. 97 diss. from. (1900) 5 C. W. N. 293.

**18 (f). Statement in suit or proceeding—  
By witness.**

**—Ss. 499 and 500 — Privileged statement —  
Statement to police officer during investigation.**

Statement made in answer to a question put by a police officer in the course of investigation made by him is privileged and cannot be made the foundation of a charge of defamation. 16 M. 235 and 41 A. 311, Foll. I. L. R. (1950) Nag. 208=1919 N. L. J. 604=51 Cr. L. J. 267=A. I. R. 1950 Nag. 20.

**—Ss. 499 and 500 — Statement in answer to  
questions put by Public Prosecutor or Magistrate.**

Where, in answer to the question put to him by the Magistrate or Public Prosecutor, a witness makes defamatory statements, he is entitled to the benefit of an initial presumption of good faith; generally speaking there would be a presumption that what the witness says is said *bona fide* in the protection of his own interest and that he would, therefore, be protected by the provisions of Excep. 9 S. 499, Penal Code. A. I. R. 1939 Rang. 371=1939 Rang. L. R. 479=41 Cr. L. J. 48=184 Ind. Cas. 566.

**—Ss. 499, Expl. (9)—Statements in answer to  
Police.**

Police requisition under S. 161, Criminal P. C.—Defamatory statements in the answer are privileged and come under Excep. 9 to S. 499. 1938-1 M. L. J. 810=47 L. W. 136=1938 M. W. N. 217.

**—Ss. 499 and 500—Witness—Privilege.**

The English rule of absolute privilege to a witness in respect of words spoken by him in course of judicial proceedings does not obtain in India. A. I. R. 1935 Sind 81=36 Cr. L. J. 881=156 Ind. Cas. 219.

**—Ss. 499 and 500—Imputation of miscarriage—  
Defamation.**

To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation because the person who makes the statement would have reasonable belief that such imputation would harm the reputation of the woman in case she was not married and if such statement is made in a witness-box and especially so in examination-in-chief when the character of the woman is not a fact in issue, the witness is not protected by S. 132, Evidence Act, unless the Judge

himself asked the question. 1930 A. L. J. 1121=129 Ind. Cas. 707=A. I. R. 1930 All. 493.

**—S. 499, Excep. (1) and (9) — Witness — No absolute privilege.**

A witness has not absolute privilege as regards the statements made by him but has only a qualified privilege under Excep. 9 or Excep. 1 to S. 499. 11 Mad. 477, not Foll. 116 Ind. Cas. 337=52 Mad. 432=29 M. L. W. 210=2 M. Cr. C. 8=1929 M. W. N. 84=30 Cr. L. J. 613=13 A. I. Cr. R. 21=A. I. R. 1929 Mad. 236=56 M. L. J. 570.

**—Ss. 499 and 500 — Irrelevant and malicious  
statement by witness—Offence.**

A witness, who being actuated by malicious motives makes a voluntary and irrelevant statement, not elicited by any question put to him while under examination, to injure the reputation of another commits an offence punishable under S. 500, I. P. C., and he cannot claim the privilege allowed to a witness by S. 132, Evidence Act. 105 Ind. Cas. 820=28 Cr. L. J. 996=9 A. I. Cr. R. 204=A. I. R. 1928 Nag. 58.

**—S. 499, Exception 1—Statement by a witness  
in judicial proceeding — Truth—No offence —  
Privilege.**

A statement in order to come under the first exception to S. 499 of the Penal Code must be true in fact. If a statement made by a witness in a judicial proceeding is true and also relevant to the matter under investigation, it is for the public good that it should be made. 40 All. 271=16 A. L. J. 201=19 Cr. L. J. 231=43 Ind. Cas. 823.

**—S. 499—Defamation—Witness—Liability of.**

A witness who makes a defamatory statement in a judicial proceeding, is not exempted from criminal liability under S. 499, I. P. C., unless the statement comes within exceptions. 34 P. R. 1889 Cr. 14 P. R. 1893; 26 A. 685 Foll. 11 M. 477, 16 M. 235, 30 M. 272, 17 B. 127, 17 B. 573, 27 C. 262, not Foll. 5 P. R. (Cr.) 1913=31 P. W. R. Cr. 1912=244 P. L. R. 1912=13 Cr. L. J. 494=15 Ind. Cas. 494.

**—S. 500—Privilege—Defamatory statement in  
deposition, when privileged — Evidence Act,  
S. 132.**

A remark made by a witness in the box, wholly irrelevant to the matter of enquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purposes, would not be privileged. (1905) 9 C. W. N. 911=2 C. L. J. 105=32 C. 756.

**—S. 499—Defamation—Witness—Evidence Act,  
Ss. 105, 132 — How far witness protected when  
giving evidence.**

If a witness whilst giving evidence makes statement concerning any person which amounts to defamation, he may be prosecuted under S. 499 in respect of such statement, and it lies upon him to show that the statement which he has made falls within one or other of the exceptions to S. 499, or that he is protected from prosecution by the proviso to S. 132 of the Evidence Act, 1872. So, held by Knox, Ag. C. J., and Aikman, J., Richards, J., dissentiente.



**Per Richards, J.**—A prosecution for defamation under S. 499 will not lie against a witness in respect of any statement made by him in the course of giving evidence, even if such statement may be not relevant to the matter under inquiry. 11 B.L.R. 301 followed. 1907 A.W.N. 235=4 A.L.J. 605=29 A. 685.

**—Ss. 499 and 500—Witness—Privilege—English Law.**

The English rule of absolute privilege to a witness in respect of words spoken by him in course of judicial proceedings does not obtain in India. A.I.R. 1935 Sind 81=36 Cr. L.J. 881=156 Ind. Cas. 219 (D.B.).

**18 (g). Statement in suit or proceeding—Private complaint.**

**—Ss. 499 and 500—Defamation by witness—Sanction.**

The provisions of S. 195, Criminal P.C., do not apply to defamation. A person, who is defamed by a witness when in a witness-box, is at liberty to file a complaint against his defamer under the provisions of Penal Code. A.I.R. 1942 Mad. 19=54 L.W. 445= (1941) 2 M.L.J. 618=1941 M.W.N. 1076=43 Cr.L.J. 441=I.L.R. (1942) Mad. 158=198 Ind. Cas. 809.

**—Ss. 499 and 500.**

Criminal case—Complainant's witness making defamatory statements against accused—Accused filing defamation complaint against the witness after the examination and cross-examination of the witness:

**Held**, that the accused is entitled to file a complaint of defamation and the filing of such a complaint does not amount to the contempt of Court. A.I.R. 1939 Oudh 225=1939 O.W.N. 467=40 Cr. L.J. 569=1939 A.W.R. 79=181 Ind. Cas. 575.

**—Ss. 499 and 500—Criminal P. C., Ss. 195, 476—Statements constituting offence under S. 500 made by person during proceedings in Court—Private complaint, if maintainable.**

There is no provision of the law by which the Court can refuse to permit a prosecution under S. 500 where the facts appear to justify such a prosecution, because the proceedings have not been initiated under S. 476, Criminal P.C. by the time before which the offence is alleged to have been committed and because the prosecution is designed to evade provisions of S. 195, Criminal P. C. The guilt or innocence of the accused must be decided in accordance with the evidence in the case and provisions of S. 499 of the Penal Code. A.I.R. 1938 Cal. 527=42 C.W.N. 674=39 Cr. L.J. 730=176 Ind. Cas. 572.

**—S. 500—Facts constituting offence also under S. 182—No sanction as required by S. 195, Criminal P. C., obtained—Complaint under S. 500, if should be dismissed.**

There is no exception to S. 499, Penal Code, that when the defamation is made in a statement to a public servant or in Court proceedings, by virtue of which the offence was punishable under S. 182 or S. 211, Penal Code, or some other section, then no prosecution under S. 500 would lie. Consequently, a complaint under S. 500 cannot be dismissed even if the same facts constitute also an offence under S. 182 and no sanction as required by S. 195, Criminal P.C., is obtained.

A.I.R. 1938 Rang. 232=39 Cr. L.J. 663=1938 Rang. L.R. 404=175 Ind. Cas. 915 (F.B.).

**—Ss. 499 and 500—Private complaint against witness by person not party to proceedings.**

A person giving evidence in a Court of law is not entitled to an absolute privilege in respect of the statements which he makes and, consequently, he is not immune from a complaint of defamation by reason of words uttered on oath in the witness box. It cannot be held that in the case of a person who alleges that he has been defamed and has not been a party to the proceedings at all, cannot move a Magistrate to entertain a complaint in respect of defamation without moving the Court in which the statement was made to make a complaint under S. 195, Criminal P. C., in respect of perjury committed before it. No doubt the Courts should be slow to admit complaints of defamation where the circumstances are such that the accusation is really one of perjury in which the Court should be moved to make a complaint. But this will not apply where the party who alleges that he has been injured was not a party to the proceedings at all, and the complainant is asking for the redress of a personal grievance. A.I.R. 1937 Nag. 138=20 N.L.J. 33=38 Cr. L.J. 775=I.L.R. (1937) Nag. 425=169 Ind. Cas. 429.

**—Ss. 499 and 500—Contempt of Court.**

Where, in a Court of the Magistrate, a person states in his answers to the interrogatories served on him that the Chief Reader had friendly relations and influence over the Court which acted dishonestly and imposed a fine of Rs. 40, the statement is defamatory against the presiding officer which is a criminal offence under Penal Code, and for which the officer concerned has a remedy by way of filing a complaint:

**Held**, in the above case that the High Court would not take cognizance of the offence as one falling under the Contempt of Courts Act. A.I.R. 1935 All. 896=36 Cr. L.J. 967=1935 A.W.R. 934=1935 A.L.J. 950 (1)=156 Ind. Cas. 542.

**—Ss. 499 and 500—Power of Court—Defamation by party in legal proceedings.**

There is nothing in the Penal Code which prevents a Court from taking cognizance of the offence of defamation where it has been committed by a party in legal proceedings. 84 Ind. Cas. 58=16 S.L.R. 150=26 Cr. L.J. 234=A.I.R. 1921 Sind 92.

**—S. 499—Questions to complainant in witness-box—Alleged defamation—Case still pending—Complaint by witness against party on whose behalf questions were put—Maintainability.**

A complaint of defamation against a party to a criminal proceeding, in respect of questions to the complainant, alleged to be defamatory, by the advocate of the party complained against, is premature, when the case is still pending and it is not known what view the Court will express on the credibility or otherwise of the witness (complainant). This is all the more so, when the actual questions are not before the Court and only the answers are available. 48 Cr.L.J. 997=A.I.R. 1948 Pat. 56.

**—Ss. 499 and 500—Witness—Complaint before Court expresses opinion on his evidence.**

No complaint for defamation against a witness should be permitted until the Court before whom the witness



gave evidence in answer to questions put to him which are relevant to the inquiry has expressed its opinion on such evidence. A.I.R. 1934 Sind 114=36 Cr. L.J. 78 =28 S.L.R. 251=152 Ind. Cas. 346.

—S. 503.

See also: S. 506.

—S. 503—Ingredients of the offence under—Speech directed against police force stationed at a particular locality in a district—Members of that force, if should have been actually frightened—Presence of such members among the audience, if should be known to the speaker.

S. 503, I. P. Code, would be inapplicable unless the speech alleged to constitute criminal intimidation threatens injury to the person reputation or property of an individual or group of individuals. Whether as a matter of fact any one was actually frightened or not, cannot affect the question of the liability of the speaker under S. 503. Nor is it necessary for the speaker to know that any member or group of persons who are intended to be frightened by the speech was present among the audience. It is the intention of the speaker that has to be considered in deciding as to whether what he stated comes within the mischief of S. 503.

Where a speech was directed against a particular police force stationed in a particular locality in a district and the purport of the speech was to cause fear in the minds of the group of police officials stationed in that district or place:

**Held,** The speech was addressed to a defined and ascertained body of individuals and was intended to frighten them with injury to their person, reputation or property and hence came within the mischief of S. 503 of I. P. Code. 61 L.W. 776=1948 M.W.N. 681=(1948) 2 M.L.J. 383=A.I.R. 1949 Mad. 233=50 Cr. L.J. 258.

—Ss. 503 and 506—Offence punishable under—Threat of social boycott if certain persons continued to work as agricultural labourers for their masters with whom the other labourers were trying to secure better terms.

Where some agricultural labourers are trying to improve their lot by bargaining with the mirasdars to obtain better conditions and trying to persuade their fellow labourers not to work until they had secured better terms, they are entitled to enforce social boycott against those who decided to work. It would not amount to an injury within the meaning of S. 44, I. P. Code. A threat of social boycott is not an offence punishable under S. 506, I. P. Code. 1948 M.W.N. 814 (1)=A.I.R. 1949 Mad. 546=3 A.I.Cr.D. 448=50 Cr. L.J. 797=61 L.W. 785=(1948) 2 M.L.J. 522.

—Ss. 503 and 506—Threat of social boycott, whether offence.

The threat of a social boycott is not a threat to a man's person or reputation unless it is accompanied by something more directly affecting his character as an individual. A.I.R. 1931 Lah. 288=32 Cr. L.J. 1176=134 Ind. Cas. 495 (1).

—Ss. 503 and 506—Scope of—Whether applies to action of solicitors endeavouring to protect their lay clients—Materials to show threat should be produced—Firm, if can commit offence under S. 506—Held, on facts, letter did not amount to intimidation.

Section 506, I.P.C., cannot be applied to the action of professional advisers endeavouring to protect their lay clients from what they are of the opinion, amount to criminal attacks of a defamatory character. Before process can issue at the instance of a party, he must produce some materials to show that the opposite party threatened him with injury to his person, reputation or property. A firm cannot commit an offence under S. 506.

After the accused was no longer in the employ of a company, he adopted the course of circularising a number of Firms and Government Departments making *prima facie* defamatory accusations against his former employers. For the purpose of self-protection, this Firm instructed their solicitors in regard to those circulars and in the usual course, acting with perfect propriety they warned the respondent of the consequences of continuing to issue these statements; but they were prepared, so they said in one of their letters, to refrain from instituting criminal proceedings against him if he was prepared to give an undertaking not to continue these circulars. So far from giving this undertaking, he invited prosecution and consequently, the firm, by their representatives, instituted a complaint against the accused under S. 500, Penal Code. A few weeks before this was done and whilst the correspondence with regard to the defamation case was still going on, by way of a counterblast, accused proceeded to launch a complaint under S. 506 against the firm represented by their directors.

**Held,** that the letter on which the action under S. 506 was based could not be regarded as a threat within the meaning of S. 503 and the proceedings ought to be quashed. A.I.R. 1937 Cal. 367=41 C.W.N. 831=38 Cr.L.J. 924=170 Ind. Cas. 367.

—S. 503.

A notice for service was taken to the accused by a constable and when the accused proceeded to write something on it, the constable said that nothing should be written on the back of the notice, except signature in acknowledgment of service. The accused threw away the notice and threatened the constable by saying, "go away, otherwise I shall break your hands and feet. I have seen many such notices".

**Held,** that the constable's insistence that the applicant should not write anything on the notice except the acknowledgment of service irritated the applicant who used certain words amounting to an idle threat uttered in anger and that it was impossible to construe the threat as one uttered for inducing the constable to make a false report. The accused could not be considered to be guilty of an offence under S. 189 but that the accused's conduct clearly amounted to criminal intimidation and should be punished as such under S. 503, Penal Code. A.I.R. 1936 All. 171=37 Cr.L.J. 212=1936 A. L. J. 195=1936 A. W. R. 28=160 Ind. Cas. 17.

—Ss. 503 and 506—Conviction under S. 506—Revision.

Where it was found that the complainant was intimidated by the accused with language that fell within S. 503, Penal Code and that the complainant was alarmed by the threat used towards him, and accused was convicted under S. 506.

**Held,** that the conviction could not be interfered with in revision. A.I.R. 1933 Lah. 497=34 Cr. L.J. 1167=34 P.L.R. 968=146 Ind. Cas. 17 (1).



## —Ss. 503, 43, 44.

Proposal by Managing Committee of Society to refer to General Body act done by one of the members cannot be regarded as a threat to cause illegal harm. A.I.R. 1933 Sind 196=27 S.L.R. 214=34 Cr.L.J. 884=145 Ind. Cas. 136.

## —Ss. 503 and 506—Compelling trader to execute agreement not to import foreign cloth on threat of picketting—Offence.

The accused, who were desirous of preventing dealers in cloth from importing foreign cloth for sale, served a notice on a shop-keeper calling upon him to execute an agreement not to import foreign cloth for sale at his shop for a period of at least one year and to pay a fine of Rs. 10 if he failed to carry out the agreement and informing him that if he did not execute such an agreement, his shop would be picketted. They were charged under S. 506, Penal Code.

Held, that the threat of the accused amounted to an injury to property, and the accused were guilty of an offence under S. 506, Penal Code. A.I.R. 1931 All. 263=32 Cr.L.J. 465=53 A. 407=130 Ind. Cas. 193.

## —S. 503—Offence under — Municipal Commissioner threatening a butcher that if he purchased a cow, he would have him sent to jail and make his living in the town impossible—Offence.

Where a Municipal Commissioner threatened a butcher that if he bought a cow, he would have him sent to jail and that he would make it impossible for him to continue to live in the town.

Held: that the use of the words did constitute criminal intimidation as defined in S. 503. 102 Ind. Cas. 557=8 A. I. Cr. R. 148=8 L. R. A. Cr. 119=28 Cr.L.J. 589=A.I.R. 1927 All. 783.

## —S. 503—Notice on a person by a self-constituted Arbitration Court that an ex-parte decree would be passed against him, if he did not attend.

Per Newbould and Buckland, JJ. (Suhrawardy, J. contra). The President of a self-constituted Arbitration Court caused a notice to be served over signature to a certain person requesting the latter to be present on a given date and arrange for amicable settlement of a certain claim. The notice stated that if the defendant did not attend and answer the claim on that date, the suit would be decreed ex-parte:

Held, a threat of a decree is a threat of harm to an individual in his person, reputation or property. That the tribunal is incompetent to execute its decree is immaterial. S. 503, I. P. C. says nothing about the capacity of the person making the threat to carry it into execution. Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial.

Under Section 44, I. P. C. injury denotes harm illegally caused. By no legal process or means could this tribunal make or give effect to such a decree but as it was the intention of the notice to cause the belief that a decree would be made if he failed to comply with it therefore in that the notice threatened the complainant with such a decree, it threatened the complainant with harm to be caused illegally. The petitioner, therefore, committed the offence of criminal intimidation.

tion. 72 Ind.Cas. 508=27 C.W.N. 479=37 C.L. J. 526=24 Cr.L.J. 396=A.I.R. 1923 Cal. 590.

## —Ss. 503 and 506.

In order to render a person liable under S. 506, the threat to injure must denote that harm to one's person property or reputation is to be caused illegally. (1902) 7 C.W.N. 116=30 C. 418.

## —S. 504.

## Synopsis.

1. Applicability and scope
2. Charge
3. Offence under
4. Sentence.

## 1. Applicability and scope.

## —S. 504—Applicability—Provocation to cause other offence than breach of peace.

A person is within the ambit of S. 504 not only if the provocation offered by him is of such a character as to cause the person provoked to commit a breach of peace but even if it is of such a nature as to cause him to commit any other offence: A.I.R. 1927 Lah. 129 Foll. 32 Bom. L.R. 103=1930 Cr.C. 195=A.I.R. 1930 Bom. 120.

## —S. 504—Provocation likely to cause the person provoked "to commit any other offence" than breach of the peace.

A person also comes within the ambit of S. 504, I.P.C., if the provocation offered by him is of such a character as to cause the person provoked "to commit any other offence," and hence a complaint made under that section should not be dismissed in limine on the ground that the provocation offered was not likely to cause the breach of public peace. 99 Ind. Cas. 604=28 Cr.L.J. 172=7 A.I.Cr.R. 324=A.I.R. 1927 Lah. 129.

## —S. 504—Object and scope.

The offence contemplated in S. 504, is a serious one. It is obviously intended to deal with persons who are as responsible for breaches of peace or the commission of offences as those who openly abet or incite them. A.I.R. 1942 Mad. 672=55 L.W. 421=(1942) 2 M.L.J. 101=1942 M. W. N. 437=44 Cr. L. J. 10=203 Ind. Cas. 321.

## —S. 504—Insulting letters.

There is nothing in S. 504 which confines the insult to spoken words and would not cover words written in a letter. 32 Bom. L. R. 103=1930 Cr.C. 195=A.I.R. 1930 Bom. 120.

## 2. Charge.

## —S. 504—Charge.

Words constituting insult must be set out. 1940 M.W.N. 389.

## 3. Offence under.

- a. Essentials
- b. What amounts to
- c. What does not amount to.



## 3 (a). Offence under—Essentials.

## —S. 504—Gravamen of offence under.

The gravamen of the offence under S. 504 of the Penal Code lies in the utterer provoking the victim by his words to commit an immediate breach of the peace. That can only occur if he utters the words in the presence of the victim or has them conveyed to him by letter or messenger, and not in a case where the victim is told about them without the utterer asking them to be conveyed to him. 1949 M. W. N. 837 = 4 A.I. Cr. D. 106 = A.I.R. 1950 Mad 273 = 51 Cr. L. J. 704 = (1949) 2 M. L. J. 767.

—Ss. 504 and 95—Ingredients of the offence under S. 504—Letter written by father from the mofussil to daughter in Madras constituting insult to her and to her husband—If constitutes an offence under S. 504—Desirability of applying S. 95, I. P. Code, to cases of this kind.

A mere insult, however gross it may be, is not sufficient to bring the case within the provisions of S. 504, I. P. Code.

To constitute an offence under S. 504, I. P. Code, there must be a likelihood of the breach of the peace as a result of the provocation caused by the alleged insult, and the likelihood of the breach of the peace must be immediately after the provocation or so soon afterwards that it must form part of *res gestae*.

A letter written by a father from the mofussil to his daughter in Madras though it may constitute an insult to the daughter and her husband would not constitute an offence under S. 504, I. P. Code.

Apart from this, it is a case in which the Magistrate should apply the principle of S. 95, I. P. Code., as it is a domestic quarrel between the father and daughter. 62 L.W. 287 = 1949 M.W.N. 332 = A.I.R. 1949 Mad. 760 = 51 Cr.L.J. 173 = (1949) 1 M.L.J. 445.

—S. 504—Ingredients of offence—Charge—Contents of—Actual words, gestures or attitudes—Necessity for record of.

Where the insult or provocation given consists in gestures or attitudes, the Court must obviously record what those gestures or attitudes were. Where it consists of words, the Court must also record what those words were either in the charge, when a charge is framed, or in the record of the evidence. Before there can be a conviction under S. 504, I. P. Code, it must be shown that the accused used the words attributed to him intending or knowing it to be likely that it would result in such provocation as would cause the person to break the peace, etc. In the absence of all mention as to what the words were which were used, the conviction cannot be upheld as it would be impossible to establish the requisite intention or knowledge. 3 A.I. Cr. D. 288.

—S. 504—Ingredients of offence under—Use of abusive words—Mere finding that abusive words were used without setting out those words—Conviction not sustainable.

To support a conviction under S. 504 of the Penal Code there should be (i) an intentional insult and (ii) the offender should have by such insult given provocation to any person intending or knowing it to be likely that such provocation will cause the latter to break the public peace or to commit any other offence. Where the act alleged to be intentional insult is the

use of abusive words, it would be necessary to know what those words are in order to decide whether the using of those words amounted to intentional insult.

Where the Bench Magistrate in convicting the accused had not set out the abusive words in their judgment but were merely content with finding that the accused had abused the complainant;

Held, that the conviction, cannot be upheld because that finding was not sufficient by itself to warrant a conviction under S. 504, I. P. Code. 60 L.W. 271 = 48 Cr.L.J. 970 = A.I.R. 1948 Mad. 9 (2) = 1947 M.W.N. 279 = (1947) 1 M.L.J. 359.

—S. 504—There must be publication to person insulted.

For the offence under S. 504, Penal Code, it is necessary that the insult should be delivered to the person insulted with the intention that he may be there and then provoked to commit an offence but where there is no such publication, no offence under S. 504 is committed. A.I.R. 1939 Pat. 27 = 39 Cr.L.J. 980 = 5 B.R. 40 = 19 P.L.T. 892 = 177 Ind. Cas. 896 (2).

—S. 504—Sensitive feeling of offended person.

The offence under S. 504, Penal Code, does not depend upon the mere sensitive feeling of the offended but upon the intention or knowledge of the offender. Such an intention may be inferred from the circumstances attending insult. A.I.R. 1935 Cal. 736 = 61 C.L.J. 205 = 37 Cr.L.J. 133 = 159 Ind. Cas. 527.

—S. 504—Essentials of offence—Intention or knowledge.

Section 504, Penal Code, provides a remedy for abusive and insulting language, and it requires intention to insult and thereby to give provocation to the person insulted and an intention that such provocation should cause or the knowledge that that provocation is likely to cause the person so insulted to break the public peace or commit any other offence. A.I.R. 1935 Sind 107 (1) = 36 Cr.L.J. 1461 = 158 Ind. Cas. 608.

—S. 504—Elements of insult—Intention of accused—Vulgar abuse—Offence of trivial nature.

To constitute an offence under S. 504, Penal Code, it is necessary to show that the accused intentionally insulted and thereby provoked some person intending or knowing it likely that such provocation would cause him to break the public peace or commit any other offence.

If abusive language is used in such circumstances that the Court comes to the conclusion that it cannot possibly have been intended, and cannot have been understood by those to whom it was addressed to have been intended, to be taken literally, the language cannot be held to amount to an intentional insult. In such circumstances, even if there be a technical offence under S. 504, the circumstances are covered by the provisions of S. 95, and the accused is entitled to an acquittal. A.I.R. 1932 Bom. 193 = 34 Bom. L.R. 282 = 56 Bom. 196 = 33 Cr.L.J. 463 = 137 Ind. Cas. 186.

—S. 504—Abusive language—Intention.

If abusive language is used intentionally and is of such a nature as would, in the ordinary course of events, lead the person insulted to break the peace or to commit any other offence under the law, the case



is not taken away from the purview of S. 504, Penal Code, merely because the insulted person exercised self-control or being terrified by the insult, or overawed by the personality of the offender, did not actually break the peace or commit any other offence. A.I.R. 1912 Lah. 480=33 Cr.L.J. 548=33 P.L.R. 695=14 Lah. 92=138 Ind. Cas. 120.

—S. 504—Essentials—Intention to cause breach.

Mere abuse unaccompanied by an intention to cause a breach of the peace or knowledge that a breach of the peace is likely does not come within S. 504. On the other hand an insult which under ordinary circumstances would be likely to provoke the person insulted to cause a breach of the peace is within the provisions of the section although the person insulted may have been reduced to a state of abject terror so as to render improbable that he would commit a breach of the peace. 32 Bom. L.R. 103=1930 Cr.C. 195=A.I.R. 1930 Bom. 120.

—S. 504—Intention to provoke breach of public peace or knowledge of its probability.

An insult is no less intentional because it is incidental to another insult or even to another statement or proceeding which is not insulting. But to insult another intentionally is not an offence punishable under Sec. 504 unless the intention is to provoke the person insulted into breaking the public peace, by assaulting him or getting him assaulted or reviling him in loud and angry tones or in any other way or unless there is knowledge that such a disturbance is a probable result of such an insult. 81 Ind. Cas. 903=7 N.L.J. 124=25 Cr. L.J. 1079=A.I.R. 1924 Nag. 121.

—S. 504—Effect of abuse in ordinary circumstances—Temperament of individual—If material.

In dealing with S. 504 the Court has not to judge the temperament or the idiosyncrasies of the individual concerned. It should try to find out what in the ordinary circumstances would have been the effect of the abusive language used. Where there is no doubt that the abusive language used might ordinarily have resulted in broken limbs or at least in an affray and consequent breach of the peace an offence under S. 504 is committed. 31 P. L. R. 892=127 Ind. Cas. 860=A.I.R. 1930 Lah. 344 (2).

—S. 504—Provocation to the person insulted—Breach of peace by him not necessary.

Insult under S. 504, which may be inferred from tone and manner of spoken words, consists in an intentional act causing provocation thereby, with the knowledge that the provocation would under ordinary circumstances cause a breach of the peace to be committed, though the person insulted does not commit a breach of the peace in the particular case. 24 C.L.J. 137=21 C.W.N. 95=18 Cr. L.J. 17=37 Ind. Cas. 849.

—S. 504—Insult—Nature of—Sufficient to cause one to lose temper and say or do something violent—Offence.

To constitute an offence under S. 504 it is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. The public peace can be broken by angry words as well as by deeds. (1902) 4 Bom. L.R. 78.

3 (b). Offence under—What amounts to.

—Ss. 504, 500 — Election meeting — Person belonging to rival candidate attending uninvited and calling the candidate on whose behalf meeting was called "liar, barbarous and ungentlemanly"—Offence, held one under S. 504 and not S. 500.

In the course of election campaign, a meeting was organised on behalf of the complainant or his adherents in the village which appertained to his estate. The complainant reached the village and was taken in procession to the place of the meeting. But he found that the accused and the rival candidate for whom he was working had already occupied the two chairs, although they were not invited to attend the meeting. When the complainant came near, the accused and his adherents shouted "Go back. Down with zamindari" and tried to create a disturbance. The complainant thereupon wanted to leave the place as he thought that his presence would further annoy the accused, who was bent upon creating a disturbance, but the raiyats requested the complainant not to go away. The zamindar then stood on the table to address the villagers numbering about two thousand. The accused then stood on a chair and said that the zamindar was a liar, ungentlemanly, barbarous and tyrannical:

Held, that there was clear intention to insult the complainant. The accused ought to have known that the insult would be likely to lead to a breach of the public peace, which was avoided owing to the most commendable behaviour of the complainant. Though the words used were not defamatory, they amounted to insult within the meaning of S. 504 and the conviction under S. 500 should be altered to one under S. 504. A.I.R. 1945 Pat. 450=11 Cut. L.T. 33.

—S. 504—Word 'behoda' addressed to president of meeting.

The word 'behoda' is an offensive expression particularly when it is uttered in the course of a defence.

Where it appeared that the word 'behoda,' was addressed to a person occupying the position of the president of the meeting and it was used with an intention to insult him knowing that he will be provoked to cause breach of peace.

Held, that the conviction in the case was proper under S. 504 Penal Code. A.I.R. 1934 Nag. 239=17 N. L. J. 131=35 Cr. L.J. 1420=151 Ind. Cas. 777 (2.)

—S. 504—To police officer—Accused without justification using the expression *Pahle munh se bakko* towards Police come to serve notice on him—Offence.

Where an accused person without any justification used the offensive expression *pahle munh se bakko* towards a police official come to serve a notice upon him as instructed by the district authorities:

Held, that the use of the expression was intentionally insulting and likely to provoke a breach of the peace and hence he was guilty under S. 504. 104 Ind. Cas. 437=28 Cr. L.J. 821=A. I. R. 1927 Lah. 702.

—S. 504—Pulling by beard—Offence.

Whatever the previous provocation may be, a man who pulls the beard of a mahomedan in the public street, intentionally insults him and thereby causes him provocation, knowing that such provocation is



likely to cause the victim to break the public peace. 86 Ind. Cas. 79=23 A.L.J. 73=26 Cr. L.J. 703=6 L. R. A. Cr. 101=A.I.R. 1925 All. 318.

—S. 504—Abuses in mosque.—Accused entering for prayer—No offence.

The petitioner had gone to mosque for midday prayer as usual; when the service was over he was asked by some others why he had on former occasions abused the moulvi and the congregation. On his attempting a denial, witness was sent for and an altercation followed, the petitioner then began to abuse all and sundry employing obscene epithets and uttering threats.

Held, that the intention of wounding the feelings of the moulvi and congregation was quite clear but the alleged "trespass" was not and that the conviction under S. 297 was wrong.

Held further, that the mere fact that the petitioner was a trustee does not take this case out of the purview of S. 297, and in the circumstances an offence under S. 504 was committed and that being a cognate offence conviction was altered under that section. 81 Ind. Cas. 41=1 Rang. 690=25 Cr.L.J. 553=A.I.R. 1924 Rang. 106.

—S. 504—Imputation of 'badmashi'.

The offence of calling a man *beiman* and *badmashi* would fall under Section 504 and not under Section 500. 4 Lah. L.J. 480=51 P.L.R. 1922=A.I.R. 1922 Lah. 459.

—S. 504—Barrister not privileged.

A barrister is not privileged when his conduct is likely to cause an assault. 19 Cr.L.J. 666=45 Ind. Cas. 1002 (Nag.).

—S. 504—Abuse and threat to strike.

An abuse and threat to strike offered by persons while being remonstrated with, for intentionally preventing the complainant from irrigating his crops, is an insult causing a breach of the peace which under S. 504 may be of spoken words only or of conduct or actions of men. 1 Pat. L.W. 536=18 Cr.L.J. 463=39 Ind. Cas. 303.

3 (c). Offence under—What does not amount to.

—S. 504—Offence under—Mere vulgar abuse.

Mere vulgar abuse does not amount to an offence under S. 504, Penal Code and even if it is a technical offence, it would be covered by S. 95 of the Penal Code barring cognizance by Courts in view of their triviality 51 Cr.L.J. 764=A.I.R. 1950 M. B. 25.

—S. 504—Gross insult.

An insult, even if a gross insult, is not an offence in itself under S. 504. What is punished under this section is something very much graver than that. A.I.R. 1942 Mad. 672=55 L.W. 421=(1942) 2 M.L.J. 101=1942 M.W.N. 437=44 Cr.L.J. 10=203 Ind. Cas. 321.

—S. 504—Accused in speech abusing zamindarini and her agents while addressing on inam legislation.

Where the accused abuses the *zamindarini* and her agents in the course of his speech on a certain inam

legislation but neither the *zamindarini* nor her agents are present at the meeting, the conviction of the accused under S. 504, Penal Code, is unsustainable. A.I.R. 1941 Mad. 683=1941 M.W.N. 373=(1941) 1 M.L.J. 610=53 L.W. 566=42 Cr. L.J. 827=196 Ind. Cas. 171.

—S. 504—Shouting "shameless fellow, I will shoe you," during discussion.

Shouting the words "shameless fellow, I will shoe you," during discussion with another person does not amount to an offence under S. 504, Penal Code. A.I.R. 1940 Mad. 681=1940 M.W.N. 390 (2)=(1940) 1 M.L.J. 655 (1)=51 L.W. 516=42 Cr. L.J. 48=190 Ind. Cas. 630.

—S. 504—Mere vulgar abuse—"De minimis non curat lex."

Held, that the words uttered being mere vulgar abuse, the complaint under S. 504, Penal Code, should have been dismissed at the outset on the principle "*De minimis non curat lex*," which is contained in S. 95, Penal Code. (1936) 160 Ind. Cas. 420 (1)=18 N.L.J. 170=37 Cr. L.J. 296.

—S. 504.

Retort by the manager of a theatre to the angry audience that "if you ask for money, we will beat you with shoes," held did not amount to an offence. 1935 M.W.N. 819.

—S. 504—Accused saying to Assistant Sub-Inspector, "You are a tyrant. Justice cannot be expected from you".

The accused was convicted under S. 504, Penal Code, for saying to an Assistant Sub-Inspector of Police during an investigation, "You are a tyrant. Justice cannot be expected from you":

Held, that it is absurd to suggest that words such as these are likely to cause a Police Officer of the rank of Assistant Sub-Inspector to commit a breach of the peace and although the act of abusing Police Officers is most reprehensible, it does not, in general, necessarily involve an offence under S. 504, Penal Code. A.I.R. 1935 Pesh. 122=36 Cr.L.J. 1210=157 Ind. Cas. 753.

—S. 504—Complainant engaged in dispute with owner of shop and asked to leave shop.

Where the complaint, in substance is that the complainant, a Police Sergeant, went to a shop and there became engaged in a dispute with the owner as a result of which he was asked to leave the shop, a conviction under S. 504 is not justifiable. A.I.R. 1935 Sind 107 (1)=36 Cr. L.J. 1461=158 Ind. Cas. 608.

—S. 504—Using contemptuous name—Arora being called a kirar—No offence.

The word *kirar* may sometimes no doubt have a somewhat contemptuous signification. *Aroras* are *kirars*, though no doubt they may not be pleased to be called so. Calling an *arora* a *kirar* is no offence under S. 504. 65 Ind. Cas. 635=23 Cr. L.J. 171=A. I. R. 1922 Lah. 455.

—S. 504—Intentional insult—Discourtesy and bad manners, whether amount to insult.

To constitute offence under S. 504, insult must be caused intentionally there by provoking with intent



that the person should break public peace. Discourtesy and bad manners do not amount to an offence under the section. 2 U.P.L.R. (All.) 124=18 A.L.J. 515=221 Cr. L. J. 451=56 Ind. Cas. 435.

—S. 504—Mere abuse not an offence.

To constitute an offence under S. 504 mere abuse will not do without an intention to cause breach of the peace or knowledge that a breach of the peace is likely to be caused. 39 Mad. 561=28 M. L. J. 505=2 L. W. 463=17 M.L.T. 398=(1915) M.W.N. 365=16 Cr. L. J. 477=29 Ind. Cas. 109.

—S. 504—Abusive language used after provocation—Entry in pleader's room—Objection to—Persistence in entering

Where the complainant who was not a pleader intruded into the pleader's room at Belgaum to see some pleader but whose presence there was objected to by another pleader, but the complainant persisted in intruding whereupon the other pleader used abusive language, held, that the pleader was protected by S. 95 taking into account his subsequent apology. 15 Bom.L.R. 1039=15 Cr.L.J. 14=22 Ind. Cas. 158.

4. Sentence.

—S. 504—Punishment—Substantial fine.

Where a person, while under the influence of liquor, abuses another and is convicted under S. 504, the most appropriate punishment is a substantial fine looking to the means of the accused. 21 P. W. R. Cr. 1911=12 Cr.L.J. 435=11 Ind. Cas. 619.

—S. 505.

Section 505 (c) is intended to deal with real classes and real communities and not purely imaginary people. I.L.R. (1937) 1 Cal. 309=40 C.W.N. 1218.

—S. 506.

See also: Penal Code, S. 503.

—S. 506—Offence under—Acquiescence or consent of party—Whether can invest Court with jurisdiction other wise not possessed—Plea of want of jurisdiction not raised during trial—Effect.

Any acquiescence or even consent cannot invest a Court with jurisdiction of which it is not otherwise possessed. Consequently, where an accused is charged under S. 506, Penal Code, an offence not triable by Bench Magistrates invested with Second Class powers, the mere fact that no objection is raised against the jurisdiction of the Bench Magistrates during the trial does not invest the Bench Magistrates with jurisdiction to try the offence. A.I.R. 1932 Oudh 251=9 O. W. N. 319=33 Cr.L.J. 511=137 Ind. Cas. 625.

—S. 506.

Police officer raiding accused's shop in order to seize revolver in his possession—Accused firing shot at Police officer without causing hurt—Accused charged with attempt to murder under S. 307—Intention of causing death not proved:

Held, accused fired with an object to cause intimidation, and if criminal intimidation amounts to a threat to cause death or grievous hurt it falls under latter part of S. 506 which offence is less grave than the

offence coming under S. 307. The accused, therefore, could not be charged under S. 307 and should be convicted under lesser offence. 1931 M.W.N. 861.

—S. 506—Charge for offence under S. 341, I. P. Code—Magistrate framing charge under S. 506 also—Legality.

Where the accused are challaned under S. 341, Penal Code, only, the trying Magistrate is justified in charging them under that section as well as under S. 506, Penal Code, and his procedure in doing so is perfectly regular. 4 O.W.N. (P. C.) 283, Foll. 7 O.W.N. 1048=A.I.R. 1931 Oudh 73=32 Cr.L.J. 350=129 Ind.Cas. 166 (F.B).

—S. 506—Charge under—Discharge of an offence under S. 500.

Where process was issued against an accused under S. 506 and he was tried under that section, but he was discharged under S. 500 his plea under S. 506 not being recorded. Held, that his plea under S. 506 ought to have been recorded, that his discharge under S. 500 was without jurisdiction, and that the proceeding were irregular. 13 Cr.L.J. 488=15 Ind. Cas. 488 (Cal.)

—S. 506—Deterrent punishment—Infliction—of Principles.

It is of some importance that the theory of deterrent punishment should not be loosely put into practice, and that the principles upon which alone a deterrent penalty should as a rule be inflicted clearly, comprehended. Deterrent punishments are now regarded only as of utility under exceptional circumstances. When waves of imitative crime such as for example garrotting, gang robbery, (or dacoity as it is called here) and forgery of counterfeit coin or notes commence to sweep over a State judicious and increasing severity may properly be utilised to check and deter such an inundation; again in times of public tumult when there is a danger of wide breach of the public peace or security or where a highly organised or what one may call semi-professional association of persons engineer series of offences such as swindling or burglary, deterrent punishments may be with caution advantageously inflicted. Such a category is naturally not exhaustive but illustrative only; and sound knowledge, experience and a proper sense of perspective are alone the guides which can safely be followed in concluding whether the use of such an aid to the maintenance of the order and tranquillity of a locality is properly permissible and desirable. To adjust the punishment, so as to make it appropriate and to balance it, so that it justly fits the gravity of the offence but does not shock the public conscience (and thus wrap and dull the public's social sense and appreciation of crime as evil), should be the aim. 63 Ind. Cas. 615=2 P.L.T. 596=1922 Pat. H.C.C. 14=22 Cr.L.J. 679=A.I.R. 1922 Pat. 267.

—S. 507—Proof—Evidence of hand-writing expert.

Where the evidence offered in corroboration of that of the expert is itself unsatisfactory and the expert evidence is further discounted by the fact that the impression which the questioned writing produces on the mind of one conversant with the Urdu characters is quite different from that produced by the admitted writing of the accused and there is absolutely no evidence of a circumstantial nature from which an inference of guilt can be drawn, it cannot be said that the accused was the writer of the abusive document com-



plained of and he cannot be convicted under Ss. 506 and 507, Penal Code. A.I.R. 1936 All. 165=1936 A.W.R. 119=37 Cr.L.J. 263=1936 A.L.J. 317=160 Ind. Cas. 264.

### —S. 508—Interpretation.

A mere threat at large that if a debt is not paid, then by operation of divine laws, displeasure will fall upon the debtor is not sufficient to attract S. 508, Penal Code, as that section contemplates that the person intended to be harmed will be made the object of divine displeasure by some act of the offender. A.I.R. 1944 Sind 203=I.L.R. (1944) Kar. 146=46 Cr.L.J. 149=216 Ind. Cas. 216.

### —S. 509—Indecent letter sent to a woman by post though closed in an envelope—Offence.

Where the accused sent by post to an English nurse, an unmarried woman having no previous acquaintance with the accused, a letter containing indecent overtures.

**Held**, that the accused intended to insult the modesty of the complainant and the mere fact that the letter was in a closed envelope before it reached the complainant is immaterial. 93 Ind.Cas. 247=50 Bom. 246=28 Bom. L.R. 99=27 Cr.L.J. 455=A.I.R. 1926 Bom. 159.

### —S. 509—Outraging modesty of particular woman.

In order to constitute an offence under S. 509, there must be some individual woman or women whose modesty has been outraged and though it is not necessary that individual woman should herself make a complaint, there must be an allegation that the action complained of, has insulted the modesty of some particular woman or women and not merely of any class or order or section of women, however small. 86 Ind. Cas. 968=19 S.L.R. 87=26 Cr.L.J. 904=A.I.R. 1925 Sind 271.

### —S. 509—Ingredients.

S. 509, makes intention to insult the modesty of a woman the essential ingredient of the offence. This intention was held wanting where the accused entered in the middle of the night the room of the complainant with whom he had previous acquaintance, and who used to speak to strangers and give *pan supari* to visitors. (1903) 5 Bom. L.R. 502.

### —S. 510.

Offence under S. 510 is not an offence involving a breach of the peace. The order for security under S. 106, Criminal P.C., in such a case is, therefore, unsustainable. A.I.R. 1940 Mad. 755=1940 M.W.N. 531 (1)=52 L.W. 66 (2)=42 Cr.L.J. 16=191 Ind. Cas. 240.

### —S. 511.

See also: Penal Code, S. 75.

### Synopsis.

1. Applicability of section
2. Attempt
3. Miscellaneous.

### 1. Applicability of section.

#### —S. 511—Applicability—Offences punishable with death.

Section 511 is a general section that makes punishable all attempts to commit offences punishable with transportation or imprisonment and not those punishable with death, which is a specific offence under the Penal Code. A.I.R. 1945 Lah. 334=47 P.L.R. 229=I.L.R. (1945) Lah. 403.

#### —S. 511—Offence under Bengal Food Adulteration Act.

Section 511 has no application to an attempt to commit an offence under the Bengal Food Adulteration Act. A.I.R. 1937 Cal. 710=41 C.W.N. 1213=39 Cr.L.J. 252=I.L.R. (1938) 1 Cal. 420=172 Ind. Cas. 869.

#### —S. 511—Attempt at extortion—Offence.

Section 385 does not expressly provide for the punishment of an attempt at extortion; and the limitation in S. 511 evidently relates to such offences as an attempt to commit suicide or an attempt to obtain illegal gratification which are expressly punishable by other sections of the Code. Therefore, a charge under S. 384 read with S. 511 is not bad. 98 Ind. Cas. 60=27 Cr.L.J. 1244=A.I.R. 1927 Pat. 89.

#### —S. 511—Application to special laws.

The sections of 'attempt to commit offences' may be applied to offences under special law, though the Code itself does not apply. 40 Mad. 34=4 L.W. 82=20 M.L.T. 180=(1916) 2 M.W.N. 161=31 M.L.J. 178=17 Cr. L.J. 321=35 Ind. Cas. 497.

#### —S. 511—Attempt to export opium—Exporting of opium—Parcel opened by Post Office and sent for identification of consignee.

S. 511 does not apply to the offence of attempting to export opium. The offence is therefore not punishable at law. The accused tendered a parcel of opium at the Post Office for despatch to Burma, the parcel was opened by the Postmaster at the place of despatch on account of information received and sent on to Burma by the Postal authorities marked 'doubtful' with a view to the identification of the consignee. **Held**, that the accused did not commit the offence of exporting opium under S. 9 (c) of the Opium Act as the parcel was seized by the authorities for despatch and ceased to be in the Post Office on accused's account before it left India for Burma. 2 P.R.Cr. 1911=6 P.W.R.Cr. 1911=108 P.L.R. 1911=12 Cr.L.J. 116=9 Ind. Cas. 682.

### 2. Attempt.

- (a) Essentials
- (b) What amounts to
- (c) What does not amount to.

#### 2 (a). Attempt—Essentials.

#### —S. 511—Attempt to commit offence—What amounts to—Act of preparation.

An attempt to commit an offence, as contemplated by S. 511, I. P. Code, is an act, or series of acts,



which leads inevitably to the commission of the offence, unless something, which the doer of the act or acts neither foresaw nor intended, happens to prevent it. An act done towards the commission of an offence which does not lead inevitably to the commission of the offence, unless it is followed or perhaps preceded, by other acts, is merely an act of preparation. 3 A.I.Cr.D. 277=A.I.R. 1949 Pat. 326=50 Cr.L.J. 682.

—S. 511—Attempt and preparation—Distinction—Difference between this section and S. 307.

An attempt to commit a crime must be distinguished from the preparation to commit it. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission, after preparation has been made. The question whether a certain act is merely one of preparation or one committed in the course of an attempt is a question of fact. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination in attempt as compared with preparation.

There is a clear difference between the definition of attempt in S. 511 and that given in S. 307, I. P. Code. To convict a person of an attempt to murder under S. 307 it must be shown that he has done some act with such intention that if by that act he caused death he would be guilty of murder, i.e., the act must have been capable of causing death and if it had not fallen short of its object it would have constituted the offence of murder. But under S. 511 it is only necessary to prove an act done in the attempt towards the commission of the offence. This section was never meant to cover only the penultimate act towards completion of an offence. 30 P. R. (Cr.) 1904; 14 P. R. (Cr.) 1914; 10 L. 253; I.L.R. (1940) Luck. 194; 15 A. 173 and 20 I.A. 90, fol. Pak. L. R. (1948) Lah. 154.

—Ss. 511, 420.

A man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is, therefore, not cheated. A. I. R. 1941 Oudh 3=1940 O. W. N. 819=41 Cr.L.J. 881=1940 A.W.R. 381=16 Luck. 194=190 Ind. Cas. 259.

—S. 511—Question is whether anything was effected to carry out illegal purpose.

For an offence under S. 511, Penal Code, the question is not whether the persons were preparing to commit or abetted the committing of an offence, but whether anything was effected to carry out the illegal purpose, if any. A.I.R. 1936 Rang. 358=14 R. 597=164 Ind. Cas. 522.

—S. 511.

In order to constitute 'attempt' under S. 511, the actual transaction must have begun and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt. A.I.R. 1933 Cal. 893=37 C.W.N. 1151=35 Cr.L.J. 97=61 C. 54=146 Ind. Cas. 590.

—S. 511—Attempt—Essentials—Completion of offence—If necessary.

An attempt to commit an offence is punishable under S. 511 though the final act short of actual commission of that offence has not been accomplished. 110 Ind. Cas. 812=10 Lah. 253=10 A.I.Cr.R. 567=29 Cr.L.J. 780=30 P.L.R. 405=A.I.R. 1928 Lah. 551.

—S. 511—"Attempt" defined.

Attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted.

Where the accused stepped across from his own roof to that of his neighbour at night and caught hold of his daughter, got on to the charpoy with her, undid the string of her pyjama and was seen struggling with her when the neighbour's wife came up in answer to her daughter's cries, and he then ran away:

Held, that he had been rightly convicted under S. 376-511: 47 Cal. 190 (S.B.) Foll. 103 Ind. Cas. 199=8 A. I. Cr. R. 432=28 P.L.R. 575=28 Cr.L.J. 663=A.I.R. 1927 Lah. 580.

—S. 511—Essentials.

In the offence of cheating the actual transaction must have begun and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt. 99 Ind. Cas. 127=28 Cr. L. J. 95=A.I.R. 1927 Mad. 77=51 M.L.J. 635.

—S. 511.

Under the Penal Code all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted. 103 Ind. Cas. 408=28 Cr. L. J. 680=A.I.R. 1927 Lah. 634.

—S. 511—Preparation and attempt — Books wherein entries were changed by accused not having left accused's hands—Difference between attempt and preparation.

There is a wide difference between the preparation and an attempt to commit an offence. The preparation consists in devising or arranging means necessary for the commission of an offence, an attempt is the direct movement towards the commission after the preparations are made.

Where a clerk, in charge of weighing the sugar-canes which were brought to the sugar company for sale, entered in the register higher weight of the sugar-cane but the register had not left his hands:

Held, that his action had not passed from the stage of preparation into that of an attempt to cheat. 65 Ind. Cas. 492=23 Cr.L.J. 108=A.I.R. 1923 Pat. 307.

—S. 511—Attempt—Overt-act.

Where an overt act is begun which would have led to the finished offence, but for an



interruption arising independently of the will of the accused, it is a complete case of an attempt to commit the offence. 15 Bom. L.R. 568=14 Cr.L.J. 433=20 Ind. Cas. 593.

—S. 511—Attempt—Preparation.

The commencement of action which, if not interrupted, would have ended in the crime, is an attempt to commit the crime and not a mere preparation. 37 Bom. 553=15 Bom. L.R. 564=14 Cr.L.J. 451=20 Ind. Cas. 611.

—S. 511—Attempt—When complete.

An attempt to commit an offence is punishable under the Penal Code. To constitute an attempt it is necessary to prove some external act, something tangible and ostensible of which the law can take hold as an act, showing progress towards the actual commission of the offence. It is immaterial if the progress was interrupted. 34 Bom. 378=12 Bom. L.R. 21=11 Cr.L.J. 180=5 Ind. Cas. 612.

—S. 511—Attempt—Intention.

Attempt implies intention. To constitute attempt something more than mere intention must be done. 32 Mad. 384=5 M.L.T. 393=9 Cr. L. J. 456=2 Ind. Cas. 33.

—S. 511 and 447—Attempt obstructed by an un contemplated obstacle.

If a man who has a evil intent does an act which is the last possible act that he could do towards the accomplishment of the particular crime, he cannot pray in his aid an obstacle, intervening not known to himself. 9 C.L.J. 432=10 Cr.L.J. 57=2 Ind. Cas. 593.

—Ss. 511, 415, 417—Attempt to cheat, what constitutes:

An attempt to deceive by false representation of fact involves that the person charged should have taken some step towards the communication of the representation to the person whom it was his intention to deceive. (1903) 8 C.W.N. 278 (F. B.).

—S. 511—Attempt to commit offence.

Per Ranade, J.—S. 511, does not relate only to the penultimate act, but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act. (1900) 25 B. 90=2 Bom. L.R. 653.

—S. 511—Attempt—Definition.

An attempt is an intentional, premeditated action which, if it fails in its object, fails through circumstances independent of the person who seeks its accomplishment. If its failure is to be attributed to something which he cannot control, its failure is no excuse. (1906) 8 Bom. L. R. 421=30 Bom. 421=4 Cr. L. J. 1.

—S. 511—Intention—How inferred.

Per Hartnoll, J.—To form an intention the man must have the knowledge to do so. But if he has the knowledge he must go a step further than having mere knowledge. (Per Young, J.)—Intention in most cases is to be inferred from the nature of the acts done and the circumstances of the case. The general presumption is that a man intends the ordinary and natural

consequences of his act. 5 Bur. L.T. 175=13 Cr.L.J. 864=6 L.B.R. 100=17 Ind. Cas. 800 (F.B.)

2 (b). Attempt—What amounts to.

—S. 511—Offence, held fell under S. 511 and not S. 379.

The accused was caught while attempting to steal the purse of P from his pocket. P, however, seized the purse from outside his pocket and also the accused's hand:

Held, that although the accused did move the purse for the purpose of committing theft, he did not commit the offence of theft, because he was unable to move the purse from the possession of P. The offence was therefore, one punishable under S. 511, Penal Code and not under S. 379, Penal Code. A.I.R. 1942 Mad. 521=55 L.W. 297 (1)=(1942) 1 M. L. J. 591=1942 M.W.N. 376=44 Cr.L.J. 501=206 Ind. Cas. 246.

—Ss. 511, 420.

Held, on facts that there was not merely preparation but attempt to cheat and accused could be convicted under S. 420 read with S. 511. A.I.R. 1941 Oudh 3=1940 O.W.N. 819=41 Cr.L.J. 881=1940 A.W.R. 381=16 Luck. 194=190 Ind. Cas. 259.

—Ss. 511, 420.

Accused, leader of Bar, writing to another—Letter containing false statement with a view to get valuable security from such person—Such person parting with security and putting it under control of accused—Deception in letter not the only cause—Accused, held guilty of attempt to cheat—Sentence of three months held enough. A.I.R. 1935 Rang. 456=37 Cr.L.J. 217=159 Ind. Cas. 1065.

—Ss. 511, 420.

Accused setting fire to insured car and giving false information to Insurance Company to obtain money—Offence of attempt to cheat committed—Deterrent punishment for such offences is necessary. A.I.R. 1935 Pesh. 67=35 Cr.L.J. 1345=151 Ind. Cas. 249.

—S. 511—Attempt to cheat—A asking Currency Office for payment for two halves of two currency notes—Currency Office making payment already to L—Non-execution of an indemnity bond by A—A prosecuted under Ss. 511 and 420—Offence.

An attempt to commit an offence is punishable under S. 511 though the final act short of actual commission of that offence has not been accomplished.

A informed the Currency Office that he had lost two halves of two currency notes of Rs. 100 during a journey and after getting instructions received in reply to his enquiries, he forwarded to the Currency Office the halves of these two notes still in his possession with the prescribed application forms and affidavits testifying that he was the owner of the notes. The Currency Officer had however already paid the value of these notes to a firm on representation by that firm that the halves of the notes had been stolen from L, one of the partners who was carrying them from Delhi to Ahmedabad. A was prosecuted under S. 511 read with S. 420, Penal Code. The trying Magistrate, without recording any clear finding as to the dishonest intention of the accused in endeavouring to recover the value of the currency notes, acquitted him on the ground that



it was the practice of the Currency Offices not to make payment in such cases until the claimant had executed an indemnity bond, and as no such indemnity bond had been executed by A, his conduct had not amounted to an attempt to cheat but had remained within the stage of preparation for the offence.

**Held:** that acquittal was bad as the execution of the bond of indemnity was not a portion of the application and was an act which would ordinarily take place before the act of cheating is completed. The applicant would be willing to take the money without an indemnity bond and by his making a false attempt in asking for the money the offence would be just as complete whether an indemnity bond was or was not insisted upon: 15 All. 173 and 16 Cal. 310, Foll. 110 Ind. Cas. 812=10 Lah. 253=10 A.I.Cr.R. 567=29 Cr.L.J. 780=30 P.L.R. 405=A.I.R. 1928 Lah. 551.

—S. 511—Attempt to cheat—Sending false claim papers as to quantity of paddy burnt.

The appellant had insured his stock of paddy which was burnt by fire; he made a claim on the basis that 75,040 baskets of paddy were stored. It was found that the mill godown could not accommodate more than 15,000 baskets.

**Held,** that the claim was not a mere exaggeration but was a false statement as to the quantity stored; that the 1st appellant having sent the notice of the fire and also the claim papers, must be regarded as having gone beyond the mere stage of preparation to the stage of attempt. 82 Ind. Cas. 39=2 Rang. 53=3 Bur.L.J. 1=25 Cr.L.J. 1175=A.I.R. 1924 Rang. 241.

—S. 511—Cheating—False pretences made and intention to defraud present but they being the means of obtaining of property not proved—Offence.

If an accused is indicated for obtaining property by false pretences and the evidence proves that the accused made the alleged false pretences, that they were false, and that the accused had an intent to defraud but the evidence fails to prove that the accused obtained the property or that the alleged false pretences led to the obtaining of the property, the accused may be convicted of the offence of the attempt to obtain by false pretences. 65 Ind. Cas. 994=23 Cr. L. J. 210=5 N.L.J. 16=A.I.R. 1922 Nag. 40.

—Ss. 511, 376.

Accused throwing down girl, putting sand in her mouth, sitting on her chest and attempting to have sexual intercourse and running away on the girl shouting out, is guilty of offence of attempting to commit rape. A.I.R. 1933 Lah. 1002 (1)=34 P.L.R. 832=35 Cr.L.J. 432 (1)=147 Ind. Cas. 560.

—S. 511—Attempt—Proposal to recover stolen goods for consideration.

In order to be guilty of an attempt of the commission of the offence under S. 215, mere proposal to the owner of the lost property to recover it on the receipt of a certain amount on the condition that the thieves should not be prosecuted is sufficient. 76 Ind. Cas. 191=20 A.L.J. 927=45 All. 159=4 L.R.A.Cr. 1=25 Cr. L. J. 127=A.I.R. 1923 All. 83.

—Ss. 511, 108 and 135—Helping desertion of sepoys.

The accused who were helping a regimental sepoy, a Head Constable and a Gharwala believing the latter two also to be regimental sepoys, to desert their regiment, were guilty of attempting and abetting the desertion of sepoys in the army under S. 135 and Ss. 108 and 511, I. P. C., although the regimental sepoys never intended to desert and had offered to do so only to entrap the accused. 10 S.L.R. 159=18 Cr. L. J. 431=38 Ind. Cas. 991.

—Ss. 511—Attempt to administer poison—Quantity of poison is not known.

The accused was proved to have put some powder into the food of the prosecutor's family. The Chemical Examiner found in the food some vegetable matter similar to *dhatūra* seeds. There was no evidence as to the quantity of the poison found in the food, **held** that the accused cannot be said to have intended to cause anything more than hurt and the offence was punishable under S. 328 and S. 511 of the Penal Code. 5 L.B.R. 79=3 Ind. Cas. 721.

—S. 511—Attempt—Asking for a bribe.

To ask for a bribe is an attempt to obtain one. (1905) 9 C.W.N. 547=32 C. 292.

2 (c). Attempt—What does not amount to.

—S. 511.

A person preparing to commit an offence should not be convicted for attempting to commit the offence. 1935 M.W.N. 651.

—S. 511—Assistance in preparation—No abetment or attempt.

Assistance in the preparation of an offence which ultimately was not committed cannot amount to an abetment either under S. 109 or under S. 511 of the Penal Code. 81 Ind. Cas. 986=25 Cr. L. J. 1162=11 O. L. J. 640=A.I.R. 1925 Oudh 158.

—S. 511—Offences regarding election—Fraudulently obtaining signature slip—No offence.

The accused went to the officer who had the custody of signature slips. He did not give out his name but produced a certain piece of paper which bore a certain number. The officer looked at that number, then looked at the electoral roll and discovered that against that number the name of one L appeared. On being asked by that officer if he was L, the applicant said he was. A patwari of the village was there and he said that the applicant was not L but was one M. There was a dispute and ultimately the applicant admitted that he was M and not L.

**Held,** that the obtaining of the "signature slip" was an act which by itself would not have amounted to an application for a voting paper. 84 Ind. Cas. 711=22 A.L.J. 1102=26 Cr. L. J. 359=6 L.R. A.Cr. 20=A.I.R. 1925 All. 226.

—S. 511—Attempt of theft—Accused caught in the vicinity of cattle on another's land—Guilt is proved.

Where accused was caught at night time in the vicinity of some cattle which had been tethered on the complainant's square and near which complainant and his brother were sleeping. **Held,** he cannot properly be held guilty of an attempt to commit theft but no doubt that he committed the offence of criminal trespass. 71



Ind. Cas. 792=24 Cr. L. J. 248=A. I. R. 1924 Lah. 223.

—Ss. 511 and 447—Attempt and preparation—Distinction between—Scaling—Roof—Theft—Offence.

Where the accused was detected on the the roof of a bazaar with an open clasp knife in his hands and two gunny bags and it was found that he had come there with intention of committing theft. Held, that the matter had not proceeded beyond the stage of preparation and the accused could not be convicted under Ss. 457 and 511, Indian Penal Code, but under S. 447 only. 20 Cr. L. J. 571=12 Bur. L. T. 222=10 L. B. R. 51=52 Ind. Cas. 59.

—S. 511—Attempt—Production of a copy of a forged document if an attempt to use the original.

The production of the copy of a forged document is not an attempt to use the original. 1 P. R. 1914 Cr.=139 P. L. R. 1914=15 Cr. L. J. 344=23 Ind. Cas. 696.

—S. 511—Attempt to commit rape—Taking off clothes.

The accused took off the girl's clothes, threw her on to the ground and then sat down beside her. He said nothing to her nor did he do anything more to her. Held, that the accused committed an offence under S. 354 and was not guilty of an attempt to commit rape. 116 P. L. R. 1912=16 P. W. R. 1912 Cr.=13 Cr. L. J. 469=15 Ind. Cas. 309.

### 3. Miscellaneous.

—Ss. 511 and 75.

Although S. 511 is not governed by S. 75, Penal Code, the fact that accused had six previous convictions can be taken into account and a much higher sentence than would be proper be imposed. A. I. R. 1942 Mad. 521=55 L. W. 297 (1)=(1942) 1 M. L. J. 591=1942 M. W. N. 376=44 Cr. L. J. 501=206 Ind. Cas. 246.

—S. 511—Conviction for attempts—Duty of Court.

The conviction by a Court for attempt to commit an offence cannot be justified simply on its surmise and thought of probability of the object of an act. 14 A. L. J. 688=17 Cr. L. J. 431=35 Ind. Cas. 991.

—S. 511—Attempt—Definition.

Definitions of 'attempt' to commit crimes are dangerous things and the only safe way is to consider the facts of the particular case and to decide in accordance with dictates of common sense. 13 P. W. R. 1914 Cr.=14 P. R. 1914 Cr.=66 P. L. R. 1914=15 Cr. L. J. 265=23 Ind. Cas. 473.

—S. 511—Attempt to cheat.

See S. 415. 9 C. W. N. 764=2 Cr. L. J. 422.

—S. 511—Application to University for duplicate certificate by person not entitled.

See S. 417. 25 M. 726=12 M. L. J. 68. Also 28 M. 90 (F. B.)

—S. 511.

See S. 468. 30 C. 822=7 C. W. N. 639.

—Ss. 511, 193.

—Fabrication of false evidence—Attempt to commit forgery.

See S. 193. 1902 A. W. N. 196=25 A. 75.

### Penalties (Enhancement) Ordinance (III of 1942)

—Ordinance is intra vires.

Penalties (Enhancement) Ordinance No. III of 1942 is intra vires of the powers of Governor-General promulgating it. A. I. R. 1943 Nag. 211=1943 N. L. J. 311=I. L. R. (1943) Nag. 369=44 Cr. L. J. 731=208 Ind. Cas. 97.

—Whether retrospective.

Quaere.—Per Iqbal Ahmad, C. J. and Collister, J.—Whether Ordinance No. III of 1942 has or has not retrospective effect.

Per Bajpai, J.—Offences committed before Ordinance No. III of 1942 are outside the scope of the Ordinance. A. I. R. 1943 All. 26=1942 A. L. J. 686=44 Cr. L. J. 216=I. L. R. (1943) All. 238=1942 A. W. R. H. C. 392 (1)=205 Ind. Cas. 113 (F. B.)

—S. 4—Offence under S. 326, Penal Code, 1860—Death Sentence, if should necessarily be passed.

Under S. 4 of Ordinance III of 1942, the Judge can pass a sentence of death for an offence under S. 326, I. P. C., but it does not follow that he must necessarily do so. The Judge can, in view of the youth of the accused and the fact that he is not a hardened criminal, impose a sentence of transportation for life. A. I. R. 1944 Sind 83=45 Cr. L. J. 598=212 Ind. Cas. 352 (F. B.).

—S. 8—Criminal P. C., S. 30—Effect of S. 8 of Ordinance and S. 30, Criminal P. C.

S. 30, Criminal P. C. is essentially a section conferring jurisdiction. It gives Magistrates power to try offences which otherwise they cannot try.

The used of the word "Court" in S. 8 of the Penalties (Enhancement) Ordinance, rather than the use of the word "Magistrate" makes no difference. The two words here mean the same thing. S. 30, Criminal P. C. deals with the trial of offences, but confers no power to pass a sentence. Section 8 of the Penalties (Enhancement) Ordinance, 1942, deals with the trial of offences, but confers no power to pass sentences. Section 30, Criminal P. C. may well be read with S. 8 of the ordinance. The effect is to remove the bar to the jurisdiction of the Magistrate, functioning as a Court under S. 30, Criminal P. C., that would otherwise prevent his trying offences punishable with death. Therefore, the Magistrate, under S. 30 of the Code, can try an offence arising out of the contravention of R. 35, Defence of India Rules, even though the offence be punishable with death, and having jurisdiction to try such offences under S. 30, Criminal P. C., it necessarily follows that under S. 34, which supplements S. 30, he has the power to pass a sentence of seven years' rigorous imprisonment, if the offence is otherwise so punishable.



As the offence under R. 35 of the Defence of India Rules is punishable with seven years' rigorous imprisonment under S. 5 of the Ordinance, the Magistrate functioning under S. 30, Criminal P. C. can impose that sentence. A.I.R. 1943 Sind 87 = I.L.R. (1942) Kar. 597 = 44 Cr. L.J. 461 = 206 Ind. Cas. 283.

#### —Penalty.

See (1) Contract Act, S. 74.  
(2) T. P. Act, S. 60.

#### Penang Settlement.

#### —Burden proof—Transfer by husband to wife.

When on the face of the transaction there is nothing suspicious except that it is conveyance in favour of wife by husband, the onus cannot be shifted on wife to prove that it is genuine. 32 M.L.W. 574 = 128 Ind. Cas. 662 = A.I.R. 1930 P.C. 265.

#### Pension.

See also: Pensions Act.

#### —Pensions—Civil Service Regulations, Arts. 458 and 464—Interpretation—Officer removed from Government service—Pension, right to.

Under Articles 458 and 464, it is essential that an officer to be entitled to pension must be in the service on the date of his retirement. An officer removed from Government service can have no claim for any pension. 2 L.W. 431 = (1915) M.W.N. 323 = 29 Ind. Cas. 252.

#### —Pensions, political and foreign—Attachability of.

See: G.P.C., S. 60. 26 M. 423.

#### Pensions Act (XXIII of 1871).

#### —Award—Distribution of pension.

A decree in accordance with the award providing for the distribution in a certain manner of a pension when received from Government does not contravene the provisions of the act. 37 Bom. 442 = 15 Bom. L.R. 362 = 19 Ind. Cas. 882.

#### —Collector—Certificate—Effect of.

Where the Collector once gives a certificate under the Pensions Act, which entitles a party to claim a certain right in a civil court, then the effect of that certificate is to give to the party the right to claim in a Civil Court whatever he is entitled to in virtue of that right. Hence where a certificate given by the Collector refers only to the plaintiff's share in the allowance for particular years, and permits the plaintiff to establish his right to a share in a civil court the plaintiff is not bound under the Pensions Act to get a certificate for each year's allowance before suing for it. (1903) 5 Bom. L.R. 950 = 28 B. 241.

#### —Construction.

The Pensions Act which is one which tends to restrict the ordinary legal rights of the subject to have recourse to the Court for remedy of grievances is one to be strictly construed. 107 Ind. Cas. 899 = 11 N.L.J. 14 = A.I.R. 1928 Nag. 189.

#### —Construction.

The provisions of the Pensions Act must be strictly construed because they are in derogation of the ordinary rights of a citizen. 80 Ind. Cas. 606 = 27 O.C. 353 = A.I.R. 1925 Oudh 210.

#### —Payment by Government to a Zaminder and his descendants—Right of a distant relative to claim a share therein.

Whether the grant of a pension is in the nature of the grantee's personal property, his ancestral property or in the nature of impartible property in his hands, a distant relative to provide for whom the grantee is under no obligation legal, social or moral, cannot claim to a share in it on any principle of law. Decision in A.S. No. 232 of 1942, distinguished. A.I.R. 1950 Mad. 595 = 63 L.W. 352 = 51 Cr. L.J. 1497 = (1950) 1 M.L.J. 525.

#### —“Pension”—Meaning of.

The word “pension” alike in the Pensions Act and Civil P.C. means periodical payments of money paid by the Government to the pensioner. It has no application to rents drawn as limited owner of the properties which yield them. A.I.R. 1931 P.C. 160 = 53 C.L.J. 493 = 1931 A.L.J. 495 = 35 C.W.N. 791 = 61 M.L.J. 208 = 58 I.A. 215 = 59 C. 1 = 35 L.W. 384 = 132 Ind. Cas. 727 (P.C.).

#### —Scope.

A grant by the British Government confirming a previous grant made by the preceding rules of such rights as the Government possessed is excluded from the purview of the Pensions Act. 28 A. 104, Foll. 18. O.C. 168 = 31 Ind. Cas. 728.

#### —S. 3—Compensation for forest dues—Sum payable by Government as compensation for forest dues—No pension.

A sum payable by the Government as compensation for forest dues in respect of Jagir land taken over by the Government for forest purposes is not a pension but a grant of money or land revenue and is not exempted from attachment. 121 Ind. Cas. 664 = A.I.R. 1930 Nag. 134.

#### —Ss. 3 and 4—Grant—Land revenue—Resumption by Government—Suit to declare invalidity.

S. 4 of Act XXIII of 1871 does not require that the grant should be of the land revenue alone in order to shut out the jurisdiction of the Civil Court. The latter has no jurisdiction to entertain a suit relating to a grant of land revenue. Even where land revenue is granted along with the land itself, a Civil Court has no jurisdiction to determine a suit which relates to the land revenue alone. Freedom from liability to land revenue is not identical with holding a grant of land revenue. The land revenue arising from a man's own holding, when it is remitted and the land pays nothing, is rather extinguished than granted. 1 B. 75 at P. 81, Ref. The Pensions Act (XXIII of 1871) contemplates money payments to be received through the Collector from recorded persons bound to pay revenue. Whether when there is a grant of the land revenue only to a person already owing the **kudivaram** right, there is anything in S. 4 of the Act XXIII of 1871, construed in the light of Regulation IV of 1832, and Act IV of 1862, to take away the jurisdiction of a Civil Court with respect to a claim to the **kudivaram** right. 23 M.L.J. 687 =



(1913) M.W.N. 255=12 M.L.T. 541=15 Ind. Cas. 871.

—Ss. 3, 11, 13—Grant of land revenue.

A grant of land revenue made by way of compensation for loss sustained on the abolition of a hereditary office is a grant falling within S. 3, and not within Ss. 11 and 12. S. 12 applies to assignments in respect of money payable on account of any such pension, pay or allowance as is mentioned in S. 11 and pensions referred to in S. 11 are periodical allowances granted by Government on political considerations or on account of past services or present infirmities or as a compassionate allowance, as distinguished from payment by Government in respect of any right, privilege, perquisite or office. (1906) 30 M. 153=2 M.L.T. 33.

—Ss. 3, 11—C.P.C., S. 206—Pensions—Zemindari granted as reward for services rendered to Government.

A zemindari granted, not revenue-free, by Government as a reward for services rendered is not a pension and an alienation by the grantee is not prohibited either by Act XXIII of 1871 or by S. 266, C.P.C. 4 B. 432; 1902 A.W.N. 161; 17 I.A. 181, foll. 1904 A.W.N. 144=1 A.L.J. 338=26 A. 617.

—S. 4.

Synopsis.

1. Applicability and scope
2. Collector's certificate
3. Construction
4. Interpretation
5. Pension
6. Second appeal
7. If ultra vires.

—S. 4.

See Attachment—Liability. 8 C.W.N. 665.

1. Applicability and scope.

—S. 4—Scope—Grant, if falls within—Considerations—Grantee of land revenue becoming owner of land—Effect of.

In order to find out whether a grant falls within the scope of S. 4 of the Pensions Act, we have to look at the substance of what has been granted or continued by Government, whatever may be the purely legal view as to the nature of the right granted and if the grant consists merely in the right to collect the land revenue, at any rate in the time of the British Government, or if it included this right in addition to other rights as well, then what we have to see is whether that right to collect the land revenue comes within the provisions of Pensions Act or not. A distinction cannot be drawn between a grant of land revenue and the right to collect land revenue. S. 9 of the Act, which provides that nothing in Ss. 4 and 8 shall affect the right of grantee of land revenue to collect the revenue for himself, seems clearly to show that the right to collect the land revenue for oneself was regarded in the scheme of the Act as a grant of land revenue. A grant of land revenue does not cease to be such a grant when the grantee be-

comes himself the owner of the land over which the grant extends. What has to be seen is whether the land itself has, at any time, been made exempt from revenue. The question whether there is a sort of merger, and whether the land becomes revenue-free when the jagirdar purchases the rights of an owner, cannot be made to depend upon the nature of jagir. 222 Ind. Cas. 22=A.I.R. 1946 Lah. 268.

—Ss. 4, 5 and 6—Applicability and scope—Desaigiri—Suit to recover share of allowance received by defendant.

A suit by the plaintiff to recover her share of the *desaigiri* allowance received by the defendant is not a suit relating to a pension and is not barred under any of the Ss. 4, 5 or 6, Pensions Act. It is a suit for money had and received. A.I.R. 1945 Bom. 496=47 Bom. L.R. 360.

—S. 4—Applicability and scope—Grant of land revenue only—Suit with respect to such grant is barred by S. 4.

Where a jagir is a grant of land revenue only and not of the soil, a suit in respect of such grant is barred by S. 4 of the Pensions Act. A.I.R. 1943 Sind 100 =I.L.R. (1942) Kar. 559=208 Ind. Cas. 138.

—S. 4—Applicability and scope—Bar under—Nature of—Whether applies to appeals.

Under S. 4, Pensions Act, a Civil Court is debarred from entertaining any suit, etc., and not debarred from entertaining any appeal. A.I.R. 1936 All. 666=1936 R.D. 300 (1)=1936 A.W.R. 702=1936 A.L.J. 1281=164 Ind. Cas. 1066.

—Ss. 4 to 6—Applicability and Scope—Suit relating to pension—Jurisdiction—Judgment-debtor, if can question decree-holder's right to execute decree by sale of pension.

**Quaere (in Order of Reference).**—Whether, in view of the provisions of Ss. 4 to 6, Pensions Act, there is an inherent want of jurisdiction in Civil Courts to entertain suits relating to pensions and whether, even after a decree for sale of pension has been passed by a Civil Court, it is open to the judgment-debtor to question the right of the decree-holder to sell the pension in execution of the decree. A.I.R. 1940 All. 373=1940 A.L.J. 420=1940 O.W.N. 950=1940 R.D. 452=I.L.R. (1940) All. 603=1940 A.W.R. 397=190 Ind. Cas. 3 (F.B.).

—Ss. 4, 7—Applicability and scope—Act, if relates to all pensions.

The Pensions Act refers not only to political pensions but relates to all pensions and under S. 4, Pensions Act, no claim can be entertained in respect of a pension in the Civil Court. A.I.R. 1936 Lah. 85=161 Ind. Cas. 499.

—Ss. 4, 11—Scope of.

Section 4, Pensions Act, is of wider scope than S. 11, Pensions Act, in as much as the latter refers to pensions, while the former refers not only to pensions but also to grants of money or land revenue. A.I.R. 1935 All. 678=58 All. 98=1935 A.W.R. 867=157 Ind. Cas. 511.



—S. 4 — Applicability and scope—Cash allowance—Suit for declaration for entry in Collector's register—Jurisdiction of Civil Court.

A Suit for declaration to the effect that the plaintiff is entitled to have his name recorded in the register of cash allowances kept by the Collector as the person to whom a cash allowance is to be paid in preference to defendant is not cognizable by a Civil Court. A.I.R. 1931 Bom. 144=32 Bom. L.R. 1420=55 Bom. 119=130 Ind. Cas. 30.

—S. 4 — Applicability and scope.

Section 11 refers merely to pensions whereas S. 4 refers not only to pensions but to grant of money or land revenue conferred whatever may have been the consideration of any such grant. S. 4 is wider than S. 11 and includes matters which do not come under S. 11. 52 A. 868=1930 A.L.J. 1326=A.I.R. 1930 All. 681.

—S. 4—Applicability and scope—Religious endowment.

A suit relating to an endowment for religious or pious purposes does not fall within the purview of S. 4, Pensions Act. 22 Bom. 496, Foll.; A.I.R. 1922 All. 22 and 16 Bom. 537, Rel. on; and 31 Mad. 12 not Foll. 107 Ind. Cas. 899=11 N. L. J. 14=A.I.R. 1928 Nag. 189.

—S. 4 — Applicability and scope — Private parties.

S. 4 applies to a suit between private parties and not only to a suit against Government. 31 Bom. 512; 14 Bom. L.R. 938; 20 Bom. 325 and A.I.R. 1925 Bom. 148, Rel. on. 100 Ind. Cas. 138=28 Bom. L. R. 1477=A.I.R. 1927 Bom. 81.

—S. 4—Applicability and scope.

Section 4 of the Act does not apply to a case of grant of land free of revenue. It applies only where the grant is of land revenue only. 99 Ind. Cas. 452=50 Mad. 441=25 M.L.W. 660=A.I.R. 1927 Mad. 140=51 M.L.J. 695.

—S. 4—Applicability and scope—Partition of inam.

Where the plaintiff sued for partition of her share in certain unenfranchised personal inams belonging to her husband's family and devised to her by his Will;

**Held**, that S. 4 of the Pensions Act did not bar Civil Court's jurisdiction. 99 Ind. Cas. 452=50 Mad. 441=25 M.L.W. 660=A.I.R. 1927 Mad. 140=51 M.L.J. 695.

—S. 4—Applicability and scope—Suit for declaration—Intention to claim pension—Effect.

It is not open to a Court when deciding the application of S. 4 of the Pensions Act to enquire into the plaintiff's motives. Simply because the plaintiff intends using the declaration which the Court may grant to him, for the purpose of prevailing upon the authorities concerned to accept his claim to the pension, a suit for declaration under S. 4 of the Pensions Act is not made untenable, nor does there exist a sufficient ground for dismissing such suit in the exercise of the discretion conferred by Section 42 of the Specific Relief Act. 80 Ind. Cas. 606=27 O. C. 353=A.I.R. 1925 Oudh 210.

—S. 4—Applicability and scope—Saranjam right—Suit for possession.

S. 4 of the Pensions Act is no bar to a suit to recover back possession of land in which **saranjam** right is resumed by the Government. 41 Bom. 408=19 Bom. L.R. 117=39 Ind. Cas. 65.

—Ss. 4 and 6—Applicability and scope—Assignment of Government revenue—Jurisdiction of Civil Courts.

A Civil Court is precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay a grant of Government revenue to any person. 37 All. 338=13 A.L. J. 460=29 Ind. Cas. 146.

—S. 4—Applicability and scope—Grant of land by Government—Suit about Melwaram—Jurisdiction of Civil Court.

Where certain land is granted by Government, the grant cannot be split up into two distinct grants of **Melwaram** and **Kudiwaram** so as to fall under S. 4 of Pensions Act in respect of the claim for **Melwaram**. But where the grant is of the land revenue only the suit relating to it is not cognizable by Civil Court. 36 Mad. 559=23 M.L.J. 728=(1912) M.W.N. 807=16 Ind. Cas. 18.

—S. 4—Applicability—Suit for partition.

The pre-requisite of filing a certificate under S. 4 of the Pensions Act is not applicable to a suit for partition of the Inam among the members of the family to which it was given and it does not also apply where the grant is of land also and not merely of the land revenue. 7 M. 191; 36 M. 591; 36 M. 559; 33 A. 580, Foll. 1 L.W. 670=16 M.L.T. 239=27 M.L.J. 618=26 Ind. Cas. 87.

—S. 4—Applicability and scope—Grant for charitable purposes—Suit to set aside order imposing full assessment—Jurisdiction.

S. 4 applies only to personal grants and endowments for religious or pious purposes do not fall within the purview of the section. Consequently, a suit for setting aside a Government Order imposing full assessment on lands granted to plaintiff's ancestors for the charitable purpose of feeding Brahmins is cognizable by Civil Courts. (1907) 17 M.L.J. 549=3 M.L.T. 104=31 M. 12.

—Ss. 4—Applicability and scope—Agreement relinquishing claims to pension and family property in consideration of maintenance—Maintenance not made charge on pension—Suit for recovery of maintenance not barred.

Where under a **karar** the plaintiff, a Hindu woman, gave up to the 1st defendant various claims which she had in regard to the family property and also her claim to portion of the pension granted to her by Government and in consideration therefor the 1st defendant, as the person liable to maintain the plaintiff, agreed to pay her Rs. 100 per mensem until her death; —**Held**, that a suit by her for the recovery of such maintenance is one not "relating to any pension" and is not barred by S. 4. (1906) 17 M.L.J. 139=30 M. 266=2 M.L.T. 188.

—S. 4—Applicability and scope—Civil Court's jurisdiction.

S. 4 debars the Civil Court from entertaining a suit relating to a pension or grant of money conferred by the



Government whatever may have been the consideration for such pension and whatever may have been the nature of the payment in lieu of which such person was granted. 38 Cal. 378=13 Cr.L.J. 360=15 C. W. N. 470=9 Ind. Cas. 859.

**—Ss. 4 and 11—Applicability and scope—Sale of unenfranchised inam in execution.**

An unenfranchised inam can be attached and sold in execution of a decree of a Civil Court. 6 M.L.T. 132=20 M.L.J. 88=4 Ind. Cas. 1057.

**2. Collector's certificate.**

**—Ss. 4 and 6—Suit without Collector's certificate—Maintainability—Effect of obtaining certificate after filing of suit.**

Per Desai, J.:—The words of Ss. 4 and 6 of the Pensions Act absolutely bar a Civil Court's entertaining a suit without the Collector's certificate. The existence of such a certificate is the condition precedent to a Civil Court's assuming jurisdiction over a suit. If there is no certificate it has no jurisdiction at all over the subject matter. The absence of such a certificate is not a defect which can be waived or can be remedied at a later stage in the suit. Where it is obtained after expiry of period of limitation, it is of no effect because the cause of action is dead by that time.

Per Bhargava, J.:—The words "upon receiving a certificate from such Collector" used in S. 6 of the Pensions Act suggest that the certificate may not be filed along with the plaint and it may be received by the Civil Court even after the suit had been filed. Strictly speaking the non-production of the certificate cannot be considered "a defect of a technical character"; but, when the certificate is received by the Civil Court from the Collector or is produced before the Civil Court before the final adjudication of the claim, the Court can take cognizance of the claim as provided in S. 6 of the Act. 1950 A.L.J. 185=A.I.R. 1950 A. 371=1950 A.W.R. 250.

**—S. 4—Collector's certificate.**

Government granting pension to son-in-law and daughters of Nawab—Death of one daughter—Payment of portion to descendants of daughter and investment of balance for benefit of descendants of daughters on lapse of pension—Death of surviving daughter—Accumulated capital replaced by political pension—Suit for account and administration of fund:

Held, that S. 4 applied and the plaintiff could not sue without obtaining a certificate from the Collector. A.I.R. 1935 Bom. 439=37 Bom.L.R. 763=160 Ind. Cas. 846.

**—S. 4—Collector's certificate—Suit for share in cash allowance payable to family—Collector's certificate, if can be produced in Appellate Court.**

In a suit for a share in certain cash allowances payable to a family, the certificate of the Collector under the Pensions Act can be produced in the High Court on appeal. A.I.R. 1935 Bom. 227=37 Bom. L.R. 343=156 Ind. Cas. 626.

**—S. 4—Collector's certificate—Purchase of 'Desaigiri haq' from Hindu widow—Entry in register—**

Subsequent order that entry was only for life of widow—Suit by purchaser for declaration of title—Certificate under S. 4, necessity of.

Where the plaintiff purchased from a Hindu widow an allowance in respect of a *Desaigiri haq* and on his application, his name was entered in the *Watan* register with the Commissioner's sanction, but he was subsequently informed that his name was entered only during the widow's life time and the plaintiff instituted a suit against the Secretary of State for a declaration that he was the full owner, without obtaining a certificate under S. 4, Pensions Act:

Held, that the suit was bad for want of the certificate. A.I.R. 1931 Bom. 505=33 Bom.L.R. 1029=134 Ind. Cas. 1217.

**—S. 4—Collector's certificate—Jurisdiction of civil and revenue courts.**

The jurisdiction of a civil court and of a revenue court alone is limited by the terms of S. 4. It does not take away the jurisdiction of the Court of Revenue to entertain a suit by the transferee of the assignee of the land revenue. Under S. 5 a suit relating to land revenue must be determined by a Revenue Court in accordance with the rules laid down by the chief revenue authority. Under Ss. 4 and 6 a Civil Court cannot entertain such a case except after receiving a certificate from the Collector authorizing it to try the case. 1929 A.L.J. 724=11 L.R.A. Rev. 65=A.I.R. 1929 All. 781.

**—S. 4—Collector's certificate—Land revenue and land—Grant of land revenue—Suit for the land—No certificate from Collector—Jurisdiction of Civil Court.**

A certain person S was given a pension and at his request a portion of it was commuted into the grant of seven villages in jagir which was to endure for three successive lives. S afterwards applied to Government for the grant of one other village in lieu of six of the seven villages. A careful calculation was made by the Government of the extent as well as the berij of the villages proposed to be given up by S and of the villages asked for in exchange. In the original sanad no intention was expressed to give full ownership in the land. The exchange was then allowed and a jodi of Rs. 11 was fixed on the two villages, which fell into arrears. In order to realize the arrears revenue authorities attached the villages and as dues were not paid, Government resumed the jagir of the villages. S brought a suit against Government to recover possession of the villages:

Held, that what was granted to S was only land revenue and not land, and that the question being whether land was granted or not, it was not incumbent on the Government to prove that the grant was subject to limitations. Provisions of S. 4, Pensions Act, were therefore applicable. Hence in the absence of a certificate from a Collector, the Civil Court's jurisdiction to entertain a suit as regards the grant of the villages was barred. A.I.R. 1925 Mad. 477; A.I.R. 1926 Mad. 1167, not Appl.; 23 M.L.J. 687; 32 Bom. 432, per Batchelor, J., at p. 438; and 12 Mad. 98, Rel. on; A.I.R. 1917 P.C. 94; 31 All. 382; 26 All. 617; A.I.R. 1923 P.C. 6, and A.I.R. 1927 Mad. 140, Dist. 114 Ind. Cas. 626=1928 M.W.N. 763=A.I.R. 1928 Mad. 1246.



—S. 4—Collector's certificate—Commutation of Kulkarni vatan—Suit by co-sharer—Certificate of Collector.

Suit by one co-sharer for his share of cash allowance in commutation of kulkarni services received by another co-sharer cannot be maintained without certificate from Collector. 88 Ind. Cas. 975=26 Bom. L.R. 1165=A.I.R. 1925 Bom. 148.

—S. 4—Collector's certificate—Recovery of revenue—Suit by one Inamdar to recover revenue received by another—No certificate—Maintainability of suit.

A suit by an inamdar to recover revenue of inam village received by another person is not maintainable in a Civil Court in the absence of a certificate from the Collector under S. 4. 18 Bom. 516, Dist. 100 Ind. Cas. 138=28 Bom. L.R. 1477=A.I.R. 1927 Bom. 81.

—S. 4—Collector's certificate—Effect.

Though a suit cannot be entertained without a certificate from the Collector, still even an appeal should not be rejected for want of certificate, but plaintiff should be allowed time to produce it. 82 Ind. Cas. 486=6 L.L.J. 343=A.I.R. 1925 Lah. 113.

—S. 4—Certificate of Collector—Suit for share in Sar Deshmukhi Haq.

A suit against the Secretary of State to recover a share in the Sar Deshmukhi Haq cannot lie in the absence of the certificate under S. 4 of the Act. S. 4 is not *ultra vires*. 22 Bom. L.R. 1176=59 Ind. Cas. 452.

—Ss. 4 and 6—Collector's certificate—Suit relating to grant.

A certificate under S. 6 of the Pensions Act is not necessary to entertain a suit relating to a grant which is given to grantee's male descendants. 22 Bom. L.R. 959=58 Ind. Cas. 331.

—S. 4—Declaration—Share in vatan—Collector's certificate.

A suit for declaration that the plaintiff is the owner of a certain share in a kulkarni vatan falls within S. 4 of the Pensions Act and is not maintainable without the certificate of the Collector. 42 Bom. 257=20 Bom. L.R. 325=45 Ind. Cas. 580.

—S. 4—Collector's certificate—Suit for share in Deshpande Kulkarni Vatan.

A suit for a declaration of an eight-anna share in the Deshpande Kulkarni Vatan, consisting of a cash allowance whether coupled with a prayer to recover the actual cash received or not, falls within the class of suits defined by S. 4 and is consequently not maintainable in a Civil Court unless a Collector's certificate is obtained. 37 Bom. 91=14 Bom. L.R. 938=17 Ind. Cas. 661.

—S. 4—Collector's certificate—Grant of the soil.

Where there is a grant of the soil and not merely of the revenue of certain villages, the provisions of the Pensions Act do not apply and a certificate is unnecessary. 32 All. 148=37 I.A. 39=14 C.W.N. 310

=7 M.L.T. 53=7 A.L.J. 165=11 C.L.J. 281=12 Bom. L.R. 267=20 M.L.J. 164=5 Ind. Cas. 689 (P.C.).

—S. 4—Certificate from Collector—Suit based on agreement to receive maintenance out of cash allowance—Suit relating to a pension or grant of money.

Under an agreement between the plaintiff and the defendants the former was entitled to an annual payment of Rs. 52 for her maintenance out of a cash allowance which was received by defendants from Government. She brought this suit to enforce her right under the agreement, but did not produce the certificate from the Collector required by S. 4.—**Held**, that the certificate was necessary. The words of the section are wide enough to include any suit or to enforce such a claim provided it relates to a pension or grant of money of land revenue; it is immaterial whether the claim is based on an agreement between the parties or arises out of any other legal rights or liability and whether it is a claim for a share by way of partition or maintenance or otherwise. (1907) 9 Bom. L.R. 889=31 B. 512.

—Ss. 4, 9—Collector's certificate—Suits for arrears of assessment—Certificate.

Suits for arrears of assessment from Khatedan holding lands in an inam village by the inamdar whose right to the inam has been admitted by Government are by S. 9 exempted from the necessity of a certificate required by S. 4. 10 A. 396 foll. (1904) 6 Bom. L.R. 423.

—Ss. 4, 6—Collector's certificate—Grant of land revenue—Heritable right—Mortgage—Foreclosure—Certificate—Competent authority—Non-production—Practice.

S. 4 of the Pensions Act is applicable to a heritable right to land revenue granted by Government. A certificate from the Collector or other officer authorized to grant the same should be produced before a suit relating to such heritable right to revenue can be entertained. Where the litigant was misled by the collector or other authority into the belief that the certificate was unnecessary, time was given for the production of such certificate. 1902 A.W.N. 187=25 A. 73.

### 3. Construction.

—S. 4—Construction—Suit relating to property subject of grant—Plaintiff's claim independent of grant—If falls under S. 4.

The Pensions Act is to be construed strictly in favour of the right of suit. A suit relating to property which has been the subject of a grant but in which plaintiff's claim is quite independent of the grant is not a suit relating to a grant of land revenue within the meaning of S. 4, Pensions Act. A.I.R. 1939 Bom. 513=41 Bom. L.R. 882=185 Ind. Cas. 839.

—S. 4—Construction of—Suit to recover land revenue of inam lands—Grant of soil—Certificate if necessary.

Section 4, Pensions Act, as it ousts the ordinary jurisdiction of the Civil Courts, should be construed strictly. Where, in a suit to recover land revenue of inam lands, the grant is not one of land revenue only but of the soil also, S. 4 will not apply



and, therefore, certificate is not necessary though the relief claimed in the suit is with regard to the revenue. A.I.R. 1933 Bom. 23=34 Bom. L.R. 1455=141 Ind. Cas. 360.

#### —S. 4—Construction.

S. 4 does not cover a suit to recover the possession of land or to obtain a declaration of right to hold land. The words 'relating to' should be construed strictly with reference to the words following them. The right to hold land, even though it be not as proprietor of the soil, is incontestably one of which the civil courts can take cognizance, if not barred by provision of statutes and the fact that the holding is claimed to be exempt from payment of land revenue does not change the suit into one relating to the grant of money or land revenue. (1905) 7 Bom.L.R. 497=29 B. 480.

#### 4. Interpretation.

##### —S. 4—Interpretation — "Suit relating to pension"—Meaning of.

An action involving the question whether or not a pension which has become due is attachable by the District Magistrate for realisation of punitive tax imposed under S. 15 (3) of the Police Act, is not a suit relating to a pension within the meaning of S. 4 of the Pensions Act. 1948 O. W. N. 241=A.I.R. 1949 Oudh 31.

##### —S. 4—Interpretation — 'Suit'—Execution proceeding not included.

The word 'suit' in Act does not include execution proceedings. (1905) 7 Bom.L.R. 659=30 B. 101.

#### 5. Pension.

##### —S. 4—Pension.

A sanad granted by the British authorities to a Prince recited that it had been established that the Prince held the villages in rent-free tenure under the former Government, and that the Chief Commissioner under the authority of the Governor-General in Council, was pleased to maintain the tenure in perpetuity, so long as there are lineal heirs, subject to certain conditions. One of the conditions was that the **jahagirdar** and his heirs should strictly perform all duties of landholders:

**Held**, that the language of the sanad was inconsistent with the view that the grant made by the British Government, was merely an assignment of land revenue, and was not a grant of revenue-free property. A mere assignee of the land revenue could hardly be expected to perform the duties of the land-holder and it conveyed a heritable and transferable estate; that it did not amount to a pension, and the provisions of the Pensions Act had no application. A.I.R. 1936 Oudh 121=1935 O. W. N. 1232=11 Luck. 588=159 Ind. Cas. 311.

##### —S. 4—Pension—Grant of land revenue—No pension.

The legislature meant to make a distinction between grant of land revenue and pensions under Ss. 4 and 11 and grant of land revenue cannot be regarded as a pension for the purpose of S. 11. 4 Bom. 432, Rel. on. 31 P.L.R. 538=A.I.R. 1930 Lah. 816.

##### —S. 4—"Pension"—Assignees of land revenue subsequently becoming proprietors of land—Status.

A grant of immovable property is not to be treated as 'pension' within the Pensions Act. Where originally the Government assigned only the land revenue to certain persons and subsequently, when the proprietors of the soil died or became extinct, a settlement was made with the pensioners themselves.

**Held**, that the fact that the Government made the settlement with the pensioners did not convert the pensioners into grantees of revenue-free immovable property. The nature of the grant must depend on what the Government gave and not on what may happen irrespective of the wishes of the Government. If the Government gave only the land revenue any acquisition of the lands by the pensioners themselves could not make them "a grantee of the immovable property."

**Held further**, that so long as the Government did not make a revenue-free grant of the land, it could not be said that there was a merger of the two different rights, simply because the pensioners had been long in possession as zamindars. 87 Ind. Cas. 569=47 All. 557=23 A.L. J. 463=6 L.R.A. Civ. 289=A.I.R. 1925 All. 565.

##### —Ss. 4 and 6 — Pension — Muafi land since British rule—Pension—Grant of land revenue, meaning of alienation.

A village granted to the ancestor of the defendant by a Hindu Raja long prior to the establishment of the British rule was held as **Muafi**. The grant of the village is neither a pension nor a grant of land revenue within the meaning of the Pensions Act, 1874, but an ordinary **Muafi** which could be transferred by sale or mortgage and that the Pensions Act did not apply. 33 All. 580=8 A.L. J. 692=10 Ind. Cas. 353.

##### —Ss. 4 and 11—Pension—Wasika allowance—Pension.

A 'Wasika' allowance is guaranteed by the British Government in consideration of a loan of 1825 by the then ruler of Oudh and must be deemed to be a pension within Ss. 4 and 11 of Act XXIII of 1871. 12 O.C. 323=4 Ind. Cas. 145.

#### 6. Second appeal.

##### —S. 4—Second appeal.

Finding that rights in question are not connected with grant of pension within the meaning of Act is one of fact and cannot be disturbed in second appeal. A.I.R. 1940 All. 373=1940 A.L.J. 420=1940 O.W.N. 950=1940 R.D. 452=1 L.R. (1940) All. 603=1940 A.W.R. 397=190 Ind. Cas. 3 (F.B.).

##### —S. 4—Second appeal—Suit as Pattedar—Collector's certificate necessary—Adjournment—Second appeal.

A suit for a declaration of a right to a share of the **Pattedari** of a village is not entertainable without the Collector's certificate under the Act. Where a plaintiff is guilty of considerable laches in not curing a technical defect in his plaint, he cannot be given in second appeal after the case has been argued, an adjournment for the purpose of enabling him to cure the defect. 23 A. 104. Dist. 7 S. L. R. 5=20 Ind. Cas. 508.



## 7. 'ultra vires.'

## —S. 4—Not 'ultra vires.'

S. 4, so far as it deals with pensions and grants of land revenue, is not *ultra vires*. 100 Ind. Cas. 138=28 Bom. L.R. 1477=A.I.R. 1927 Bom. 81.

—S. 4—If *ultra vires*—Provisions in their application to Ratnagiri District—If *ultra vires*.

The provisions of the Pensions Act dealing with pensions and grants of land revenue in District Ratnagiri are not *ultra vires*. 40 Cal. 391; 5 Bom. H. C. App. 1; 2 Bom. 99. Ref. and 27 All. 338, Cons. 59 Ind. Cas. 452=45 Bom. 196=A.I.R. 1921 Bom. 125.

## —S. 6.

See: Grant. 28 A. 104=1905 A.W.N. 206.

## —S. 6—Certificate under—Cause of action.

It cannot be said that the certificate under S. 6 permitting the plaintiff to bring the suit is part of the cause of action in respect of the suit. The absence of the certificate is a bar to the bringing of the action but no such certificate would be given unless a cause of action already existed. The giving of the certificate under S. 6 removes the bar which prevented the plaintiff from bringing the cause of action into Court. It does not give the plaintiff a new cause of action. A.I.R. 1944 Oudh 139=1944 O.W.N. 37=1944 A.W.R. (C.C.) 11=19 Luck. 515=216 Ind. Cas. 276.

## —S. 6—Suit without Collector's certificate—Certificate, if can be allowed to be produced later on.

It would be taking much too stringent a view of the provisions of S. 6, Pensions Act, to hold that the Civil Court is debarred from taking cognizance of a claim even though the certificate has been produced subsequently, if it was not produced at the time of the institution of the suit. The suit is not bad *ab initio* by reason of its being filed without a Collector's certificate and where at the hearing of such a suit, the necessary certificate is not produced, the Judge ought to grant the plaintiffs' application for an adjournment in order that the certificate might be obtained and produced. A.I.R. 1937 Oudh 484=13 Luck. 584=1937 O.W.N. 1131=171 Ind. Cas. 33.

## —S. 6—Applicability—Voluntary grant by Government to shrine—Suit for declaration of right to office of Sajjada Nashin to shrine—Certificate, if necessary—Claim, if affects liability of Government.

Where a voluntary grant is made by Government to a shrine but the grant is resumable at the pleasure of the Government and a suit is instituted for declaration of the plaintiff's right to the office of Sajjada Nashin of the shrine, the claim not being one for a pension or grant, no certificate is necessary under S. 6, Pensions Act, and as the grant has been made voluntarily by the Government which could be withdrawn at any time at Government's absolute pleasure, the decree which the plaintiff sought would not affect any liability of Government directly or indirectly. A.I.R. 1937 Pesh. 65=169 Ind. Cas. 319.

## —S. 6—Certificate of Collector—Necessity of fresh certificate for fresh suit.

Under S. 6, Pensions Act, a certificate from the Collector is necessary for every case to be tried by the Civil Court.

Where the predecessors-in-interest of the plaintiff had obtained the certificate and instituted a suit against the defendant's father and obtained a decree:

Held, that the certificate was not sufficient for a suit in 1931 after there had been a novation of the grant in the defendant's favour. A.I.R. 1933 Lah. 336=14 Lah. 48=34 P.L.R. 587=149 Ind. Cas. 952.

## —S. 6—Certificate by Collector—Temple receiving grant—Suit by wahiwardar of a temple receiving a grant from the trust fund set apart by the British Government—No certificate from Collector—Maintainability.

The plaintiff brought a suit as wahiwardar of the Shri Jagriteshwar Deostham at Nagpur which claims the amount from trust fund which has been set apart by the Government and placed under the indenture dated 24th October 1866 for three instalments due to him in respect of his services as wahiwardar of the temple against trustees who formed a committee of the temple:

Held, that the suit was not maintainable without a certificate from the Collector. 22 Bom. 496, Foll; 31 Mad. 12, Dist. 107 Ind. Cas. 899=11 N.L.J. 14=A.I.R. 1928 Nag. 189.

## —S. 6—Certificate of Collector—Cognizance of suit—Claim to land revenue.

The suit relating to a grant of land revenue by the British Government cannot be taken cognizance of except upon a certificate from the Collector under S. 6. 93 Ind. Cas. 634=A.I.R. 1926 Lah. 333.

## —S. 6—Saranjam inam—Suit to recover—Certificate of Collector—Failure to produce certificate—Appeal—Remand.

The grant of a Saranjam should be presumed to be a grant of the land revenue and not of the soil. In a suit to recover a *saranjam* a preliminary issue was raised 'whether the suit lies without a certificate under the Pensions Act.' Plaintiff's pleader having admitted the necessity of the certificate, the Court decided that the certificate was necessary and gave time to the plaintiff to produce it. Plaintiff having failed to produce the certificate, the Court disposed of the suit on the preliminary issue. Held, that the plaintiff was bound by his pleader's admission which was upon an issue regarding which evidence could have been given. 29 I.A. 76, Foll; and that in absence of materials justifying reversal of the decree on the preliminary issue the suit could not be remanded under O. 41, R. 23 of the C.P. Code. 39 Bom. 352=17 Bom. L.R. 187=28 Ind. Cas. 485.

## —S. 6—Certificate of Collector—Right to receive Government revenue—Absence of certificate.

A suit to establish a right to collect Government revenue from the villages granted as endowment to a religious office is not maintainable in the absence of a certificate under S. 6 of the Pensions Act. 28 Ind. Cas. 934. (Mad.)

## —S. 6—Certificate of Collector—Future payments—Decision without a certificate.

A Court has no power to make any order as to the future annual payments of the allowance by the



Collector, and such order is *ultra vires* in as much as the decision of the question is premature in the absence of a certificate under S. 6 of the Pensions Act. 34 Bom. 154=11 Bom. L.R. 1369=4 Ind. Cas. 842.

—S. 6—Suit for share of inam—Collector's certificate.

A suit relating to a share in an inam consisting of two-third of the revenue is not cognizable without Collector's certificate. Where the plaintiff has not obtained the certificate, the hearing may be adjourned to enable him to produce it. 17 Bom. L.R. 153=27 Ind. Cas. 927.

—S. 6—Collector's order referring the parties to Civil Court—Certificate produced in the Court of appeal.

Where in a partition suit subject-matter of which was subject to the Pensions Act the Subordinate Judge decreed partition, holding that an order of the Collector, referring the parties to a Civil Court to determine whether the said villages were partible, was equivalent to a certificate under S. 6 of the Pensions Act and the High Court on appeal allowed the plaintiff to procure and file a certificate under the said section of the said Act. Held, that the defect was cured and the decree should not be interfered with in appeal. 32 All. 148=37 I.A. 39=14 C.W.N. 310=7 M.L.T. 53=7 A.L.J. 165=11 C.L.J. 281=12 Bom. L.R. 267=20 M.L.J. 164=5 Ind. Cas. 689 (P.C.).

—S. 6—Suit before certificate—Application for declaration to be a sharer in jagir to Collector—Collector declining to interfere and directing the applicant to Civil Court—Civil suit filed without certificate—Order by the Court for its production within a fixed time—Production within the period—Suit if proper.

A applied to the Collector for declaring him to be a jagirdar jointly with B. Collector for declined to entertain the application and directed him to Civil Court. A then instituted a suit against B for a declaration that he was a jagirdar jointly with B and that B was not entitled to recover land revenue from him. He claimed an injunction that B should not recover the land revenue on A's land alleging that Collector's direction was tantamount to a certificate under S. 6. It was contended that the Civil Court had no jurisdiction to entertain the suit without the Collector's certificate. A was given time to produce certificate of the Collector, which was duly produced and placed on record:

Held, that it was a sufficient compliance under S. 6 as the certificate was produced within time fixed by the Court. 111 Ind. Cas. 528=A.I.R. 1928 Lah. 713.

—S. 6—Suit for declaration

Under S. 6, Pensions Act, 1871, it is not open to the plaintiff to obtain an order for payment. He can, however obtain a declaration of his rights. A.I.R. 1934 P.C. 108=30 L.W. 748=1934 M.W.N. 437=66 M.L.J. 614=1934 A.L.J. 438=38 C.W.N. 568=59 C.L.J. 282=36 Bom. L.R. 551=58 Bom. 306=3 A.W.R. 663=61 I.A. 190=148 Ind. Cas. 796 (P.C.).

—S. 6—Suit for declaration—Relief for declaration that dismissal after discharge on invalid pension was wrong and for damages—Declaration, if can be granted,

The plaintiff brought a suit against the Secretary of State for India in Council for a declaration that he was wrongly dismissed after he had been discharged on an invalid pension and for damages amounting to Rs. 9,900:

Held, that if the Court was to give a declaration to which it can give effect, it can only be that the order of dismissal of the plaintiff was void. This meant that he was entitled to have his pension restored to him. That remedy would be clearly barred by S. 6, Pensions Act, and hence, the declaration sought for could not be granted. A.I.R. 1934 Mad. 516=40 L.W. 146=67 M.L.J. 123=57 Mad. 857=154 Ind. Cas. 884.

—S. 6—Suit for declaration.

Where a suit for a declaration that the plaintiff is entitled to a certain share in the cash allowance which the Government has decided to pay to the defendant has been filed with a certificate from the Collector, S. 6, Pensions Act, does not preclude the Court from granting such a declaration as it does not affect the liability of the Government. A.I.R. 1931 Bom. 473=33 Bom. L.R. 783=133 Ind. Cas. 851.

—S. 6—Suit for declaration—Suit for declaration of relationship—Maintainability—Refusal of certificate—Effect.

A suit for a mere declaration that one person is related to another is not a suit to establish a legal right or any right as to any property and is incompetent.

A person sued for a declaration that he was the grandson of another. He alleged that he used to receive his share of the pension granted to the latter up to a particular year when it was stopped. He stated in the plaint that he would bring a suit for his share of the pension later:

Held, that the person was able to seek a further relief, namely, a right in future to a share of the pension and for the arrears and so the suit was not maintainable.

Held, further: that the refusal of the certificate under S. 6, Pensions Act, did not remove the bar to the maintainability of such a suit. A.I.R. 1928 All. 309, Foll.; 110 Ind. Cas. 595, Foll.; 31 P.L.R. 900=121 Ind. Cas. 417=A.I.R. 1930 Lah. 795.

—S. 6—Suit for declaration—Government allowance to Durga—Right to share—Suit for.

A suit for a declaration that the plaintiff is entitled to get his name entered in place of the last manager of a Durga which is in receipt of a cash allowance from the Government is not maintainable for two reasons: (1) The right of entering the names rests exclusively with the Collector, and none else; (2) The declaration entails a corresponding liability on the Government to pay and a suit to enforce it is barred by S. 6. 32 Bom. L.R. 1420=55 Bom. 119=130 Ind. Cas. 30=A.I.R. 1931 Bom. 144.

—S. 6—Suit for declaration—Darga service grant.

Where the manager of a Darga receiving pension from the Government dies and the name of one of his heirs (nephew) is entered in the Government records, a suit by another heir (brother) for a declaration that



he is entitled to have his name entered in preference to that of the other heir is not maintainable. 32 B.L.R. 155; 23 Bom. 101; 40 Bom. 55 and 22 Bom. 344, Dist. 32 Bom. L.R. 1420=55 Bom. 119=130 Ind. Cas. 30=A.I.R. 1931 Bom. 144.

—S. 6—Applicability — Suit for declaration.

S. 6 does not apply to a suit for declaration that funeral expenses cannot be claimed to be paid out of income of a Jagir. A.I.R. 1922 Lah. 365.

—Ss. 5 and 6—Suits for declaration.

Ss. 5 and 6 bar a suit for a declaration against Government that the plaintiff is entitled to *muafi* rights in a certain *mahal*. 12 M.L.W. 311=2 U.P.L.R. (P.C.) 19=57 Ind. Cas. 156. (P.C.).

—S. 7—Attachment of pension — Burden of proof.

A pension is not ordinarily attachable for sale. The Burden of proof that a particular pension is attachable lies on the decree-holder. 68 Ind. Cas. 854=20 A.L.J. 679=44 All. 697=A.I.R. 1922 All. 429.

—S. 7—Attachment of pension—Attachment and sale of unenfranchised inam of land revenue or grant of money.

An unenfranchised inam can be attached and sold in execution of a decree of civil court. (1909) 20 M.L.J. 88=6 M.L.T. 132=4 Ind. Cas. 1057.

—Ss. 7, 11 — "Pension", in Ss. 7 and 11, whether cover all kinds of pension.

There is nothing in the Pensions Act, which states that the two kinds of pension in S. 7 and the four kinds of pension in S. 11 of the Act comprise all possible kinds of pension nor is there any reason to suppose that these six kinds do comprise all possible kinds of pension. A.I.R. 1935 All. 862=1935 A.L.J. 910=1935 A.W.R. 1034=58 All. 230=158 Ind. Cas. 1106.

—S. 7—Certificate granted—Pension, whether necessarily comes under S. 7.

No doubt a certificate is not required for a suit about a pension mentioned in S. 7, Pensions Act, but the mere fact that a certificate is not required does not make the proposition correct that if a certificate is granted, then the pension in regard to which it is granted cannot be one mentioned in S. 7. A.I.R. 1935 All. 862=1935 A.L.J. 910=1935 A.W.R. 1034=58 All. 230=158 Ind. Cas. 1106.

—S. 7—Resumption of personal inam—Right of Government to resume unenfranchised personal inams.

Section 7 (1) exempted enfranchised inams from its operation but restricted its scope only to pensions, grant of money and grants of land revenue. This does not, however, mean that the Government have an undoubted and absolute right to resume unenfranchised personal inams whatever may be the object and extent of the grant. 114 Ind. Cas. 626=1928 M.W.N. 763=A.I.R. 1928 Mad. 1246.

—S. 9—Section shows that Act applies to right to collect land revenue for oneself.

Section 9 which provides that nothing in Ss. 4 and 8 shall affect the right of a grantee of land revenue to

collect the revenue for himself clearly shows that the right to collect land revenue for oneself was regarded in the scheme of the Act as a grant of land revenue. It cannot, therefore, be said that the Pensions Act applies only to revenue which is first collected by Government and then paid out from the treasury to the jagirdar. A. I. R. 1946 Lah. 268=222 Ind. Cas. 22.

—S. 10—"Pension", meaning of.

"Pension" is a periodical allowance or stipend for past services and once it is commuted and ceases to be a periodical payment, it becomes a capital sum. A.I.R. 1935 Mad. 249=68 M.L.J. 118=41 L.W. 146=1935 M.W.N. 89 (2)=58 Mad. 469=157 Ind. Cas. 608.

—S. 11.

Synopsis.

1. Applicability and scope
2. Evidence and proof
3. Liability for attachment.
4. "Pension"

1. Applicability and scope.

—S. 11—Applicability and scope—Money not paid to pensioner only comes within S. 11.

In S. 11, Pensions Act, the words "money due or to become due" by necessary implication mean the money that has not yet been paid and has not been received by the pensioner. A.I.R. 1942 Sind 19=I.L.R. (1941) Kar. 479=198 Ind. Cas. 630.

—S. 11—Applicability and scope—Commuted pension, if protected under S. 11.

Although, after commutation, a pension or a portion thereof ceases to be pension and becomes a capital sum, still the payment of the commutation amount being a payment on account of the pension, falls within the protection of S. 11 of the Pensions Act. A.I.R. 1941 Mad. 207=I.L.R. (1941) Mad. 393=1940 M.W.N. 1150=(1940) 2 M. L. J. 782=52 L.W. 719=195 Ind. Cas. 290.

—S. 11—Applicability and scope—S. 11, if limited to cases of execution of simple money decrees.

S. 11, Pensions Act is wide enough to include cases where the property is to be sold in execution of a mortgage-decree and cannot be limited to cases of simple money-decrees. It draws no distinction between a case where the property is directed to be sold by a decree or is directed to be sold in pursuance of an attachment made by the order of a Court. A.I.R. 1935 All. 678=1935 A.W.R. 867=58 All. 98=157 Ind. Cas. 511.

—S. 11—Applicability and scope.

An insolvent cannot be ordered to pay a certain amount monthly out of the pension received by him from Government for past services, to the Receiver. 164 Ind. Cas. 747=40 C.W.N. 142.

—S. 11—Scope of.

S. 11 of the Act protects from attachment, seizure or sequestration a pension or money due or to become due under a pension. 12 O.C. 323=4 Ind. Cas. 145.



## 2. Evidence and proof.

—S. 11—Evidence and proof—Objection that sale was prohibited—Court's duty to enquire.

A Court is not bound to refuse to hear evidence which is offered to show that the property is one the sale of which is prohibited by S. 11, Pensions Act. The Court must ascertain the truth of the allegation that it has no jurisdiction to sell the property which it is required to sell. A.I.R. 1935 All. 678=1935 A.W.R. 867=58 All. 98=157 Ind. Cas. 511.

—S. 11—Evidence and proof—Compromise decree in regard to pension challenged.

Where a compromise decree in regard to a pension is challenged, it must be proved after making proper allegation, that the pension falls under S. 11, Pensions Act. A.I.R. 1935 All. 862=1935 A.L.J. 910=1935 A.W.R. 1034=58 All. 230=158 Ind. Cas. 1106.

—S. 11—Evidence and proof—Jagir—Political pension—Burden of proof.

There is no initial presumption that a jagir is a political pension and the burden of proving that it is a political pension and as such exempt from attachment is on the person who alleges it. 111 Ind. Cas. 838, Foll. 31 P.L.R. 538=A.I.R. 1930 Lah. 816.

## 3. Liability for attachment.

—S. 11—Attachment of pension for realising punitive police tax—Legality.

The attachment by a District Magistrate of a pension which has become due for realisation of punitive police tax imposed under S. 15 (3) of the Police Act, is not illegal under S. 11 of the Pensions Act, as the attachment is not by a creditor and is not founded upon a decree or order of Court. U.P. 1948 O.W.N. 241=A.I.R. 1949 Oudh 31.

—S. 11—Liability for attachment.

Amount of pension after it is paid over to pensioner ceases to be exempt from attachment. A.I.R. 1944 Mad. 263=57 L.W. 17=1944 M.W.N. 180=(1944) 1 M.L.J. 45.

—S. 11—Liability for attachment—Political pension.

A political treaty pension cannot be attached in execution of a decree. 62 Ind. Cas. 273=3 U.P.L.R. (All.) 11.

—S. 11—Liability for attachment.

A jagir granted on political considerations is exempt from attachment whether or not it was granted for services rendered to the British Government. 61 Ind. Cas. 895 Lah.

—S. 11—Grant of land revenue—Liability for attachment.

For the purposes of S. 11, a grant of land revenue of is not a pension and is, therefore, liable to be attached in execution of a decree. The distinction drawn in the Act between pensions and grants of money and land revenue is not to be disregarded. 11 L.W. 398=54 Ind. Cas. 331.

—S. 11—Liability for attachment—Wasika allowance—Arrears of—Whether can be attached.

The arrears of wasika allowance accruing due in the life time of the wasikadar and paid after his death to his heirs cannot be attached in execution to satisfy the debts of the wasikadar in the hands of his heirs. 6 O.L.J. 137=21 O.C. 329=49 Ind. Cas. 511.

—S. 11—Liability for attachment—Malikana allowance—Execution of decree.

A Malikana allowance is in the nature of a pension and so cannot be attached in execution of a money decree. 8 A.L.J. 126=13 Ind. Cas. 194.

—S. 11—Liability to attachment—Political pension—C. P. C., 60 g (O. C. S. 266 g.)

A pension is a periodical allowance or stipend granted not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits or as a compensation to dethroned princes, their families and dependants. Where certain immovable property was granted in lieu of a pension and it was provided in the sanad that upon the death of the original grantee the estate would be continued in perpetuity in the manner of an hereditary holding (*Zemindari mauzusi*) and at the desire of the grantee revenue was assessed and the members of the family had treated it as an ordinary Zemindari property, subject simply to the payment of Government revenue: Held, that the Zemindari so granted was not a pension within the meaning of S. 11 and was liable to attachment and sale. (1900) 6 A.L.J. 519=31 A. 382=2 Ind. Cas. 100.

—S. 11—Liability for attachment—Pensions, foreign but payable in India.

See C. P. C., S. 60. 26 M. 423.

## 4. "Pension".

—S. 11—Pension—Right to lakhiraj or revenue-free land is not pension or grant of land revenue.

There is an obvious distinction between an assignment and a remission of land revenue. A remission of land revenue cannot be regarded as assignment. The Government may remit a liability to pay land revenue in which case no assessment is made, but that is a very different thing from assessing a certain sum and then granting or assigning that sum to some person other than the Government. A right to lakhiraj or revenue-free land is certainly not a pension or a grant of land revenue. A.I.R. 1940 All. 373=1940 A.L.J. 420=1940 O.W.N. 650=1940 R.D. 452=I.L.R. (1940) All. 603=1940 A.W.R. 397=190 Ind. Cas. 3 (F.B.).

—S. 11—Pension—Term "pension," meaning of—Jagir, if pension.

The term 'pension' as used in the Pensions Act implies 'periodical payments of money to the pensioner.' A jagir is not a pension within the meaning of the Act. A.I.R. 1940 Lah. 492=I.L.R. (1941) Lah. 564=44 P.L.R. 204=192 Ind. Cas. 288.

—Ss. 11, 12—"Pension"—Grant of land revenue, if 'pension'.

The grant of land revenue is not a pension within the meaning of S. 11 and S. 12, Pensions Act. A.I.R. 1936 All. 666=1936 R.D. 300 (1)=1936 A.W.R. 702=1936 A.L.J. 1281=164 Ind. Cas. 1066.



—Ss. 11, 12—"Pension"—Every *Muafi* right, whether pension.

The phraseology of Ss. 11 and 12, Pensions Act, is narrower, and must be presumed to be designedly so. Every "*muafi*" right cannot be regarded as a "pension" within the meaning of Ss. 11 and 12. A.I.R. 1936 All. 298=1936 A.W.R. 65=1936 A.L.J. 161=162 Ind. Cas. 56.

—S. 11—Pension—Assignment of revenue—If pension.

An assignment of revenue for services rendered was held to amount to a pension within the meaning of S. 11 and therefore not transferable under S. 12 of the Act. A.I.R. 1922 All. 22, Rel. on. (1902) A.W.N. 161, Dist. 52 A. 868=1910 A.L.J. 1326=A.I.R. 1930 All. 681.

—S. 11—Pension—Assignment of land revenue—If pension.

A pension may take the form of an assignment of land revenue. Whether or no particular assignment of land revenue is a pension depends upon the circumstances of the particular case. 86 P.R. 1914 Rel. on. (Case Law referred). 31 P.L.R. 812=A.I.R. 1930 Lah. 904.

—S. 11—Pension—Pension from foreign State—If political pension.

The word "pension" is not defined in the Act, but there is nothing in the Pensions Act to exclude allowances granted by the British Government to political prisoners detained under Regulation III of 1818 from its operation in cases where the British Government by some arrangement with a foreign State collects the allowance which it fixes. 26 Mad. 423, Foll; 18 Cal. 216 (P.C.) Expl.

The word "political pension" is a general term and the source from which the money is derived is not an element which should be taken into consideration so long as the payment is made by the Government through its Treasury. 103 Ind. Cas. 339=50 Mad. 711=38 M.L.T. 299=25 M.L.W. 640=1927 M.W.N. 374=A.I.R. 1927 Mad. 604=52 M.L.J. 622.

—S. 11—Pension—Commutation of Mogul grant—Cash allowance substituted for land in *muafi* grant by Mogul Government—No pension.

Where a *muafi* grant of landed property had been made by the Mogul Government to the plaintiff's family but subsequently the land was resumed and cash allowance was substituted therefor, and is recognized by the British Government, the cash allowance is a substitution for land which can be alienated by the grantee. The allowance is not a pension within S. 11. 95 Ind. Cas. 208=24 A.L.J. 630=A.I.R. 1926 All. 521.

—S. 11—"Pension"—Meaning—Assignment of pension—Validity.

The word 'pension' in S. 11 is used in its ordinary and well-known sense, viz., that of a periodical allowance or stipend granted not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits or as compensation to dethroned princes, their families and dependents. 4 Bom. 432 at page 436, Foll.

Assignments of the pensions to plaintiff upon which he founds his claim are null and void under S. 12 of the

Act and the claim is unsustainable. 65 Ind. Cas. 645=44 All. 354=20 A.L.J. 172=A.I.R. 1922 All. 22.

—Ss. 11 and 12—"pension"—Meaning of.

The word 'pension' involves the idea of a fixed periodical allowance or stipend and if it is granted for political consideration or for past services it cannot be assigned and comes with the protection afforded by S. 12. 86 P.R. 1914=233 P.L.R. 1915=26 Ind. Cas. 743.

—S. 11—Pension—Meaning.

'Pension' means periodical allowance or stipend granted for past services or particular merits or as compensation to dethroned princes. 31 All. 382=6 A.L.J. 519=2 Ind. Cas. 100.

—S. 11—"Pension" definition of — Political pension—C. P. C., S. 266.

The word "pension" in S. 11 of the Pensions Act & C. P. C., S. 266, implies periodical payments of money by Government to the pensioner in the manner prescribed by S. 8 of the Act. 1904 A.W.N. 144=1 A.L.J. 338=26 A. 617.

—S. 11—Pension—Definition of.

See 8 C. W. N. 665.

—Ss. 12, 11—Assignment of land revenue—Original grant and subsequent confirmment must be considered.

An assignment of the land revenue itself which entitles the assignee to recover such revenue directly from the *zemindars* who are liable to pay the same is not contemplated by S. 11 or S. 12 of the Act. Whether such an assignment is transferable or not will depend on the terms of the grant itself. Presumably, if it is an interest in immovable property, the right would be heritable and transferable.

Each case of assignment of land revenue must be considered in terms of the original grant and of subsequent confirmments. Where the original grant was to a certain person and his heirs in perpetuity and there is nothing to indicate that it is not transferable, the grant is transferable and its assignment is not barred by S. 12, Pensions Act. A.I.R. 1936 All. 666=1936 R.D. 300 (1)=1936 A.W.R. 702=1936 A.L.J. 1281=164 Ind. Cas. 1066.

—S. 12—Assignment of land revenue — If prohibited.

Per *Sen, J.*—A grant of land revenue as such cannot be comprised in the term "pension." A right to share in the Government revenue granted in perpetuity by sovereign power cannot be described either as a pension or as a political pension. Such a grant may be hereditary and partakes of the nature and character of a *jagir*. Its liability to resumption is dependent upon the terms under which it is created and upon the will of the sovereign power. When a gift of this description is created by contract or grant its transferability will in each case depend upon the terms of the contract or grant. The assignment of such grant is not prohibited by S. 12, Pensions Act.

The word 'pension' in S. 12 does include a grant of land revenue and the assignment of such grant is null and void under S. 12. 1929 A.L.J. 724=11 L.R.A. Rev. 65=A.I.R. 1929 All. 781.



**—S. 12—If retrospective.**

Section 12 is not retrospective and therefore, cannot be applied to the case of a transfer of pension made before the Act came into force. A.I.R. 1944 Oudh 139=1944 O.W.N. 37=1944 A.W.R. 11=19 Luck. 515=216 Ind. Cas. 276.

**—S. 12—If retrospective—Alienation before the Act—Validity of.**

The Pensions Act has not a retrospective effect and no alienations made before the Pensions Act came into force are invalid under S. 12 of the Act. 86 P.R. 1914=233 P.L.R. 1915=26 Ind. Cas. 743.

**—S. 12—Scope—Arrangement between pensioner and his creditor to pay portion of pension to creditor and deposit pension papers with creditor—If falls under S. 12.**

The language of the Pensions Act is very wide and the transaction by which a pensioner arranges with his creditor to pay a certain portion of the pension month by month in liquidation of the sum previously advanced, and to deposit with the creditor his pension pay order and pension papers is clearly one of the class of transactions which S. 12, Pensions Act is enacted to prevent. A.I.R. 1940 Cal. 192=I.L.R. (1939) 2 Cal. 434=43 C.W.N. 1194=187 Ind. Cas. 699.

**—S. 12—Scope of.**

All kinds of Government pensions do not come under S. 12, Pensions Act. A.I.R. 1935 All. 862=1938 A.L.J. 910=1935 A.W.R. 1034=58 All. 230=158 Ind. Cas. 1106.

**—S. 14—Allowance to Deshmukhs and Deshpandias.**

Under R. 32 of the Rules framed under S. 14 of the Pensions Act, 1872, as applied to Berar, the cash allowance payable to Deshmukhs and Deshpandias in commutation of their emoluments as *ex-pargana* officials is paid to the person whose name has been recorded as *dastaki*. Under R. 36 of the aforesaid rules, the *dastaki* is bound to distribute the allowance among all persons who are entitled to any share in it. These allowances are intended for the maintenance of the grantees and their descendants. A.I.R. 1940 Nag. 129=I.L.R. (1940) Nag. 244=1940 N.L.J. 78=194 Ind. Cas. 454.

**—Ss. 46 and 14—Collector's certificate—Cancellation of by Revenue Board—Order ultra vires.**

A Board of Revenue is not competent to revoke or cancel a certificate issued by a Collector under the Pensions Act. The rules issued by Government and printed at page 125 of the Boards Standing Orders cannot be deemed to be framed under S. 14 of the Pensions Act and are *ultra vires*. 25 M.L.J. 155= (1913) M.W.N. 374=18 Ind. Cas. 353.

**Peon.**

See Penal Code, S. 186.

**Per Capita and per Stirpes.**

See Hindu Law—Succession.

**Performance of contract.**

- See (1) Contract Act, Ss. 37 to 57.  
(2) Specific Relief Act, Ss. 12 to 30.  
(3) Transfer of Property Act, S. 53-A.

**Perjury.**

- See (1) Criminal P. C., S. 195.  
(2) Penal Code, Ss. 191 and 193.

**Permanent Appointment.**

See Words and Phrases.

**Permanent Lease.**

- See (1) Deed—Construction—Lease,  
(2) Landlord and Tenant—Nature of Tenancy.  
(3) Lessor and Lessee.  
(4) T. P. Act, S. 111.

**Permanent occupancy right.**

See Land-lord and Tenant.

**Permanent settlement.**

- See also; (1) Bengal Permanent Settlement Regulation (1 of 1793)  
(2) Grant  
(3) Land Tenures  
(4) Madras Permanent Settlement Regulation (XXV of 1802)

**—Burden of proof—Whether particular property is included in the settlement—Evidence.**

It cannot be presumed as a matter of law that the state of things described in the thak and survey maps existed at the time of the Permanent Settlement. The question, what lands were included the Permanent Settlement, is a question of fact and not of law which may or may not be satisfactorily proved by subsequent survey maps. The onus of proving that any particular lands were included in the Permanent Settlement of 1793 is clearly on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the thak and survey maps showing that specific lands are included in a peculiar estate. The thak and survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement. 65 Ind. Cas. 866=34 C.L.J. 141=A.I.R. 1921 Cal. 687.

**—Enhancement by zamindar.**

The Zamindar holding under the Permanent Settlement has a right from time to time to raise the rent of all rent-paying lands within his zamindari according to the current rate unless he is precluded from the exercise of that right by a contract binding on him or by the law in force. 13 M. I. A. 248 (P. C.); 32 C.L.J. 919, Foll. 87 Ind. Cas. 758=42 C.L.J. 172=A.I.R. 1925 Cal. 1248.



**—Ground rent of hats—Right to receive ground rent of existing and future hats vested in proprietors at the time of Permanent Settlement.**

In resuming the *sayer* the Government did not intend to divest the land-holders of collections made by them as consideration for the use of grounds shops or other buildings belonging to them and ground rents whether in markets or in other parts of the zamindari were the exclusive property of the zamindar, and therefore the Commissioner of Income-tax is not entitled to deprive the assessee of his right to exemption of income received by him in the markets. Whether the hats existed at the time of Permanent Settlement or spring up subsequently these ground rents were included in the assets as the property of the zamindar at the time of settlement and the mere fact that the lessee may in some instances abuse his rights and enforce illegal exactions from those using the markets, is not by itself any ground for depriving the zamindar of his legal rights. The rents from markets are just as much *mal* rents as the rent from agricultural or any other species of land. 92 Ind. Cas. 338=2 Pat. L.R.Cr. 242=6 P.L.T. 355=1925 P.H.C.C. 49=A.I.R. 1925 Pat. 313.

**—Jalkar—Right if included in assets of Permanent Settlement.**

*Jalkar* was included in the assets of the Permanent Settlement and in the rules for the resumption of *sayer* passed in 1790 which are referred to in Regulation XXVII of 1793. The rights of *phalkar*, *bankar* and *jalkar* were exempted from the resumption and remained vested in the land-holders. 92 Ind. Cas. 338=6 P.L.T. 355=2 Pat. L.R.Cr. 242=1925 P.H.C.C. 49=A.I.R. 1925 Pat. 313.

**—Liability to future taxes.**

Per *Mullick, J.*—By permanent Settlement a limited right of ownership was conferred upon the Zamindar not only in respect of the owner's share of the produce of the soil but also in the soil itself. The demand was based on contract and it was open to the Zamindar to decline to engage. If he accepted the engagement not even the total destruction of the property was a ground for remission. The demand had some of the attributes of a land-tax but it was not a tax in reality; the transaction was a sale of the owner's rights on the basis of the capitalized value of the assessment. The Company represented the Sovereign and the general community; they were also the owners of the soil; they surrendered to the zamindar no part of their rights in the former capacity which included the right to tax but only a portion of their rights of ownership, namely, the right to the produce of the soil, and it seems clear from the context that the declaration that the *jama* was unalterable could only refer to the limited purposes of the contract. If this view is not correct then at least the language of the permanent Settlement is ambiguous and does not clearly and distinctly give any exemption from all future taxes and rates. The meaning of the Legislature being doubtful contemporary exposition can be resorted to. The uniform view of the Legislature and its servants has been that the Permanent Settlement Regulation did not intend to surrender all future rights of taxation in respect of the profits of the estates thereby affected. If the language of the Permanent Settlement Regulation is not ambiguous and if it clearly indicates an intention to surrender all such future rights of taxation then the interpretation placed upon statutes similar to the

Income-tax Act can be called in aid for the purpose of explaining the meaning of the words used in the Act. If such a course leads to the conclusion that similar general words have hitherto been considered sufficient to revoke the exemption granted by the Permanent Settlement then the absence of express words in the Act will not prejudice the Crown and the affirmative language of the Act is sufficient to revoke the exemption in question. Therefore the profits of *jalkar ghatlagi*, and market rights are chargeable with Income-tax. 78 Ind. Cas. 783=3 Pat. 470=2 Pat. L.R.Cr. 25=1924 P.H.C.C. 69=5 Pat. L.T. 459=A.I.R. 1924 Pat. 474.

**—Madras Settlement.**

The Madras Permanent Settlement is not based upon the Bengal Settlement. A.I.R. 1923 Mad. 454; A.I.R. 1929 Mad. 399, Foll.; A.I.R. 1926 Mad 511, not Foll. 119 Ind. Cas. 305=30 M.L.W. 129=A.I.R. 1929 Mad. 676.

**—Object.**

The Permanent Settlement aims at confirming Zemindars in their holdings at a fixed rent and any assumptions made should justify the title rather than make it insecure. 22 M.L.T. 438=26 C.L.J. 590=(1918) M.W.N. 28=20 Bom. L.R. 46=43 Ind. Cas. 361 (P.C.)

**—Settlement of ghats—Rights.**

Settlement of *ghats* not only means the right to collect tolls or ferry dues but also includes the right to mooring dues. 92 Ind. Cas. 338=6 P.L.T. 355=2 Pat. L.R.Gr. 242=1925 P.H.C.C. 49=A.I.R. 1925 Pat. 313.

**—Survey map made since 1793—Inclusion of some area covered by river within ambit of revenue-paying estate — If proves that the area was included in land assessed to revenue.**

The inclusion in a survey map made since 1793 of some area covered by a river within the ambit of a revenue-paying estate neither amounts to an admission nor necessarily establishes, in the absence of any other evidence on record, that the said area was included in the land assessed to revenue at the time of Permanent Settlement. 2 D.R. 312.

**—Variation—Right of Government — Effect of Income-tax Act.**

Per *Dawson—Miller, C. J.*—Though the legislature has power to vary or modify the bargain entered into between the Government and the proprietors by the Permanent Settlement, yet this can only be done by clear and specific language in a statute and not by general implication. The applications for settlement made by the proprietors at the time of Permanent Settlement were, as a rule, a counterpart of the actual settlement made and were part of a single transaction completed at the same time, just as a *kabuliyat* is a counterpart of a *patta*. The Income-tax Act, if and in so far as it charges income derived from property included in the original settlement with the proprietor and assessed to revenue, varies the terms of Reg. I of 1793. The Income-tax Act of 1922 is not explicit enough in its terms to repeal the exemption created by the permanent Settlement Regulation; for such repeal cannot be effected merely by words of general import or by implication. By the Permanent Settle-



ment it was the revenue of rent payable to Government as the paramount land-lord that was fixed in perpetuity. The effect of the imposition of income-tax on the profits arising out of **jalkar**, **bat**, and **ghatlag** is in fact to increase the revenue under another name. The jama permanently fixed at the date of the settlement was calculated on a percentage of the rents and profits at that time derived from the ownership of the land. Income-tax is based upon the same rent and profits as they now exist and it is impossible to escape from the conclusion that a tax under whatever name upon the same sources of income would increase the duty payable under the name of revenue and which by the Permanent Settlement it was agreed should then be fixed for ever. (45 Mad. 518, Foll.) 78 Ind. Cas. 783=3 Pat. 470=2 Pat. L. R. Cr. 25=1924 P. H. C. C. 69=5 Pat. L. T. 459=A.I.R. 1924 Pat. 474.

#### Permanent Settlement Regulation.

See: (1) Bengal Permanent Settlement Regulation (I of 1793).

(2) Madras Permanent Settlement Regulation (XXV of 1802).

#### Permanent Settlement Regulation (Bengal Reg. I of 1793).

##### —Applicability.

The Permanent Settlement Regulations 1 and 8 of 1793 apply to the Ramgarh estate. 114 Ind. Cas. 194=A.I.R. 1928 Pat. 294.

##### —Assessment on churs in rivers—Churs formed subsequent to settlement—Liability to assessment.

**Churs** within the limits of the **Zemindari** formed after the decennial settlement are to be treated as unsettled under Bengal Regulation II of 1890 notwithstanding the fact, that the river-bed from which the **Churs** have been thrown up belong to the **Zemindar** at the time of the settlement and the **Jama** was assessed on the **Zemindari** as a whole. Therefore under Bengal Act IX of 1847 the Government can assess to public revenue **Churs** formed in a non-navigable river both where it flows through a permanently settled **Zemindari** and within the middle line of the river where it is the boundary of the **Zemindari**. The right of the Government to assess the **Churs** in question is not affected by the fact that the whole or half of the river-bed was part of the **Zemindar's** permanently settled estate. Bengal Regulation I of 1793 exempts from further assessment all lands included in a permanently settled estate whether they were cultivated or waste at the time of settlement. 67 Ind. Cas. 835=26 C.W.N. 619=35 C.L.J. 92=49 Cal. 103=48 I. A. 565=A.I.R. 1922 P. C. 6=42 M.L.J. 61 (P. C.).

##### —Commencement.

The Permanent Settlement does not date from the expiry of the Decennial Settlement in 1799, but from the time when the Decennial Settlement was made in 1790. 75 Ind. Cas. 955=2 Pat. 839=A.I.R. 1924 Pat. 213.

##### —Effect.

The effect of the Permanent Settlement was that the Government limited its own demand upon the zamindar in so far as that demand related to the in-

come that was derivable from the land. 102 Ind. Cas. 845=54 Cal. 863=45 C.L.J. 323=31 C. W. N. 765=A. I. R. 1927 Cal. 432 (F. B.).

##### —General taxes on estates—Liability to income-tax.

**C. C. Ghose, J.—Buckland and Panton, JJ. concurring.**—The clear purport of the declaration made in Regulation I of 1793 is that the re-assessment of the estates dealt with therein was for ever barred. In other words, the land assessment then formed was to be considered the permanent and unalterable revenue of the territorial possessions of the East India Company in Bengal so that no discretion might be exercised by the Company's servants in any case of introducing alteration whatsoever. The Regulation of 1793 was so framed as to operate as an ample and complete guarantee that no resettlement of the estates referred to therein should ever take effect. But no guarantee was ever given that the proprietors of those estates should never, at any time, be called upon to aid in the relief of the future necessities of the Government of the land and there was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a 'general' tax upon incomes of all persons irrespective of the fact whether they are zamindars with whom the Permanent Settlement was concluded or not. A 'general' tax is no doubt a public demand but it is one which is levied upon a wholly different principle and in respect of a wholly different kind of liability; such a 'public demand' is no doubt a demand made upon zamindars with whom the Permanent Settlement was concluded, but it is made upon them in company with other classes of the community and with no exclusive reference to the source from which their incomes are derived.

**Mukerji, J., and Subrawardy, J., concurring.**—The public assessment could be augmented in any way, so long as the method adopted did not mean to take away a portion of this income or profits *qua* such income or profits. Although by the Permanent Settlement right to taxation generally was not given up the income or profits derivable from the lands was not to be taxed as such. Whether a portion is taken as revenue and another under the head of income-tax, both are demands of the State, and when in assessing the revenue, a guarantee was given of its fixity and a declaration was made that the balance will not be altered at any time, to impose a further tax on the income or profits does away with that fixity and alters that which was guaranteed to be unalterable. The object of the Settlement in exempting from further burden income which has already paid toll to the State in the shape of land revenue was primarily to protect and improve agriculture, as that then was the chief source of income, and the exemption of agricultural income from the operation of the Income-tax Act perhaps indicates a continuity of policy on the part of the legislature in that respect. The words of the Settlement, however, are clear enough as indicating an intention to leave untouched for all times to come the surplus that the land-holder will be able to derive as income or profits from the lands of his estate. 102 Ind. Cas. 845=54 Cal. 863=45 C. L. J. 323=31 C. W. N. 765=A.I.R. 1927 Cal. 432 (F. B.).

##### —Right to minerals.

A Zamindar of a permanently settled estate under the Regulations of 1793 is the owner of the soil, and whatever may be the claim of the Crown against him,



as between himself and a tenure-holder he has the right to the minerals unless he has expressly parted with them. 114 Ind. Cas. 194=A.I.R. 1928 Pat. 294.

—S. 1—Decennial taluks—If independent.

The mere fact that in various reports made and proceedings taken under the then existing Regulations the taluks are mentioned as decennial taluks does not make them independent taluks. 98 Ind. Cas. 211=A.I.R. 1927 Cal. 136.

—Art. 6—Effect on future taxes.

Per **Mullick, J.**—By Permanent Settlement a limited right of ownership was conferred upon the Zamindar not only in respect of the owner's share of the produce of the soil but also in the soil itself. The demand was based on contract and it was open to the zamindar to decline to engage. If he accepted the engagement not even the total destruction of the property was a ground for remission. The demand had some of the attributes of a land-tax but it was not a tax in reality; the transaction was a sale of the owner's rights on the basis of the capitalized value of the assessment. The Company represented the Sovereign and the general community; they were also the owners of the soil; they surrendered to the zamindar no part of their rights in the former capacity which included the right to tax but only a portion of their rights of ownership, namely, the right to the produce of the soil, and it seems clear from the context that the declaration that the jama was unalterable could only refer to the limited purposes of the contract. If this view is not correct then at least the language of the Permanent Settlement is ambiguous and does not clearly and distinctly give any exemption from all future taxes and rates. The meaning of the Legislature being doubtful contemporary exposition can be resorted to. The uniform view of the Legislature and its servants has been that the Permanent Settlement Regulation did not intend to surrender all future rights of taxation in respect of the profits of the estates there by affected. If the language of the Permanent Settlement Regulation is not ambiguous and if it clearly indicates an intention to surrender all such future rights of taxation then the interpretation placed upon statutes similar to the Income-tax Act can be called in aid for the purpose of explaining the meaning of the words used in the Act. If such a course leads to the conclusion that similar general words have hitherto been considered sufficient to revoke the exemption granted by the Permanent Settlement then the absence of express words in the Act will not prejudice the Crown and the affirmative language of the Act is sufficient to revoke the exemption in question. Therefore the profits of **jalkar ghatlagi** and market rights are chargeable with income-tax. 78 Ind. Cas. 783=3 Pat. 470=2 Pat. L.R.Cr. 25=1924 P.H.C.C. 69=5 Pat. L. T. 459=A.I.R. 1924 Pat. 474.

—Art. 6—General taxes on estate—Exemption from liability.

While the Regulations contain assurances against any claim to an increase of the jama based on an increase of the zamindari income, they contain no promise that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property, taxation, or that the income of the zamindari shall not be subjected with other incomes to any future general taxation of income, such as income-tax. 57 I. A. 228=34 C.W.N. 1017=52 C.L.J. 225=125 Ind. Cas. 871=32

M.L.W. 458=32 Bom. L.R. 1541=1930 A.L.J. 1361=1931 M.W.N. 201=59 M.L.J. 814=A.I.R. 1930 P. C. 209 (P.C.).

**Permanent Tenancy.**

- See: (1) Land-lord and tenant.  
(2) Land Tenures.  
(3) Local Tenancy Acts.  
(4) T. P. Act, Ss. 105 to 108.

—Tenure—Ulavadai miras and Purakudy.

See 14 M.L.J. 200=27 M. 291=31 I. A. 83.

**Perpetual Injunction.**

- See: (1) Criminal P. C., S. 144.  
(2) Specific Relief Act, Ss. 54 and 55.

**Perpetual Lease.**

- See: (1) Deed—Construction—Lease.  
(2) Land-lord and tenant—Nature of tenancy.  
(3) Lessor and Lessee.  
(4) T. P. Act, S. 111.

**Perpetuity.**

- See: (1) Succession Act, S. 114.  
(2) T. P. Act, S. 14.  
(3) Will—Validity.

—Perpetuity, rule of—Endowment, creation of—How far affectable.

—See **Religious Endowments**. 9 C.W.N. 528=1 C.L.J. 605.

**Persona Designata.**

- See: (1) Deed—Construction.  
(2) Will—Construction.

**"Person aggrieved."**

See: Cr. P. C. S., 198.

**Personal Appearance.**

- See: (1) Civil P. C., O. 3, R. 1; O. 5, R. 3; O. 18, R. 4; O. 19, R. 2 and O. 26, Rr. 1 and 4.  
(2) Criminal P. C., S. 205.

—Exemption from.

See: Civil P. C., S. 132.

**Personal Covenant.**

See: T. P. Act, Ss. 40 and 58.

**Personal Decree.**

—Mortgage suit.

See: Civil P. C., O. 34, R. 6.

**Personal Effects.**

See: Civil P.C., S. 60.

**Personal Inam.**

See: Inam.



**Personal Interest.**

See: Criminal P. C., Ss. 526 and 556.

**Personal knowledge of Magistrate.**

See: Criminal P. C., S. 190.

**Personal Law.**

See: (1) Hindu Law.  
(2) Jews.  
(3) Muhammadan Law.

**Personal Security.**

See: Criminal P. C., Ss. 107 to 123, 144, 145.

**Personation.**

See: Penal Code, Ss. 170 and 171.

**Petroleum Act (VIII of 1899).****—Rule-making powers of government—Extent of.**

Government cannot make a rule requiring that persons must have a licence except for the purpose of possessing or transporting, or for the purpose of possessing or transporting except as provided in the Act. A.I.R. 1937 Bom. 11=38 Bom. L.R. 967=38 Cr.L.J. 221=I.L.R. (1937) Bom. 106=166 Ind. Cas. 277.

**—Ownership of natural gases—Grant of right to oil—Effect.**

Where by a grant by Government, dated 25th April 1912, the Secretary of State for India in Council granted to the respondents the right to win and get earth-oil from a certain well site and to dispose of all earth-oil to be gotten therefrom on certain conditions:

**Held**, that the grantee did not by his grant obtain any right to win, get or dispose of gas.

**Held further**, that the ownership of natural gases, so far as they are capable of ownership, remained with Government and did not pass either in 1912 or in 1919 by the rules under Burma Oil-fields Act (1918) to the grantee. 102 Ind. Cas. 830=5 Rang. 133=A.I.R. 1927 Rang. 201.

**—Transport—Unlawful possession.**

'Transport' of petroleum involves the idea of removal and a mere order for petroleum which is sent accordingly is not transport. A person taking delivery of petroleum in excess of the quantity allowed by law and unable to show he was not in possession of it for a reasonable time is guilty under S. 15 (a). 39 Ind. Cas. 995, Dist. 28 P.R. 1919 Cr.=20 Cr.L.J. 686=52 Ind. Cas. 606.

**—Ss. 1 (3), 11, 15—Also Repealed Act, Ss. 2 (2), 10 and 15—Kerosine oil possession of exceeding statutory quantity—Notification in Gazette extending repealed Act to Cuttack—New Act not expressly preserving same—General Clauses Act, Ss. 8, 24 notification preserved by.**

The accused had been convicted under Ss. 11, 15 of the Petroleum Act for being in possession of 148 tins of kerosine oil at Cuttack, a place to which similar provisions of the Petroleum Act of 1886 had been extended by notification in the Calcutta Gazette, dated

7th April 1891. **Held**, that the notification of 1891 made the present Act applicable to Cuttack and the conviction was right. That notification has been preserved by the operation of Ss. 8, 24 of the General Clauses Act although the Act of 1886 itself was repealed, and there is no provision in the present Act expressly preserving the notifications issued under the provisions of the repealed Act. The notification was an order within the meaning of S. 24 of the General Clauses Act, and a second notification in the Gazette, under the new Act on the repeal of the old Act was unnecessary. 7 C.W.N. 658.

**—Ss. 5, 11 and 15—Transport licence—Accused holding transport licence—Keeping petroleum on premises for transport for short time is not punishable—No offence.**

The accused held a licence for storage of 500 gallons of petrol and had a store for that quantity at K. He was the Agent of the Burmah Oil Company and as their agent also held a transport licence for transport of petrol without limit of quantity. On 28th November 1925 evening he took delivery at K of 1000 gallons. He carried these to his premises, put 500 in store, disposed of another 100 before dark, and kept the remaining 400 in bandies on his premises over night with a view to transporting them in the morning to V and M, for which places he had booked orders. At 10 A.M. on the 29th morning the police visited the premises and found 400 gallons in excess.

**Held**, that a licence to transport includes permission to possess or keep for the process of and during the transport, and the fact that the place at which the bandies were kept was the accused's own premises and that he had a store for petrol there makes no difference. (1917) M.W.N. 720. Appr.

**Madhavan Nair, J.**—The keeping of petroleum received under a transport licence for a short period, which is incidental to, and necessary for the distribution of it, cannot amount to "keeping" or "possession" within the meaning of Ss. 5, 11 and 15(a). The question whether the period of time is short enough to be considered reasonable or too long to be considered unreasonable, will have to be decided with reference to the particular facts of each case.

**Jackson, J.**—If a person licensed to keep 500 gallons keeps 900 gallons of petrol in his depot, he commits an offence under Ss. 5 and 15, Act VIII of 1899. He may plead that he had not kept the excess quantity very long, and had not intended to keep it much longer, but this is only a plea of extenuation which cannot be regarded as a plea of acquittal. (1917) N.W.N. 720, Dist. (Wallace, J.) on difference between. 106 Ind. Cas. 459=51 Mad. 248=1 M. Cr. C. 33=9 A. I. Cr. R. 273=29 Cr.L.J. 43=27 M. L. W. 69=A. I. R. 1928 Mad. 147=54 M.L.J. 158.

**—Ss. 11 and 15 (a)—Possession.**

The word 'possession' in S. 15 (a) and 'amounts to keeping' within S. 11 which defines the quantity of petroleum, the keeping in excess of which amounts to an offence, must be understood with reference to S. 11 of the Act and a person receiving petroleum from the Company on the Railway premises will be adjudged guilty or not according as he is on the Railway premises with the permission of the Railway Company for a reasonable time or he uses it as a godown or store-house for purposes of sale. (1917) M.W.N. 720=18 Cr. L. J. 627=39 Ind. Cas. 995.



—Ss. 15, 9—Storing on licensed premises belonging to another — Conviction for failure to possess licence—Legality of.

**Prima facie**, a person who has no intention of storing or keeping petroleum but merely orders it with the intention of having it stored on licensed premises belonging to another person is not required to have a licence under S. 6 of the rules framed thereunder. He is not, therefore, liable to conviction under S. 15 for failing to possess one. A.I.R. 1937 Bom. 11=38 Bom. L.R. 967=38 Cr.L.J. 221=I.L.R. (1937) Bom. 106=166 Ind. Cas. 277.

—S. 15 (c) — No offence of licence — Licensee possessing excess quantity but in another's licensed shed.

The licence granted to the accused was headed as "Licence to possess dangerous petroleum." The licence then proceeded: Licence is hereby granted to .....for the storage in the storage shed described below of 1,000 gallons, of dangerous petroleum." The accused on several occasions got possession of more than 1,000 gallons, but he never stored in his shed more than 1,000 gallons, the excess quantity being stored on his behalf by another who had proper licence.

**Held**, that the heading of the licence was merely descriptive and so, as the accused never stored more than the permitted quantity in his shed, he was not liable to be convicted. 32 Bom. L.R. 761=1930 Cr.C. 889=A.I.R. 1930 Bom. 370.

#### Phuka.

- See (1) Bengal Cruelty to Animals Act, (1 of 1920) —S. 6.  
(2) Prevention of Cruelty to Animals Act, (1890).

#### Physical Possession.

- See (1) Adverse Possession.  
(2) Limitation Act, Ss. 142 and 144.  
(3) Possession.

#### Picketing.

- See (1) Prevention of Intimidation Ordinance, 1930.  
(2) Prevention of Molestation and Boycotting Ordinance, 1932.

#### Pious Obligation.

See Hindu Law — Debts — Son's Liability.

#### Piracy.

See International Law.

#### Place of Inquiry.

See Criminal P.C., S. 16; 179.

#### Place of performance.

- See (1) Civil P.C., S. 16.  
(2) Contract Act, Ss. 47 and 49.

#### Plaint.

See Civil P.C., S. 26, O. 4, R. 1; O. 6 and O. 7.

#### —Plaint—Construction.

See Practice—Pleadings.

#### Plea.

- See (1) Criminal P.C., Ss. 255, 256.  
(2) Criminal trial.  
(3) Limitation.  
(4) Limitation Act, S. 3.

#### Pleader.

- See (1) Bar Councils Act.  
(2) Bombay Pleaders' Act.  
(3) Civil P.C., O. 3,  
(4) Criminal P.C., S. 340.  
(5) Legal Practitioner.  
(6) Legal Practitioners' Act.

#### —Pleaders — Magistrate's remarks against — Pleaders right to copy of judgment.

See Practice — Procedure. 6 Bom. L.R. 540.

#### —Pleader and Client—Disability of Pleader — Rule in Palmer v. Carter—Applicability.

Where it appeared that the pleader did not use his confidential portion to his advantage in arranging a sale on behalf of his client. **Held**, that the case did not come within the ruling in *Carter v. Palmer*, 8 Cl. and F. 657. 52 C. L. J. 492=A.I.R. 1931 Cal. 76.

#### Pleader's Act (I of 1846).

#### —S. 6—Pleaders' fees—Assessment.

For assessing the pleaders fees an appeal to the High Court from a preliminary decree adjudicating the status of a party as an agriculturist is regulated neither by S. 52 of Regulation II of 1827 nor by S. 6 of the Pleaders' Act, but by Rule 65 of the appellate side rules of the Bombay High Court. 37 Bom. 303=14 Bom. L.R. 1190=17 Ind. Cas. 964.

#### —Pleader's Clerk.

See Legal Practitioner.

#### Pleadings.

- See also: (1) C.P.C., Os. 6, 7 and 8.  
(2) Practice.  
(3) Relief.

#### Pleadings.

#### Synopsis.

1. Abandonment of plea or relief
2. Admission
3. Alternative pleas or reliefs
4. Amendment
5. Cause of action
6. Construction
7. Contents
8. Defence
9. Evidence and proof



10. False averments
11. Finding
12. Fraud or undue influence
13. Highway
14. Inconsistent pleas
15. Nature of suit
16. Omissions
17. Pleas included in other pleas
18. Procedure and duty of Court
19. Raising pleas in appeal
20. Redemption
21. Relief
22. Time for raising pleas
23. Variation and new case
24. What is
25. Miscellaneous.

### 1. Abandonment of plea or relief.

—Abandonment of plea or relief—Impleading trustee as defendant—Claim against the original defendant.

The plaintiff sued the 1st defendant for the value of the goods sold and after the institution of the suit the 1st defendant executed a trust deed in favour of his creditors with the 2nd defendant as trustee. The plaintiff's name was not in the list of creditors. The plaintiff sought to implead the 2nd defendant on the ground that 1st defendant himself was a trustee holding the goods on behalf of plaintiff and that he could follow the trust property in the hands of the 2nd defendant. The Court found that the property was not identifiable and decreed the suit disallowing the claim as against the 2nd defendant. On appeal, the 1st defendant contended that by impleading the 2nd defendant the plaintiff had abandoned his claim against the 1st defendant:

**Held**, that the plaintiff exercised no election and that he had not given up his claim against the 1st defendant. 96 Ind. Cas. 164=23 M.L.W. 564=A.I.R. 1929 Mad. 720=51 M.L.J. 373.

—Abandonment of plea or relief—Limitation and res judicata.

Although the general rule may be that a plea once abandoned may not be raised, yet such fundamental issues as limitation and res judicata are exception to it. 4 All. 69 (F. B.) and 36 All. 370, Rel. on. 100 Ind. Cas. 40=25 M.L.W. 11=A.I.R. 1927 Mad. 273.

—Abandonment of plea or relief—Cause of action—Change of

Where plaintiff-mortgagee first alleged that the date of the cause of action was the date when the agreed term expired, viz., 21st February 1905, but later on amended the plaint by saying that it was the date when there was a default in payment of an instalment on the agreed date, viz., 21st February 1894 according to the terms agreed to in the mortgage deed and alleged, but failed to prove payment of interest on later dates:

**Held**, that he could not be allowed to revert to the position taken in the unamended plaint with respect to the cause of action. 99 Ind. Cas. 650=48 All. 457=53 I. A. 187=24 A.L.J. 736=1926 M. W. N. 520=

24 M. L. W. 241=31 C.W.N. 324=A.I.R. 1926 P. C. 85 (P. C.).

### 2. Admission.

—Admission of fact—Court coming to opposite view on evidence—Permissibility.

If a fact is unequivocally admitted in a pleading, the other side naturally makes no effort to prove it and it would be unjust and unfair for the Court to pick on stray pieces of evidence which might lend colour to the opposite view and decide on that in the face of what is admitted. Not only would it be unfair, the law does not allow it either. I. L. R. (1950) Nag. 160=A.I.R. 1951 Nag. 259.

—Admission—Defendant asking issue to be decided on allegation of plaintiff—If deemed to admit them.

Where the defendants ask the Court to decide an issue on the very allegations of the plaintiff, they must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true reserving to themselves the right to show that these allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled. I.L.R. (1947) Nag. 477=1947 N.L.J. 417=A.I.R. 1948 Nag. 334.

—Admission—Failure to deny.

Rules of pleading are not strictly enforced in Courts. Where a pleading has not been specifically denied by defendant, it cannot necessarily be held that he admitted the truth thereof in clear and unmistakable terms. 71 Ind. Cas. 779=A.I.R. 1923 Lah. 409.

—Admission—Claim on mortgage—Personal decree can be given where a mortgage deed is not proved.

Where a mortgage was found invalid for want of registration, but the defendant admitted the amount as due it was open to the Court to pass a decree against its defendant for that amount personally. 68 Ind. Cas. 1005=24 Bom. L.R. 502=A.I.R. 1922 Bom. 440.

—Admission.

If the plaintiff cannot prove his allegations and the defendant denies the claim the suit should be dismissed but if the defendant admits the claim partially, that part of the claim may be allowed to the plaintiff. 50 Ind. Cas. 366. (Lah.).

—Admission—To be taken as a whole.

It is permissible for a court to accept part and reject the rest of any witness's testimony. But an admission in a pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not at all. 39 Bom. 399=17 M. L. T. 402=28 M. L. J. 589=13 A. L. J. 529=19 C.W.N. 713=21 C.L.J. 507=17 Bom. L.R. 460=2 L.W. 524=(1915) M.W.N. 522=42 I. A. 103=29 Ind.Cas. 223 (P.C.).

—Admission—Effect of.

A statement in a pleading is not an admission so as to dispense with further proof. 25 Ind. Cas. 22 (Mad.).



### —Admissions—Two sets of defendants.

Where some defendants admit the plaintiff's claim and the others do not and no separate relief could be given as against those that admit the claim: **Held**, that no decree could be passed against such defendants, unless the plaintiff fails to establish his case. 1. O. L.J. 591=26 Ind. Cas. 547.

### 3. Alternative pleas or reliefs.

#### —Alternative pleas or reliefs.

It is open to the plaintiffs to base their claim on the promissory notes and alternatively on the original debt. A.I.R. 1918 P. C. 146, Foll. 32 Bom. L. R. 1035=128 Ind. Cas. 43=A.I.R. 1930 Bom. 424.

#### —Alternative pleas or relief—Suit for rent.

Where the plaintiff in the first place alleges that there was an existing rental, at a certain rate and in the alternative prays that if it be found that there was no existing rental a fair and equitable rent might be assessed there is nothing wrong in making such an alternative prayer. 123 Ind. Cas. 615=A.I.R. 1930 Pat. 485.

#### —Alternative pleas or reliefs—Pre-emption suit.

Where pre-emptor claims partial pre-emption alleging vendor's want of title to the rest, and in the alternative offers to pre-empt the whole property if Court holds that the vendor had title to the whole, his putting forth such alternative cases is not fatal. 116 Ind. Cas. 16=1929 A.L.J. 589=A. I. R. 1929 All. 398.

#### —Alternative pleas or reliefs—Where plaintiff alleges his possession and prays for possession.

The plaintiff is always entitled to claim an alternative relief, unless in doing so he offends against some express provisions of the law.

Where a person claimed a decree for a declaration that he was in possession as owner of the land and in the alternative if the Court found that he was not in possession, a decree for possession of the lands, the reliefs claimed in the alternative and the frame of the suit are both legal and proper. 116 Ind. Cas. 890=A. I. R. 1929 Lah. 820.

#### —Alternative pleas or reliefs—Cannot be treated as an additional prayer.

In the village in suit there was some waste land appertaining to a *shamilat patti* in which there were twenty or more co-sharers. One of these determined to bring a number of plots of this waste land under cultivation; but instead of occupying them himself he granted a perpetual lease of the same to two lessees. About a year later the lessees induced seven more of the co-sharers in the *patti* to grant them another perpetual lease. The present suit was brought by two co-sharers who were dissatisfied with this arrangement. The principal relief sought was a declaration that the two leases above referred to "are improper, null and void and are not fit to be enforced." There was an alternative prayer for a decree for joint possession in favour of the plaintiffs and all the co-sharer defendants, "If, for any reason the passing of a declaratory decree be not thought proper by the Court." The Court found the plaintiffs entitled to the declaration sought

for and framed its decree accordingly. In appeal plaintiffs prayed for joint possession by actual ejectment of the lessees defendants in addition to the declaration already granted, and not by way of alternative. **Held**: that the prayer for ejectment could not be granted as it had been preferred in the plaint only as an alternative. 74 Ind. Cas. 331=A.I.R. 1924 All. 271.

#### —Alternative pleas or reliefs—Ownership and easement.

A claim of ownership and a right of easement can only be advanced in the alternative. 69 Ind. Cas. 183=A.I.R. 1924 Cal. 369.

#### —Alternative pleas or reliefs—Ownership and easement.

Where the defendant contended that the case of easement could not be made out where plaintiffs put forward an allegation of ownership and the evidence in the case made it clear that the plaintiffs were using the dispute lane as a means of access to their survey number:

**Held**, the real issue in the case was whether the plaintiffs had enjoyed for the statutory period the right of way over the strip in dispute. The Court was entitled to accept the defendant's contention that the lane belonged to him but that would not prevent the plaintiffs from asking the Court to protect their user of the lane. 64 Ind. Cas. 517=46 Bom. 200=23 Bom. L.R. 1009=A.I.R. 1922 Bom. 199.

### 4. Amendment.

#### —Amendment of plaint—When to be allowed—

Claim for pre-emption under Mahomedan law as owner of adjacent land—Allegation that plaintiff was pattadar of house in suit—Amendment by adding relief on basis of *Shikmidari* rules under Land Revenue Act—Permissibility.

Where it is not likely to cause injustice to, or does not take, the defendant by surprise, and where by the amendment the plaintiff is allowed only to rely upon a new ground of relief, it would not and cannot amount to an alteration of the character of the suit or the introduction of a new case, and hence an amendment of the suit could be allowed.

The plaintiff filed a suit for pre-emption under the Mahomedan law of pre-emption alleging that he was the pattadar of the suit house and the owner of the land adjacent to the house. Plaintiff sought leave to amend the plaint by adding a prayer for relief on the ground that he may be granted a decree for pre-emption under *Shikmidari* rules under the Hyderabad Land Revenue Act on the basis that he was the pattadar of the suit house.

**Held**, that the amendment applied for was proper and should be allowed. A.I.R. 1950 Hyd. 43.

#### —Amendment—Duty of Court to allow.

Amendments should be freely allowed unless they change the nature of the suit or unless the allowing of such amendments would interfere with rights which have already accrued to the party who may be adversely affected by the amendments. The party aggrieved by the granting of an amendment can well be compensated if he is allowed costs. I.L.R. (1949) 1 Cal. 75=54 G.W.N. 37.



—Amendment—Plaint praying for partition and separate possession of property—Dismissal for reason that agreement conferring right was unregistered—Appeal—Monies realised during pendency—Right to claim share belonging to plaintiff—Amendment of plaint.

The appellant purchased from the Official Receiver the insolvent's rights in two mortgages one of which was a simple mortgage and the other a usufructuary mortgage. About two years after the sale the appellant entered into an unregistered agreement with the predecessors-in-title of the respondent, who were simple creditors of the insolvent whereby the appellant was to have a three-fourth share and the respondent's predecessors-in-title, an one-fourth share in the rights to the amounts of the said deeds and to the property. Relying on the agreement the respondent filed the present suit for partition and separate possession of the property which was the subject matter of the agreement and for an account of the mesne profits. The trial Court held that as the agreement was not registered and as there was no evidence of any prior agreement the suit was liable to be dismissed. Thereupon an appeal was preferred and during its pendency the amounts due under the mortgages had been realised. Thereupon the plaintiff respondent filed a petition for amendment of the plaint and claimed a share of the sum realised in respect of the mortgage. The appellate Judge allowed the amendment holding that although no rights to the security could be conferred by the unregistered document, a right to the debts could.

Held, that the plaintiff was in any event entitled to a share of the money realised and that the amendment of the plaint was rightly allowed by the lower Court. 61 L.W. 382=A.I.R. 1949 Mad. 52=(1948) 1 M.L.J. 458.

—Amendment of written statement on payment of costs of the other side—Tender of costs and refusal by the other side to accept—Proper procedure—Permission granted if can be withdrawn for non-observance of proper procedure.

Where permission to amend the written statement is granted on payment of costs of the other side and the costs are tendered but refused by the other side, it must be deposited in Court. Where it is not so deposited it is hard to punish the party by withdrawing the permission granted. Instead the party can be ordered to pay the costs. 1948 A.M.L.J. 35.

—Amendment of plaint—Principles governing.

See Limitation Act (IX of 1908), Art. 11-A. (1946) 1 M.L.J. 104=A.I.R. 1946 Mad. 324.

—Amendment—Change of plea.

It is not open to a defendant to change his pleas taken in the written statement without filing a supplementary written statement or making an express request to the Court for permission to so change it and obtaining its orders thereon. 1949 R.D. 120.

—Amendment—Adoption—Administration—Will, construction of—Validity of adoption—Amendment.

In a suit for the construction of a will and administration in which the plaintiff's right to ask for administration depends on the invalidity of an adoption the plaintiff should not only allege its invalidity, but

must pray for a declaration to that effect. A mere allegation of the invalidity of the adoption without a prayer to have it declared invalid does not put the validity of the adoption in issue. Plaint directed to be amended by the insertion of a prayer as to the factum and validity of the adoption and the issue of adoption ordered to be tried as a preliminary issue. (1900) 5 C.W.N. 162.

## 5. Cause of action.

—Cause of action—Decree.

The Court is wrong in passing a decree on a cause of action on which the plaintiff has not based his suit. 5 L.B.R. 46=2 Ind. Cas. 539.

—Cause of action—Erroneous description of.

The fact that the cause of action has been erroneously described does not render it necessary to dismiss the suit. 13 C.W.N. 513=9 C.L.J. 362=5 M.L.T. 297=1 Ind. Cas. 66.

—Cause of action—Hundi.

Where in a suit on a Hundi, the Hundi is inadmissible in evidence for want of proper cancellation of the stamp; the plaintiff can fall back on the original consideration for the hundi provided the terms of the plaint are wide enough to include the original consideration as the basis of the suit. 28 Bom. 432; 28 A. 221, Foll. 26 A. 178, Dist. 18 P.R. 1912=75 P.L.R. 1912=65 P.W.R. 1912=14 Ind. Cas. 512.

—Cause of action—Objection to.

Plea of non-existent cause of action should be taken at the first hearing and it should be allowed to be raised for the first time in the second appeal. 2 P.L.R. 1911=28 P.W.R. 1911=9 Ind. Cas. 385.

## 6. Construction.

—Construction—Duty of Court to read plaint as a whole.

In construing a plaint, the Court must read the plaint as a whole. 29 P.L.T. 132=A.I.R. 1949 Pat. 166.

—Construction—Court's duty to determine their meaning.

When all the facts necessary for ascertaining what, if any, legal relation is created are on record, the Court can brush aside the label given by a party, determine their true meaning and draw such inference from them as the law enjoins upon it to do. I.L.R. (1949) Nag. 106=A.I.R. 1949 Nag. 286=1949 N.L.J. 591.

—Construction—Liberal construction—Omission of some averments in pleadings—If ground for rejecting case set up.

Pleadings in India ought to be construed liberally as they are not drawn up with such exactitude and clarity as in other countries; and the case of a party cannot be thrown out merely on the ground that certain averments are omitted in the pleadings. 29 P.L.T. 81=13 Cut. L.T. 66.

—Construction not to be strict—Plea not specifically stated—If may be raised.

It is a well-recognised rule that the pleadings of the Mofussil Courts should not be strictly construed, and



a plea cannot be ruled out merely because it is not mentioned specifically and in terms in the pleadings. A.I.R. 1949 E.P. 301=51 P.L.R. 44.

—**Construction—Rule in India—Duty of Court to avoid technicalities and to do substantial justice by deciding legal effect of facts.**

Pleadings in India cannot be regarded with the same meticulous care with which they are scrutinised in the English Courts. Too much insistence should not be laid on technicalities. When facts on both sides are stated with sufficient precision, the legal effect of the facts should be determined by the Court, as rules of pleading are only subordinate to the administration of justice. What has to be looked to is the essential justice of the case and not the observance of forms. A.I.R. 1950 H.P. 12.

—**Construction—Mofussil pleadings.**

Mofussil pleadings should not be taken exactly as they are drafted and should not be held strictly against the pleaders and their clients, but a good deal of latitude is to be allowed. The intention should be seen. 110 Ind. Cas. 21=1928 M.W.N. 98=A.I.R. 1928 Mad. 489.

—**Construction.**

In India the substance of the pleading and not the form should be considered. In England pleading is an art, and the principles which apply to English pleadings should not be applied whole sale to pleadings in India without due regard to the circumstances and conditions prevailing here: A.I.R. 1922 Bom. 199, Rel. on. 109 Ind. Cas. 199=27 M.L.W. 769=A.I.R. 1928 Mad. 445=54 M.L.J. 587.

—**Construction—Pleadings in mofussil.**

In a case from a District Court in Burma pleadings, and the whole conduct of the case can scarcely be scrutinized with the strictness with which a case would be scrutinized in England. 94 Ind. Cas. 916=4 Rang. 513=1926 M.W.N. 489=3 O.W.N. 735=A.I.R. 1926 P.C. 29 (P.C.).

—**Construction.**

Pleadings cannot be dissected and accepted in part and rejected as to the remainder but they must be taken as a whole. (39 Bom. 399 (P.C.) and A.I.R. 1924 Nag. 129, Rel. on). 89 Ind. Cas. 1016=A.I.R. 1926 Nag. 60.

—**Construction.**

In construing pleadings, judgments and decrees in this country the most liberal construction must always be accepted. 72 Ind. Cas. 477=A.I.R. 1924 Lah. 342.

—**Construction—Indefinite pleadings.**

The mere fact that the pleadings do not specifically refer to a contract of sale does not compel the Courts to treat it, as if it were non-existent. 81 Ind. Cas. 857=3 Bur. L.J. 78=2 Rang. 285=A.I.R. 1924 Rang. 214. (F.B.).

—**Construction—Pleadings in mofussil.**

Where the plaintiff has not expressly asked for a relief but the facts entitling him to such relief are fully set out in the plaint, the plaintiff should not be non-suited merely because of the inartistic method

in which his pleas were made in the mofussil Court. 68 Ind. Cas. 559=A.I.R. 1923 Nag. 11.

—**Construction—Pleadings in Mofussil.**

It is not the duty of the High Court to read pleadings in the Mofussil Courts as strictly as they would be read if they were filed in the Chancery Division of the Supreme Court. The High Court has a much larger range of vision, and the plaintiffs' case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed. 46 Bom. 200=23 Bom. L.R. 1009=A.I.R. 1922 Bom. 199=64 Ind. Cas. 517.

—**Construction—Liberal construction—Substance to be looked to.**

An erroneous description of the claim is not fatal. The law looks at the substance and not at the form. If a claim for money had and received by the defendant was described as damages, it does not much matter. 34 Ind. Cas. 173 (All.).

—**Construction.**

The substance of the grounds set out in an application must be considered to determine the proper section applicable; the section mentioned in the application is not the criterion. 33 Bom. 698=11 Bom. L.R. 1113=4 Ind. Cas. 253.

—**Liberal construction—Strict accuracy, if expected.**

The High Court on appeal and dealing with pleadings in the mofussil will not be so strict as it would be in cases from the Original side of the High Court. 27 Ind. Cas. 373. (Cal.)

—**Liberal construction—Mofussil.**

Pleadings which are loosely drawn and do not contain accurate and legal methods of founding and describing rights alleged are denied, could not be taken too literally and the substance of the averments should alone be looked into. 23 M.L.T. 137=7 L.W. 477=(1918) M.W.N. 346=44 Ind. Cas. 641.

—**Liberal construction.**

Allowance must be made for the inaccurate mode of setting forth claims of persons and the answers or defences to them. The court must look not only to the mere wording of the plaint but to the issues framed in the case and to the manner in which the case was treated in the lower courts. (1914) M.W.N. 883=26 Ind. Cas. 337.

—**Liberal construction.**

Mofussil pleadings should not be construed strictly. 12 N.L.R. 90=34 Ind. Cas. 704.

—**Liberal Construction.**

Pleadings in India should not be too strictly construed. 2 Pat. L.W. 46=41 Ind. Cas. 577.

## 7. Contents.

—**Contents—Particulars—More plea that suit or application is misconceived—Propriety—Duty to give particulars.**

No doubt a party is not bound in his pleadings or affidavit to disclose his evidence, but he is certainly



bound to give sufficient particulars of his contentions. It would not do merely for the defendant or respondent to say that the suit or the application is misconceived. The practice of merely stating in an affidavit or pleading that the suit or the application is misconceived without anything more ought to be strongly deprecated. 49 Bom. L.R. 468=A.I.R. 1948 Bom. 20.

**—Contents—Necessity to plead all material facts.**

The rule that material facts should be pleaded is no mere technicality and an omission to observe it deprives pleadings of most of their value and may increase the difficulty of the Court's task of ascertaining the rights of the parties. 74 I.A. 182=I.L.R. (1948) Mad. 139=(1947) 2 M.L.J. 63 (P.C.)=A.I.R. 1947 P.C. 132.

**—Contents of plaintiff—Defendant supporting plaintiff—Separate written statement necessary.**

Where in a suit for ejectment a third party who is added as defendant supports the plaintiff's case it is necessary that the defendant should file written statement to that effect. It is an erroneous procedure for the plaintiff to state what the defendant intends to read. 52 C.L.J. 357=A.I.R. 1931 Cal. 76.

**—Contents.**

Mere abuse describing a party as very "cunning and litigious" should not be allowed to find a place in any pleadings. 126 Ind. Cas. 830=A.I.R. 1930 All. 647.

**—Contents—Criminal trial.**

It is the practice of the Allahabad High Court in appeal to give little or no weight to the allegations or charges of a defendant or accused if they ought to have been put to the plaintiff or complainant or his witnesses and have not been so put. A plaintiff or complainant has an absolute right to know exactly the allegations or charges upon which the opposite side are going to rely and they must be put to him or to his appropriate witnesses clearly, specifically and with the utmost plainness, so that he may have an opportunity of admitting them wholly or in part, or denying them wholly or in part, and of calling witnesses to rebut such allegations or charges as he denies. 115 Ind. Cas. 872=30 Cr.L.J. 530=10 A.I.Cr.R. 101=9 L.R.A.Cr. 90=26 A.L.J. 196=A.I.R. 1928 All. 222.

**—Contents—Suit to set aside a decree.**

Whatever may be the latitude that may be given or expected in ordinary actions, at any rate in cases where the relief claimed is to have a decree of a Court of competent jurisdiction set aside on certain grounds alleged, it is absolutely necessary that the grounds relied on should be set out clearly and definitely. 108 Ind. Cas. 639=A.I.R. 1928 Mad. 945.

**—Contents—Should be complete.**

A party is not absolved from the necessity of taking up all available grounds for resisting a contention of the other side merely because at the date he has authority of the High Court which, it followed, would relieve him of resisting that contention on any but one ground. 103 Ind. Cas. 277=2 A.L.J. 842=A.I.R. 1927 All. 666.

**—Contents.**

Pleas should be definitely taken and the facts constituting them should be expressly stated. 84 Ind. Cas. 386=1924 P.H.C.C. 297=6 P.L.T. 465=A.I.R. 1925 Pat. 168.

**—Contents.**

Counsel should not plead their opinion in the plaint in originating summons. 77 Ind. Cas. 83=24 Bom. L.R. 1111=47 Bom. 349=A.I.R. 1923 Bom. 177.

**—Contents—Custom.**

It is not desirable to pin down both the parties to the precise form of pleadings, though they should allege a custom with distinctness and certainty. But the parties cannot insist the courts upon admitting an obsolete custom. An issue in a case setting up a custom and the allegation in a plaint on which it is based ought to have contained particulars of the custom set up at the trial. 1915 M.W.N. 968=2 L.W. 1214=19 M.L.T. 296=30 M.L.J. 451=31 Ind. Cas. 833.

## 8. Defence.

**—Defence—Plaintiff—Materials on which he can succeed—If can rely on weakness of defendant's case—Defence, if bound to point out defects in plaintiff's title.**

It is a well-established principle that the plaintiff can only succeed on the strength of his own case and not on the weakness of the defendant's case. Further it is not necessary for the defendant in his pleadings to point out the defects in the plaintiff's title. He can utilise such defects as appear in that title during the course of the trial. 22 Luck. 164=230 Ind. Cas. 50=1947 O.A. (C.C.) 23=1947 A.W.R. (C.C.) 23=1947 O.W.N. 59=A.I.R. 1947 Oudh 174.

**—Defences.**

Defences cannot be excluded from the province of procedure unless they negative the rule of procedure. 121 Ind. Cas. 403=56 Cal. 704=A.I.R. 1930 Cal. 53.

**—Voidable transaction—Defence.**

Reliance by plaintiff upon a voidable transaction in support of his title justifies defendant in impeaching its validity by way of defence for which he need not file a separate suit. 82 Ind. Cas. 369=28 C.W.N. 805=A.I.R. 1925 Cal. 26.

**—Defence—Eviction suit.**

A lessee can set up eviction by a person having title paramount in a suit by lessor for rent. 43 Cal. 554=36 Ind. Cas. 33.

**—Defence—Jus Testis—How to be set up.**

A defendant in raising the plea of *jus Testis* should state definitely the name of the person in whom that right resides. 1 Ind. Cas. 525 Cal.

## 9. Evidence and proof.

**—Evidence and proof—Pleadings and proof—Duty of party.**

A party is expected and is bound to prove the case as alleged by him and as covered by the issue framed.



This is in accordance with the main principle of practice that a party can only succeed according to what was alleged and proved. *Secundum allegata et probata*. A.I.R. 1950 E.P. 256.

—Evidence and proof—Pleadings and proof—Variation—Effect—Suit to eject tenant on determination of tenancy—Tenancy not proved—Proof of title and permissive possession of defendant—Decree—Right to

Where in a suit to eject a person as a monthly tenant whose tenancy had been determined by notice, the tenancy set up is not proved, but it is found that the plaintiff had title and the defendant entered into possession with the plaintiff's permission a decree for possession may nevertheless be passed on the facts proved, though they are different from the facts alleged. It is not necessary that the suit should be dismissed. 226 Ind. Cas. 137=12 B.R. 691=1945 P.W.N. 395=A.I.R. 1946 Pat. 103.

—Evidence and proof—Variance of—Cause of action

It is for the party alleging that there was complete contract to show that the contract was complete on the particular date, the party cannot be allowed to prove a contract of different date when it definitely alleges the contract of a particular date. A.I.R. 1930 Lah. 325.

—Evidence and proof—Variance of—Rule as to.

Although the determination of a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby, it does not follow from this that every variance between the pleading and proof is material and justifies a dismissal of the claim. 11 P. L. T. 447=A.I.R. 1930 Pat. 476.

—Evidence and proof—Oral gift.

A party relying upon an oral gift is bound to prove with the utmost precision the words on which he relies with other circumstances of time and place. 117 Ind. Cas. 456=6 O.W.N. 51=A.I.R. 1929 Oudh 134.

—Evidence and proof—Claim as partner—Evidence as assignee of a partner.

It is a fundamental principle of the law of pleadings that a plaintiff in a suit can only succeed on the cause of action set forth in the plaint or on a cause of action consistent with his pleadings.

Where in a suit for a share in partnership the plaintiff bases his claim on his being a partner, but it is subsequently proved that he is the assignee of a partner:

Held, that he is not entitled to a decree. 101 Ind. Cas. 367=5 Bur. L.J. 233=A.I.R. 1927 Rang. 118.

—Evidence and proof.

A claim should be decided *secundum et allegata et probata* and proof must accord with pleas. 33 Bom. 35 Foll. 95 Ind. Cas. 18 Nag.

—Evidence and proof—Claim for easement on behalf of all—Acquisition of right by some only.

If a plaintiff comes into Court and says that he as well as other persons have acquired a right of easement

over a certain land, and does not succeed in proving that the other persons had such right, there is nothing to prevent him from succeeding in his claim if he can prove that he has used the land in the way required by law for the purpose of acquisition of a right of easement. 91 Ind. Cas. 648=A.I.R. 1926 Cal. 647.

—Evidence and proof—Attachment of joint family property—Plaintiff alleging partition—Failure to prove.

Where A comes into Court with an allegation that certain property was exclusively his by reason of its allotment to his share at a partition effected between him and his other co-parcener B, and that it was not, therefore, liable to attachment and sale in execution of a money decree obtained by a creditor against his debtor B, but fails to prove the allotment and the attaching creditor who similarly contended that the said item of joint property had become the exclusive property of his judgment-debtor by virtue of its allotment to his share also fails to prove the alleged allotment and the Court finds that the property was the joint property of the family it is open to the Court to grant to the plaintiff such relief as flows from the findings and if the Court does it, it cannot be successfully impeached in second appeal. 90 Ind. Cas. 263=A.I.R. 1926 Nag. 203.

—Evidence and proof—Oral will.

Where a party sets up a Will and gives the facts on which he relies, the Court is entitled to infer from those facts the execution of an oral Will. 94 Ind. Cas. 796=13 O.L.J. 152=A.I.R. 1926 Oudh 342.

—Evidence and proof.

Evidence of party is not part of pleading. 89 Ind. Cas. 639=47 All. 867=23 A. L. J. 795=6 L.R.A. Civ. 405=A.I.R. 1925 All. 759.

—Evidence and proof—Pleadings and proof—Variance between—Defendants admission—Effect of.

Every variance between pleadings and proof is not fatal. The rule that the plaintiff is entitled to succeed upon the allegations made by him in the plaint and pleadings is intended for the protection of the defendant so that he may have notice, from the very commencement, of the case which he has to meet and may not be taken by surprise. This rule has no application where a finding though at variance with the plea of the plaintiff has been arrived at by the admission of the defendant and on the evidence adduced by him. 1 N.L.R. 4 and 12 N.L.R. 57 Foll. 89 Ind. Cas. 486=A.I.R. 1925 Nag. 434.

—Evidence and proof.

In a suit for damages for loss of goods conveyed by a railway under Risk-note B, the plaintiff put forward an argument that Risk-note B was not justified at all and that the plaintiff had paid full rate and not the reduced rate. This issue was not put forward in this form in the trial Court. Further there was evidence on the record of two witnesses to the effect that the goods were booked at reduced rates. Plaintiff desired the Court to give another opportunity to disprove those statements and prove as a fact that the rate charged was a reduced one.

Held: that he was not entitled to any such privilege. 87 Ind. Cas. 215=A.I.R. 1925 Oudh 631.



**—Evidence and proof—Variance of—Plea of custom.**

It is not every variation between pleading and proof which is fatal to a suit or a defence. Where a custom was alleged in defence but not proved and it was not framed as a distinct issue:

**Held**, that it did not prejudice the defence. 78 Ind. Cas. 480=A.I.R. 1924 All. 831.

**—Evidence and proof—General ownership alleged—Legal implications not mentioned.**

Where the plaintiff alleged tarwad ownership of the money, but it did not say distinctly whether a certain deed was taken in the defendant's name benami or the money was given to her.

**Held**, it submitted the general facts to the Court without specification of their exact legal implications, and whether the plaintiff proved the narrower case of gift by the first defendant of what was found to be trust money or the wider case of benami, the evidence required would be the same, and therefore no surprise or misapprehension had been established on defendant's behalf. 74 Ind. Cas. 1012=1923 M.W.N. 657=A.I.R. 1924 Mad. 174.

**—Evidence and proof—Claim for exclusive possession—Decree for joint possession.**

A suit cannot be dismissed merely on account of a false averment. A Court is entitled to apply the law to the fact actually proved by the evidence even though they show the allegations of both the parties to be untrue, incorrect or incapable of proof and judicial recognition. A plaintiff who claims exclusive possession of land can be awarded its joint possession. A Court is justified in giving the plaintiff relief to which he is entitled on facts found proved irrespective of what his original claim was. (12 N.L.R. 67; 5 N.L.R. 105; 20 B. 569, Foll.) 76 Ind. Cas. 200=A.I.R. 1924 Nag. 189.

**—Evidence and proof—Suit on title.**

A suit based on title could not succeed on the ground of possessory title in case plaintiff failed to prove his real title. 33 All. 174 Foll. 72 Ind. Cas. 924=A.I.R. 1923 All. 117.

**—Evidence and proof—Variance between—When material—Prejudice to defence.**

The rule that the pleading and proof must correspond is intended to serve a double purpose: first, to apprise the defendant distinctly and specifically of the case he is called upon to answer; and secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. The test thus is, whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence; or, a variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. The principle of variance between pleading and proof should not be applied in an abstract way; the whole of the circumstances must be taken into account and carefully scrutinised, as the question is, in ultimate analysis, one of circumstances and not of law. 74 Ind. Cas. 793=36 C.L.J. 356=50 Cal. 292=A.I.R. 1923 Cal. 142.

**—Evidence and proof—Fraud—Proof of.**

Where a case of fraud is attempted to be made out and the evidence adduced in the case is equally

consistent with the allegations of the plaintiff as with the denial of the defendants a case of fraud is not established. 71 Ind. Cas. 843=4 P.L.T. 102=1923 P.H.C.C. 137=1 Pat. L.R. 252=A.I.R. 1923 Pat. 327.

**—Evidence and proof—Evidence consistent with allegation of plaintiff and denial of defendant—Plaintiff must fail.**

Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of the defendant, the plaintiff must fail. 67 Ind. Cas. 451=A.I.R. 1923 Pat. 165.

**—Evidence and proof—Variance of—Prejudice to the other party.**

Neither party to a litigation can be allowed to set up at the hearing an entirely new and inconsistent case. The plaintiff must be held to the state of facts alleged in his plaint or substantially consistent therewith. The defendant also must be held to the state of facts alleged in his written statement or in harmony therewith. In allowing an objection that the case has been decided on a ground not raised in the pleadings, the test to be applied is whether the party aggrieved has really been taken by surprise. 64 Ind. Cas. 565=35 C.L.J. 103=26 C.W.N. 294=A.I.R. 1922 Cal. 254.

**—Evidence and proof—Variation—Proof—Object of the rule against.**

Every variance between pleading and proof is not fatal; the Court must carefully consider whether the objection is one of form or substance having in view the purpose which the rule that allegation and proof must correspond is intended to serve; viz., first to apprise the defendant distinctly and specifically of the case he is called upon to answer so that he may properly make a defence and not be taken by surprise and secondly to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. 24 C.W.N. 662=30 C.L.J. 475=55 Ind. Cas. 689.

**—Evidence and proof—Variation—Change of case.**

The determination in a cause should be based upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, although the Court is competent to determine that the rights of the parties litigant are really different from what is alleged either by the plaintiff or by the defendant. 22 C.W.N. 853=29 C.L.J. 1=41 Ind. Cas. 378.

**—Evidence and proof.**

The principal practice is that a plaintiff can only recover according to his allegations and proof 10 Bur. L.T. 119=36 Ind. Cas. 464.

**—Evidence and proof.**

Every variance between pleadings and proof is not fatal, though the determination of the case should be founded upon the allegations in the pleadings or involved in or consistent with the case made thereby. The rule that the pleading and the proof must correspond is intended to serve a double purpose: (1) to apprise the defendant distinctly and specifically of the case he is



called upon to answer and (2) to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. Where the plaintiff fails to make out the precise title set up in the plaint but the court comes to the conclusion upon the entire evidence that he is entitled only to one half of what he claimed, the court is entitled to give a decree therefor. 23 C.L.J. 429=34 Ind. Cas. 444.

—Evidence and proof—Variance—When fatal to suit—Variance not affecting cardinal point in issue—Nature of the principle.

**Held**, that the High Court in relying for the dismissal of the suit on, amongst other grounds, that of variance between pleading and proof had applied that principle in an abstract and unsatisfactory way which had misled them in estimating the merits of the case. The question in ultimate analysis was one of circumstances and not of law. The evidence adduced in support of the transaction having been effected on the 7th Nov. was not necessarily perjured or fabricated when it appeared that the statements of witnesses and entries in account books might be due to bona fide mistake 20 C.W.N. 297=30 M.L.J. 444=3 L.W. 308=(1916) 1. M.W.N. 137=34 Ind. Cas. 268. (P. C.).

—Evidence and proof—Variation—Evidence gone into—Effect of.

Where evidence has been fully taken on a plea arising in the case it is not proper for the court to decide against a party on a strict construction of the pleadings without considering the evidence when such a technical view might have been obviated by a mere amendment of the pleadings. 39 Bom. 399=17 M.L.T. 402=28 M.L.J. 589=13 A.L.J. 529=19 C.W.N. 713=21 C.L.J. 507=17 Bom.L.R. 460=2 L.W. 524=(1915) M.W.N. 522=42 I.A. 103=29 Ind. Cas. 223 (P. C.).

—Evidence and proof—Variance.

Where both parties understood the real point in issue and give evidence, the fact that the pleadings subsequent to the plaint and the evidence disclosed facts at variance with the plaint is immaterial. 25 Ind. Cas. 280. (All.).

—Evidence and proof.

Where a Mahomedan lady soon after her return from Mecca, impeached a deed of gift, she had made to the defeddant before her setting out on account of fraud and misrepresentation and sued for accounts, when there was a finding that she was entitled only to one fourth of the properties, **Held**, that in spite of a general issue as to liability to account the defendant could not be called to render accounts as regards the one-fourth to which she was entitled. 17 C.W.N. 427=23 Ind. Cas. 332.

—Evidence and proof—Variance.

It is not every variance between the pleadings and proof that justifies dismissal of the suit; the variance must be in material respects. The object of the rule requiring that the proof must correspond with allegation is to apprise the defendant distinctly of what he is called on to meet and to preserve an accurate record of the cause of action as a protection against a second proceeding on the same allegations. 18 C.W.N. 473=16 Ind. Cas. 741.

—Evidence and proof—Variance.

To the general rule that the parties ought to be kept to their pleadings and the Court should not raise for

them in appeal a new point there are some exceptions. Agreements between persons in the relation of mortgagor and mortgagee or trustee and 'cestui que' trust, are some of them.

A Court as a Court of equity is bound to examine into the nature of such agreements if it finds **prima facie** ground to suspect that the transaction is oppressive or unconscionable. When a question is fairly raised either at the original trial, or in appeal and it is met there by one of the parties on a specific ground though other grounds were open and the specific ground fails that party should not be allowed as a general rule, to rely upon any of the other grounds in second appeal if the allowing of that ground necessitates a remand for the taking of fresh evidence. 12 Bom.L.R. 795=7 Ind. Cas. 977.

—Evidence and proof—Denial of plaint—Allegation—Duty of plaintiff to prove.

Where an allegation in a plaint is not admitted by the defendant, the plaintiff, if he ignores the point, does so at his peril for the defence puts him to prove his title. Action for damages for breach of trade mark was dismissed on the ground of want of proof of plaintiff's title to sue. 13 C.W.N. 82=4 Ind. Cas. 318. (P. C.).

—Evidence and proof—Variation—Decision Court must be based on.

The determination in a cause should always be founded upon a case either to be found, in the pleadings or involved in or consistent with, the case thereby made. 6 W.R. (P. C.) 57; 14 C. 801 (P. C.), Foll, 5 L.B.R. 76=3 Ind. Cas. 719.

—Evidence and proof—Variance.

A variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. 15 C.W.N. 882=11 Ind. Cas. 540.

—Evidence and proof—Variation of.

The determination of a case should be founded either on allegations in the pleadings or involved or consistent with the case thereby made. 8 Ind. Cas. 713 (Cal.).

—Evidence and proof.

Where the plaintiff is unable to prove his assertions his suit should be dismissed. 78 P.L.R. 1911=74 P.W.R. 1911=9 Ind. Cas. 591.

—Evidence and proof—Defective pleadings should be supplied by evidence and documents.

A plaintiff ought not to be non-suited in other than absolutely plain cases; in case of defective pleadings, the proper course is to hear the evidence and examine the documents. 29 M.L.J. 786=31 Ind. Cas. 704.

—Evidence and proof.

A party need not prove an allegation of fact neither denied nor expressly admitted by his opponent. A Court is bound to accept a party's repudiation of his interest in the suit. 101 P.W.R. 1912=131 P.L.R. 1912=16 Ind. Cas. 122.



—Evidence and proof—Variation—Proof—Form of decree.

Where the case of the plaintiff as made in the plaint is that she has been all along in possession and she is not found to be in possession, a decree for recovery of possession is inconsistent with the suit. 14 C. W. N. 366=4 Ind. Cas. 547.

—Evidence and proof—Plea of mala fides.

The plea of *mala fides* must be conclusively established so that the facts from which it is inferred must not admit of any other explanation. 33 Bom. 334 = 10 Bom. L. R. 821=3 Ind. Cas. 361.

—Evidence and proof—Prayer for exclusive possession—Decree for joint possession, if can be given:—

It cannot be affirmed as a general proposition of law that whenever a party asks for recovery of property on the allegation that he is exclusively entitled to possession there-of, his suit must necessarily be dismissed if he proves that he is entitled to joint possession; but if he claims possession of a specific portion of a large area as representing his share he cannot recover joint possession of the whole property upon failure to prove his exclusive title. (1909) 10 C.L.J. 213=2 Ind. Cas. 492.

10. False averments.

—False statements—Suit for declaration by reversioner.

The fact that the plaintiff made certain false allegations to establish his right as the presumptive reversioner does not disqualify him from maintaining the suit if the facts found invest him with a status in which he can sue for the declaration he seeks. 1930 A.L.J. 1428 = 128 Ind. Cas. 782=A. I. R. 1930 All. 734.

—Effect of false averments.

The effect of a false assertion in the plaint on a certain matter does not entitle the court in refusing the plaintiff another relief to which he is entitled. 9 M.L.T. 478=10 Ind. Cas. 498.

—False averments—Dismissal of suit.

A Court should not dismiss a suit mainly on the ground of false averments in plaint. 12 N.L.R. 57=33 Ind. Cas. 497.

—False case—Plaintiff's failure to prove case set up—Decree upon case proved—No surplus to defendant.

Where plaintiff brought the suit for possession of house and damages and not for arrears of rent alleging due termination of tenancy and it was found that the defendant was not tenant but merely in permissive occupation and never before asserted an adverse title:

Hold, that the court may pass a decree in favour of plaintiff although he had failed to prove the case he set up, the new case not being such as could have possibly taken the defendant by surprise. (1884) A.W.N. 285, (1901) A.W.N. 157 dist. 1903 A. W. N. 18=25 A. 256.

11. Finding.

—Finding—Basis of.

No finding can be based upon statements, however true, made in an affidavit by a person about 18 or 19 years of age, where the statement is made at the instigation of persons who have some interest to serve thereby. 33 C.W.N. 930=51 C.L.J. 320=57 Cal. 434 = A.I.R. 1930 Cal. 69.

—Finding — Pleadings found untrue—Binding nature.

If a particular fact is alleged in his pleadings by a party and an enquiry is made regarding its truth or otherwise and as result of that enquiry it is found to be untrue and decision is given on the basis of such finding in favour of the opposite party, such opposite party is no more in a position to ignore that finding and to ask the Court to hold the party originally taking such a plea to be bound by it: A. I. R. 1915 P. C. Foll. 111 Ind. Cas. 843=A.I.R. 1929 Oudh 41,

—Finding.

It is of absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made: 11 M.I.A. 7 (P.C.) Foll. 20 S.L.R. 220=A.I.R. 1927 Sind. 219.

—Finding.

It is open to a Court to find that the case of a party lies somewhere between the cases of both parties. 12 N.L.R. 57 Rel. on. 89 Ind. Cas. 991=A.I.R. 1926 Nag. 48.

—Finding — Party impeaching prior suit—Reliance on pleadings.

A party pleading that he is not bound by certain previous proceedings, he being not a party to those proceedings, is not entitled to take advantage of any finding in those previous proceedings which is in his favour. 85 Ind. Cas. 454=20 M. L. W. 798=A.I.R. 1925 Mad. 300.

—Findings—Inconsistent findings against co-defendants.

Where after both parties have given evidence and the Court has come to the conclusion that the plaintiff had failed to prove the case set up by him, it would not lie in the mouth of the plaintiff to turn round and ask for a decree against one of the defendants who had not expressly denied one of the facts in issue. (25 All. 159, Foll.) 77 Ind. Cas. 609=45 All. 571=A.I.R. 1924 All. 150.

—Finding—Claim not denied.

Where plaintiffs claimed mesne profits which were not specifically denied in the written statement, the absence of specific issue on the point is no ground for disentitling plaintiff to mesne profits. The Court should have framed an issue if necessary and decided the point. 69 Ind. Cas. 389=16 Mad. L.W. 752=A.I.R. 1929 Mad. 168.

—Finding.

The Court of first instance, although it declared the plaintiff's title, nevertheless passed an order for maintaining the defendant's possession as manager:



**Held**, this was a wrong order in as much as the defendant did not profess to be in possession as manager but was setting up an adverse title. 66 Ind. Cas. 148 = 20 All. L. J. 231 = A.I.R. 1922 All. 114.

—**Finding—Pleading not specific**

When the plaint is drawn so as to cause confusion the issue may be taken to ascertain the plaintiff's case. 8 M. L. T. 202 = 7 Ind. Cas. 800.

—**Finding—Acknowledgment of full consideration—Finding of failure of consideration in part in favour of some of the defendants.**

Where in a suit upon a mortgage the mortgagor either by acknowledgment or otherwise estopped himself from disputing the receipt of the full consideration, but the court found that the consideration was true only partially, the finding can be taken advantage of even by the mortgagor. 3-A. 82 foll. 1902 A.W.N. 218 = 25 A. 159.

**12. Fraud or undue influence.**

—**Fraud or undue influence.**

See also Evidence Act, S. 44.

—**Fraud—Particulars—Necessity.**

Where a defendant merely says that the suit bond was obtained from him by fraud and does not specify anywhere in the pleadings or his deposition the particulars of the fraud or in what the fraud consisted, it cannot be held on such materials that the bond was obtained by fraud. A.I.R. 1950 Kut. 67.

—**Fraud or undue influence—Raising of and relief on—Absence of specific label of undue influence—Written statement containing all particulars and material facts—Plea of undue influence—Duty of Court to go into.**

The mere fact that no plea of undue influence is specifically raised in a written statement does not debar the party from raising it before the Court or the Court from going into it and deciding it. Though it is true that a plea of undue influence has to be pleaded with precision, it does not mean that the relevant particulars in the pleadings giving rise to that plea must be labelled as undue influence. If there are sufficient facts on record to justify the inference of undue influence, the omission to specifically raise the plea as such will not prevent the Court from deciding the case on that ground and giving relief to the party on that ground. The absence of the label of undue influence is not of much importance; when all the material facts are set out in the written statement, the claim to relief must be decided with reference to them, independently of their being labelled as undue influence or fraud as the case may be. The Court will not be justified in refusing to go into the question in such a case. 58 Mad. 454; 27 N.L.R. 19 rel. A.I.R. 1950 Hyd. 55.

—**Fraud—To be pleaded with particularity.**

No case of fraud can be gone into by Courts unless it is pleaded with the utmost particularity and unless it is proved as laid. Details of the fraud and why the fraud was necessary and how it was carried out has to be given. A.I.R. 1948 Nag. 170.

—**Fraud—Plea of—Particulars to be set forth—General allegations—Sufficiency.**

Litigants who prefer charges of fraud or other improper conduct against persons should be compelled to place on record precise and specific details of those charges even if no objection is taken on behalf of the parties who are interested in disproving the accusations. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice. Full particulars of the fraud alleged must be set forth. 48 Bom. L. R. 341 = A.I.R. 1946 Bom. 516 = 1947 Comp. C. 21 = 229 Ind. Cas. 84.

—**Fraud.**

Where fraud or undue influence is alleged detailed particulars must be given in the pleadings and parties must be strictly confined to that state of facts. Where particulars of fraud or undue influence alleged are wholly rejected and evidence disbelieved and a vague and different kind of fraud of undue influence is held to have been probable on other circumstances and doubts and conjectures, there is a substantial error in procedure resulting in a finding not according to the pleadings and evidence and not sustainable in law. A charge of fraud must be substantially proved as laid and where one kind of fraud is charged another kind of fraud cannot, upon failure of proof, be substituted for it. The same rule applies when undue influence is a species of fraud. 11 Bom. 620 P. C. and 22 Cal. 324 (P. C.) Rel. on. 110 Ind. Cas. 91 = 5 O.W.N. 435 = A.I.R. 1928 Oudh 330.

—**Fraud—Allegations.**

In suits on the basis of fraud definite and clear allegations must be made. 14 A.L.J. 25 = 38 All. 126 = 33 Ind. Cas. 913.

—**Fraud—Who can set up.**

A person cannot be allowed to plead fraud of his own predecessors to avoid the legal consequences of those transactions. 37 Bom. 217 = 13 Bom. L. R. 1011 = 12 Ind. Cas. 583.

—**Fraud—Proof.**

A plea of fraud must be specifically raised and clearly proved. 24 C.L.J. 335 = 37 Ind. Cas. 707.

—**Fraud.**

A general allegation unaccompanied by particulars do not amount to an averment of fraud of which any Court would take notice. *Walingford v. Mutual Society* 5 A.C 685 Rel. 17 C.W.N. 524 = 14 Ind. Cas. 53.

—**Fraud—Alternative plea.**

If a plaintiff fails in establishing a plea of fraud he cannot be allowed to raise another plea, unless he has asked the relief alternatively. 37 Cal. 856 = 12 C. L. J. 70 = 6 Ind. Cas. 472.

—**Fraud—undue influence—If consistent.**

Two pleas, in a plaint to set aside a document of fraud and undue influences are not inconsistent, where there is a clear indication in



the plaint that the plaintiff intended to plead undue influence; if there was any omission of any specific plea as to undue influence, it will be cured by the subsequent statement that undue influence was used. 72 P.W.R. 1917=90 P. R. 1917=39 Ind. Cas. 798.

#### —Fraud—Plea of.

A party relying on fraud ought to allege it specifically in the plaint. 15 P. W. R. 1915=121 P. L. R. 1915=26 Ind. Cas. 426.

#### —Fraud—Definite allegations.

All allegation of fraud must be made in the pleadings definitely and categorically according to O. 6, R. 10, C. P. C., and must in no circumstances, be allowed to be made at a later stage of the suit. (1916) 1 M. W. N. 180=34 Ind. Cas. 1.

#### —Fraud—Proof of.

The Court should not insist upon direct proof of fraud in every case, since fraud could not be proved positively. 21 Ind. Cas. 69 (Oudh).

#### —Fraud—Suit for cancellation of mortgage deed on the ground of fraud—Declaratory decree that mortgage true and valid in part.

When the plaintiff brings a suit for cancellation of a mortgage deed on the ground of fraud, and fraud is found against, the proper course is for the court to dismiss the suit. It cannot grant a decree declaring that the mortgage is true and valid to the extent of a portion of the amount, especially when the plaintiff, being entitled to a consequential relief, fails to claim it. (1905) 29 M. 298.

#### —Fraud—Question of.

See Fraud. 10 Bom. L.R. 276=32 B. 255.

### 13. Highway.

#### —Highway—Public and private rights of way—Allegations.

In pleading a public right of way the Termini need not be set out because the public have a right to use the way for all purposes and at all times, but in pleading private rights of way, the Termini or the way and the course which it takes must be shown with reasonable precision. 57 Ind. Cas. 151 (Pat.).

### 14. Inconsistent pleas.

#### —Inconsistency in—If affects maintainability of suit.

Where inconsistent allegations are made in the pleadings, the inconsistency may be, and probably would be, a ground for viewing both the allegations with the greatest suspicion, but it would not, as a matter of pleading, render the suit not maintainable. I.L.R. 34 Cal. 54, Foll. 1950 A.W.R. 166=A.I.R. 1950 A. 352=1950 A.L.J. 172.

#### —Inconsistent pleas—Permissibility.

It is a fundamental principle that a party, whether he is a plaintiff or a defendant, cannot make a new case, much less a new case which is inconsistent with the case as made in his pleading. 53 C.W.N. 284.

#### —Inconsistent reliefs—Suit to revoke gift and for possession of gifted property and defendant's failure to fulfil conditions of gift to pay maintenance—Claim to arrears of maintenance under gift—Competency—Election of remedies.

In a suit by a Mahomedan woman for revocation of a deed of gift executed by her on the ground that the donees had failed to maintain her out of the produce of the property gifted, as stipulated in the deed of gift (the consideration for the gift having failed) and for possession of the property it is not open to the plaintiff to claim arrears of maintenance due to her under the gift deed. Though it would be open to the donor to sue for arrears of maintenance on the basis of a breach of contract or breach of trust committed by the defendants, the plaintiff must elect between the two alternative course open to her, namely, possession of the property after revocation of the gift or arrears of maintenance on the basis of the gift deed. If a decree for arrears of maintenance be passed and the amount due under it be paid, then the donees would have fulfilled their obligation and would then be entitled to have the property gifted. But if the plaintiff elects to recover possession, no decree for arrears of maintenance can be legally passed. A. I. R. 1950 Pat. 300.

#### —Inconsistent pleas—Co-tenancy and adverse possession.

Once a plaintiff pleads co-tenancy, he could not at the same time advance a plea of adverse possession 1950 R.D. 57.

#### —Inconsistent pleas in the alternative—Competency.

A defendant in a suit is not precluded from raising inconsistent pleas in the alternative. 1950 K.L.T. 143=A.I.R. 1950 T.C. 66 (F.B.).

#### —Inconsistent pleas—Permissibility.

A litigant is within his rights in taking alternative and inconsistent points, as in the case of a borrower of an article belonging to the plaintiff who was alleged to have damaged that article and pleaded (1) that it was irreparably broken when he had it; (2) that it was perfectly all right when he returned it. I.L.R. (1945) 1 Cal. 565=80 C.L.J. 297.

#### —Inconsistent pleas—Right set up as owner and as holder of easement—Dismissal of suit not proper.

Plaintiff cannot be allowed to take the impossible position of being the owner of and of having a simultaneous right of easement over the same land. But where the reliefs claimed upon ownership and upon the right of easement in respect of the same property are not claimed simultaneously,



but in the alternative, the action of the plaintiff must be condemned, but the plaintiff should not be penalized by a total dismissal of the suit. 128 Ind. Cas. 755=1930 A.L.J. 1537=A.I.R. 1930 All. 877.

#### —Inconsistent plea.

Where plaintiff based his suit on the averment that A was the last male holder but it was found that B and not A was the last holder:

Held, that plaintiff's suit cannot be dismissed on the ground of false averment. 12 N.L.R. 57 Foll. 100 Ind. Cas. 446=22 N.L.R. 175=10 N.L.J. 5=A.I.R. 1927 Nag. 104.

#### —Inconsistent pleas.

A person is not precluded from setting up an inconsistent case in a subsequent litigation. (33 A. 344 P.C. Foll.). 90 Ind. Cas. 124=21 M.L.W. 551=A.I.R. 1925 Mad. 645.

#### —Inconsistent pleas—Existence of contract denied—Plea as to enforceability.

A plea that the policy was not in existence at the time of the fire and that there was no contract of insurance at all coupled with a plea, that if there was any then by reason of certain conditions precedent to the attaching of any liability the defendants would not be liable, is not contrary to the law of India. 83 Ind. Cas. 593=2 Rang. 144=A.I.R. 1924 Rang. 317.

#### —Inconsistent plea.

Where the defendant's witnesses said that the property gifted was worth a thousand rupees or more, and the witnesses for the plaintiff said that the property was only worth Rs. 200, the plaintiff cannot contend that the property involved in the transfer is so valuable as to make it grossly improbable that the defendant's second party should have made a gift of it, and at the same time to claim that it is worth only Rs. 200 and was in fact transferred for its market value. 73 Ind. Cas. 295=4 L.R.A. Civ. 85=A.I.R. 1923 All. 135.

#### —Inconsistent pleas—Character of suit.

Where a plaintiff has rested his case upon fraud, when the case of fraud has failed, he cannot be permitted to support it upon an entirely different and inconsistent ground. Although, therefore, a suit, brought as one for possession, may, in the discretion of the Court, where the circumstances of the case permit it, be converted into one for redemption on the assumption that the mortgage was valid and binding, a plaintiff must ordinarily succeed on the case he has made in the plaint, and unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot properly be converted into an action to redeem. As it would in reality amount to conversion of a suit of one character into a suit of another and inconsistent character. 67 Ind. Cas. 394=A.I.R. 1923 Cal. 296.

#### —Inconsistent pleas.

It is well settled that a party litigant cannot be allowed to take inconsistent positions in

Court to the detriment of his opponent. 64 Ind. Cas. 903=35 C. L. J. 58=A. I. R. 1922 Cal. 114.

### 15. Nature of suit.

#### —Nature of suit.

Nature of a suit is to be determined from the plaint as framed and not from the pleas of the defendant. A. I. R. 1930 Lah. 613.

#### —Nature of suit.

The nature of suit is determined by the allegations in the plaint and not by the question of finding. 120 Ind. Cas. 421=A. I. R. 1929 Lah. 386.

#### —Nature of suit.

A suit must always be regarded as having relation only to the legal obligations previous to the institution of the suit. 108 Ind. Cas. 319=1927 M. W. N. 527=A.I.R. 1928 Mad. 245.

### 16. Omissions.

#### —Omissions.

#### —Court finding a case for party.

In the absence of any pleading and issue on a point, a Court is not justified in setting up a case for a party which he did not try to assert in pleading. 31 P. L. R. 578=A.I.R. 1930 Lah. 803.

#### —Omissions—Adverse inferences.

Pleadings in this country are generally defective and carelessly drawn and it is not always conducive to justice to draw an adverse inference against a party because he has omitted to mention certain facts in his pleadings which ought to have been mentioned. 11 P.L.T. 403=A.I.R. 1930 Pat. 455.

#### —Omissions—Effect of.

If a particular point is not alleged in the pleadings and consequently no issue is framed on it, the mere fact that argument is addressed to the Court on that point will not remedy the defect in pleadings. 1929 A.L. J. 1132=A.I.R. 1929 All. 657.

#### —Omissions—Provision of law.

Omission to specify the provision of law in an application is not a serious objection, which can deprive the plaintiff of his rights. 92 Ind. Cas. 314=A.I.R. 1926 Mad. 305.

#### —Omission—Pleadings—Want of consideration.

If the defendant does not plead want of consideration, the question of consideration cannot be gone into. 5 L. B. R. 46=2 Ind. Cas. 539.

### 17. Pleas included in other pleas.

#### —Pleas included in other pleas — Major plea includes minor.

Where the defence Pleader gave four reasons for a gift being invalid and one of these was that it was never given effect to.



Held, that such a plea can very well include the plea of want of acceptance by the donee. 74 Ind. Cas. 818=A.I.R. 1924 Oudh 164.

—Pleas included in other pleas—Loan repudiated—Plea as to high rate of interest.

It is not possible to say, after the decision of the Board in the case of *Nazir Begum v. Rao Raghunath Singh*, (23 C.W.N. 700), that a plea of no legal necessity for a loan and that the property is not at all liable for payment of the amount claimed, does not open the door for a defendant to say that the rate of interest is excessive, and place on the plaintiff the onus of proving that the rate of interest is not excessive, having regard to all the circumstances which prevailed when the loan was made. 71 Ind. Cas. 933=2 Pat. 285=25 Bom. L.R. 568=1923 M. W. N. 382=38 C.L.J. 25=4 P.L.T. 29=32 M.L.T. 129=50 I.A. 14=28 C.W.N. 446=18 M.L.W. 767=1 Pat. L.R. 445=4 L.R.P.C. 75=A.I.R. 1923 P. C. 37=44 M.L.J. 615 (P.C.).

—Pleas included in other pleas—Confirmation of possession—Prayer for possession.

The words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the Court thinks the plaintiff is out of possession. It is for this reason that such a relief has been held to be consequential relief within S. 7 (iv) (c) of the Court Fees Act. 68 Ind. Cas. 316=73 Ind. Cas. 43=2 Pat. 198=1922 P.H.C.C. 337=4 P.L.T. 71=1 Pat. L.R. 25=A.I.R. 1923 Pat. 137.

## 18. Procedure and duty of Court.

—Procedure and duty of Court—Duty of Court to confine parties to pleadings.

Parties should be confined to their pleadings and a Court of law should not allow itself to be persuaded to enter into a roaming inquiry or to undertake to decide points on which the party adversely affected has not been given an opportunity to put forward his defence or to adduce evidence. 21 Luck. 222=225 Ind. Cas. 45=1946 A.W.R. (C.C.) 127=(1946) O.W.N. 160=1946 O.A. (C.C.) 127=A.I.R. 1947 Oudh 22.

—Procedure and duty of Court.

A plaintiff who is purposely vague in hopes of his case being misunderstood by the Court in his favour ought to be carefully examined and tied down to definite pleadings. 127 Ind. Cas. 524=A. I. R. 1930 All. 321.

—Procedure and duty of Court—Different custom pleaded on each side.

Where plaintiffs set up a particular custom and the defendants in terms deny the custom set up by the plaintiffs and go on to plead a different custom, it is not permissible in such a case to split up the custom but the case as regards the custom set up either by the plaintiffs or by the defendants must be taken as a whole and not piecemeal. 114 Ind. Cas. 113=A.I.R. 1929 Oudh 204.

—Procedure and duty of Court.

*Baker, J.*—The Court is bound to apply the law to the facts proved or admitted whatever the case of

the parties may be. 110 Ind. Cas. 633=52 Bom. 393=30 Bom. L.R. 591=A.I.R. 1928 Bom. 291.

—Procedure and duty of Court—Omission to plead—Objected by defendant in Second Appeal.

Where a defect in the plaint was not pointed out by defendants in the trial or appellate Court and it was also not raised in grounds of appeal to 2nd Appellate Court but it was found that both the lower Courts dealt with the aspect of the case as, according to defendants, the plaintiffs ought to have presented as though a direct issue was raised in respect thereof.

Held: that it would not be in the interests of justice to non-suit the plaintiffs on the mere ground that the plaint did not contain any averments with regard to it. 111 Ind. Cas. 266=28 M.L.W. 213=A.I.R. 1928 Mad. 703=55 M.L.J. 369.

—Procedure and duty of court—Omission which can be cured by amendment.

It is, no doubt, true that a cause should be decided *secundum allegata et probata* but that rule should not be applied in an abstract way regardless of the circumstances. It would not be satisfactory to decide against a party on a view which might have been obviated by a mere amendment of the pleading, and in a case where the parties had been allowed to go to proof: A.I.R. 1915 P.C. 2 Foll. 104 Ind. Cas. 412=A.I.R. 1927 Sind 248.

—Procedure and duty of Court—Fraud or forgery allegations—Proof of.

Where defendants challenged the contract of sale by plaintiffs on the grounds of forgery and fraud but these points were not pointedly put in the defendants' written statement, and, though perhaps open under the general words of the defence and on the issues, it was put without detail or colour, was not raised in the cross-examination of the plaintiffs or his witnesses, and was only disclosed when defendants' witnesses, after an interval of several months, came into the witness box.

Held: that these defences should not be easily accepted: 97 Ind. Cas. 543=1926 M.W.N. 812=3 O.W.N. 731=25 A.L.J. 20=38 M.L.T. 3=31 C.W.N. 538=A.I.R. 1926 P.C. 109 (P.C.).

—Procedure and duty of Court—Suit on lost bond.

In a suit on lost bond the trial Court must exercise the greatest circumspection and care in deciding the fundamental question of fact, namely, loss of original. 97 Ind. Cas. 82=49 All. 78=24 A.L.J. 964=A.I.R. 1926 All. 741.

—Procedure and duty of Court—Evidence of plaintiff.

As a general rule, however wide and unsatisfactory a claim in the plaint may be, it is better for the trial Court to take the plaintiff's evidence before it dismisses it. 96 Ind. Cas. 89=A.I.R. 1926 All. 672.

—Procedure and duty of Court—Misrepresentation and fraud.

*Per Kincaid, J. C.*—Pleas such as misrepresentation and fraud must be examined with the utmost rigour.



They are not pleas that an honest man would make save in the most exceptional circumstances. They are pleas too, which, if allowed, would be capable of the most dangerous extension. 82 Ind. Cas. 81 = A.I.R. 1923 Sind 25.

#### —Procedure and duty of Court.

Tendency on the part of Subordinate Courts to ignore the provisions of O. 8, R. 9 and O. 10, R. 1, condemned. A written replication is not a substitute for the oral examination under O. 10, R. 1. 66 Ind. Cas. 222 = 8 O.L.J. 439 = A.I.R. 1922 Oudh 178.

#### —Procedure and duty of Court.

Where an agent's authority to bring the suit is questioned, the court ought not, on principle to grant a decree unless the authority is proved. 19 C. 678, Ref. If merely the form of the authority is questioned it is a question of practice and procedure and the lower court cannot dismiss suit on this ground without giving opportunity of correcting the defect. 39 All. 343 = 15 A.L.J. 309 = 39 Ind. Cas. 462.

#### —Procedure and duty of Court.

The object of pleadings is that each side may be fully alive to the question about to be argued in order that they may have an opportunity of bringing forward evidence appropriate to the issues. When the pleadings are vague it is the duty of the court to have them clearly specified. 1 O.L.J. 591 = 26 Ind. Cas. 547.

#### —Procedure and duty of Court—Verification—Judges duty.

Judges must see that plaints are signed by authorised persons and that verifications are not treated as mere formalities. 7 Bur. I.T. 310 = 26 Ind. Cas. 240.

#### —Procedure and duty of Court—Vague allegations.

Where vague and loose allegations are made it is the duty of the court to ascertain the real controversy between the parties. 35 Bom. 182 = 13 Bom. L.R. 92 = 9 Ind. Cas. 765.

#### —Procedure duty of Court—Public policy.

It is the duty of Judge, even though no objection may be taken by any one, to consider whether a rule of public policy does not prevent the disclosure of the documents or information sought by a party to suit. 21 Q.B.D. 509, 521 foll. (1902) 4 Bom.L.R. 342.

### 19. Raising pleas in appeal.

#### —Raising pleas in appeals — Defendant's evidence supporting the plea.

Though generally a ground not taken in the plaint ought not to be allowed to be urged, the matter should be considered when the defendant's own document supports it and when it appears to have been raised in the lower Appellate Court without any objection; and the High Court in second appeal may in order to do substantial justice between the parties permit such ground to be advanced. 119 Ind. Cas. 556 = A.I.R. 1929 Pat. 237.

#### —Raising pleas in appeal—Pleas depending on evidence.

It is undesirable that a party, when he has omitted to raise a question depending upon evidence for its determination in the pleadings, and has failed on the points which he has raised, should be allowed in first appeal to entirely alter his case according to the circumstances and rely upon a fresh ground for the purpose of defeating the plaintiff's claim. 95 Ind. Cas. 573 = 28 Bom.L.R. 513.

#### —Raising plea in appeal—Objection depending on a question of fact.

An objection not taken in the lower Courts and involving a question of fact cannot be gone into in appeal. 69 Ind. Cas. 1005 = A.I.R. 1924 Cal. 372.

#### —Raising pleas in appeal—Validity of notice.

Validity of the notice, not challenged in the lower Courts cannot be, as of right challenged in the Appellate Court, though it is open to the Court to allow such a point to be raised in second appeal. Ordinarily, however, it should not allow it to be raised since, plaintiff will be prejudiced as he would lose the advantage of withdrawing his suit when he finds that a notice was not a proper notice and of bringing a fresh suit at once, after giving a proper notice. 82 Ind. Cas. 956 = 20 M.L.W. 433 = 1924 M.W.N. 830 = A.I.R. 1924 Mad. 904.

#### —Raising pleas in appeal—Partition suit.

Where the plea of out and out division was raised and proved false in the lower Court;

Held, that it could not be pleaded for the first time in appeal that there was at least a severance in status. 79 Ind. Cas. 902 = 1924 M.W.N. 485 = A.I.R. 1924 Mad. 845.

#### —Raising pleas in appeal—Plea depending on evidence.

When it is impossible for the Court to come to a decision on a new point in the absence of any evidence the Court ought not to allow the point to be taken for the first time in appeal. 64 Ind. Cas. 952 = 20 All. L.J. 92 = A.I.R. 1922 All. 346.

#### —Raising pleas in appeal—Mortgage by Coparcener—Plea as to consideration.

In a suit by the mortgagee on a mortgage executed by the karta of a joint family the onus is on the mortgagee to prove that the mortgage was a valid one and although the defendants have not raised a plea in their written statement that the debt for which the mortgage was excused was time-barred, they can raise the same in appeal for the first time. (14 Bengal L.R. 21 Rel. on.) 61 Ind. Cas. 20 = 2 P.L.T. 318 = 6 P.L.J. 256 = A.I.R. 1921 Pat. 99.

### 20. Redemption.

#### —Redemption—Mortgage not proved.

Plaintiffs sought for redemption against persons alleged to be mortgagees and appellants who were purchasers in execution of a decree against some other persons. The mortgagees admitted the title of the plaintiffs but the defendant appellants denied the mortgage and the right of plaintiffs. The lower Appellate Court holding that the mortgage was not proved, dismissed the suit. Held, that the lower appellate Court having found



that no mortgage was proved a single Judge of the High Court was not justified in sending down an issue as to the fact and nature of the possession of plaintiffs within the statutory period. The plaintiffs having failed to prove the case set up by them, the suit was rightly dismissed. 13 A.L.J. 342=28 Ind. Cas. 602. [On appeal from. 12 A.L.J. 1233=27 Ind. Cas. 35.]

**—Redemption suit—Mortgage set up but not proved—Dismissal of suit.**

Where in a suit for redemption the mortgage mentioned in the plaint is not proved, the suit must fail. 25 Ind. Cas. 197 (All.).

**—Redemption—Suit on foot of one mortgage—Relief on foot of another admitted by defendant.**

Where the plaintiff fails to prove the mortgage set up by him he may be allowed to redeem on the basis of a different mortgage under which the defendant claims to hold. 30 M. 388 foll. (1916) 1 M.W.N. 171=32 Ind. Cas. 624.

**—Redemption—Variation—Proof.**

In a suit for redemption based on a specific mortgage to two persons a decree for redemption could not be had on prior mortgages in favour of the two separately, if the specific mortgage alleged is not proved. 37 Ind. Cas. 976 (Pat.).

## 21. Relief.

**—Relief—Power of appellate Court.**

It is an absolute necessity that the determinations in a cause should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. The appellate Court should not offend against this principle. 77 I.A. 15=63 L.W. 232=1950 M.W.N. 168=A.I.R. 1950 P.C. 68=1950 A.L.J. 326=1950 A.W.R. 292=1950 R.L.W. 31=52 Bom. L.R. 498=85 C.L.J. 352=(1950) 1 M.L.J. 417 (P.C.).

**—Relief—Duty of Court.**

The whole foundation of a case rests upon pleadings and no Court has got the right to decide a dispute on a consideration of a fact which has no basis in pleadings. I.L.R. (1950) Nag. 679=1949 N.L.J. 550.

**—Relief—Subsequent agreement to pay enhanced interest by transferee of the mortgagor.**

After mortgaging certain properties the mortgagors transferred part of them to others. The transferees agreed by a letter to pay an enhanced rate than that fixed in the mortgage but the period within which it was to be paid was not fixed. In a suit by the mortgagees enhanced rate was not claimed in the plaint but was claimed in the oral pleadings when it was time-barred.

**Held:** that this latter relief which was a personal one against the transferees on the basis of subsequent agreement and not against all the holders of the property together cannot be claimed in the suit though in this suit it was bound to fail being time-barred. 114 Ind. Cas. 309=A.I.R. 1929 Oudh 303.

**—Right not found in pleadings but decided.**

No doubt relief not founded on the pleadings should not as a rule be granted, but where substantial

matters which constitute the title of all the parties are touched in the issues, and have been fully put in evidence and formed the main object of discussion and decision in the Courts, the case does not come within the rule; and a declaration of the rights of the parties, though not founded on the pleadings may be made; (25 All. 53 (P.C.) Foll; 39 Mad. 634 (P.C.), Dist.) 95 Ind. Cas. 1011=43 C.L.J. 501=A.I.R. 1926 Cal. 1003.

**—Relief—Suit for possession—Joint possession.**

Where in a suit for possession it is found that parties are joint owners of the land, the proper course is to pass a decree for joint possession and not to dismiss the suit and not to refer the parties to Revenue Officer for partition. 96 Ind. Cas. 253=A.I.R. 1926 Lah. 567.

**—Relief—Defective pleadings.**

Where, on account of badly drafted plaint, the relief sought is not clearly brought out, but evidence is led on right issues and no party is prejudiced, the proper relief should be granted to the plaintiff. 93 Ind. Cas. 928=8 L.L.J. 166=27 P.L.R. 344=A.I.R. 1926 Lah. 417.

**—Relief—Prayer as to.**

Where a suit is brought for the recovery of money charged on a property, the mere circumstance that the plaintiff does not expressly ask for relief against the property, but asks that a decree may be passed against the defendants is not a sufficient indication that he intended to claim relief against the defendants personally, and not against the property: 95 Ind. Cas. 1004 (Oudh).

**—Relief—Prayer for general relief.**

A prayer for general relief must be consistent with a specific claim and the case raised in the pleadings. A plaintiff, claiming only confirmation of possession cannot get a decree for recovery of possession. 63 Ind. Cas. 2 (Pat.).

**—Relief—Additional.**

Where the plaint contains charges putting material facts in issue, the plaintiff can get the relief sought for, if it comes under the general prayer. But he cannot desert the special relief prayed for and ask for another, unless the facts in the plaint will consistently with the rules of the Court, maintain the relief. The test is, whether the defendant will be taken by surprise and there can be no surprise, if relief not specifically claimed is consistent with that specifically claimed as well as with the case raised by the pleadings. 43 Cal. 743=20 C.W.N. 446=22 C.L.J. 419=32 Ind. Cas. 437.

**—Relief—Decree.**

Relief granted to the plaintiff should be restricted to the property, set out in the original plaint. 10 C.L.J. 213=2 Ind. Cas. 492.

**—Relief—Further relief.**

Where plaintiff sued for cancellation of pattah on the ground of forgery, the court should not go into the question of its invalidity as regards plaintiff's share as it assumes the pattah to be genuine and no relief on this ground can be given under the common form of prayer for further relief. 1 Ind. Cas. 657 (Cal.).



**—Relief—Discretion of Court.**

Where a large relief is claimed the plaintiff is not necessarily debarred from any relief to which on the facts proved he might be entitled e. g., plaintiff suing for a particular declaration may in the discretion of the court get any other declaration to which he is found entitled. 9 C.L.J. 623=1 Ind. Cas. 530.

**—Relief—Reduction in claim—Court's power.**

No reduction can legally be made, when the sum sued for is considerably less than the sum legally due from defendant even after deducting all the items claimed by the defendant excluding the interest payable thereon. 68 P.W.R. 1914=166 P.L.R. 1914=24 Ind. Cas. 669.

**—Reliefs—Plaintiff must succeed in his own title.**

A plaintiff must succeed upon the strength of his own title and not upon the weakness of the defendant's case. 201 P.W.R. (1913)=323 P.L.R. 1913=20 Ind. Cas. 879.

**—Relief—Mixing up barred claims with reliefs not barred—Suit, if can be dismissed.**

A suit is not liable to be dismissed because a barred claim is set up along with other reliefs which are not barred. 4 L.W. 441=(1916) 2 M.W.N. 325=37 Ind. Cas. 642.

**—Relief.**

Decree for one share may be granted in a suit for the possession of whole estate. (1915) M.W.N. 968=2 L.W. 1214=19 M.L.T. 296=30 M.L.J. 451=31 Ind. Cas. 833.

**—Reliefs—Powers of Court—Relief not claimed in the alternative.**

It is not competent for a court to give a decree for *Quantum Meruit* when there is no alternative claim in a suit for commission. 17 Ind. Cas. 106 (Mad.).

**—Relief—Plaintiff to get relief on his own right.**

No relief ought to be granted to a plaintiff except to his own rights. 11 M.L.T. 25=(1912) M.W.N. 50=22 M.L.J. 225=13 Ind. Cas. 788.

**—Relief—General prayer for—Effect of.**

Where, in a suit for possession of a house, there was no prayer that the decree which was alleged to have been fraudulently obtained should be set aside it was held that the general prayer for any other relief embodied one for cancellation of the decree. 4 Ind. Cas. 356 (Mad.).

**—Relief—Principal and ancillary.**

The claim for principal relief does not fail merely because the claim for ancillary relief is found not maintainable. 11 Ind. Cas. 537 Oudh.

**—Relief.**

A suit once framed as a suit for fair and equitable rent cannot be changed into a suit for enhancement of rent and the court is competent only to pass a decree

for rent for the year in suit, the rent of the holding being presumed to be a fair and equitable rent until the contrary is proved. 5 Pat. L.J. 406=57 Ind. Cas. 558.

**—Relief—Several reliefs, claim for—Failure to prove some—Decree.**

If a plaintiff claiming two reliefs failed to prove one relief he can get a decree for the one which he proves only. If in a suit for possession and declaration of permanent and heritable right, plaintiff fails to prove the latter, but proves former he is entitled to a decree for possession. 2 Pat. L.J. 15=38 Ind. Cas. 543.

**—Reliefs—Smaller relief—Contribution.**

The main principle of practice is that plaintiff can only recover according to his allegations and proofs. 11 B.L.R. 391 (P.C.); 8 L.B.R. 334, ref. If plaintiff claimed restitution of the whole amount of a decree on a pronote which he was jointly liable with the defendants on the ground that he was only a surety for them, but it was found that he borrowed the money for partnership purposes the plaintiff could not be given a decree for contribution. 10 Bur. L.T. 119=36 Ind. Cas. 464.

**—Relief—Claim—Reduction.**

Where plaintiff sues for a sum after giving up a portion to which he is entitled, the defendant will not be allowed any reduction if the net amount after deducting the reduction claimed, from the amount due, is still greater than the suit amount. 68 P.W.R. 1914=166 P.L.R. 1914=24 Ind. Cas. 669.

**—Relief.**

A plaintiff cannot succeed on a case not to be found in the pleadings nor involved in or consistent with the case made thereby. 6 W.R. (P.C.) 7; 9 W.R. (P.C.) 7 foll. The Court may afford the relief which the plaintiff forgot to ask in his prayer, under the prayer for general relief, provided such relief is conformable to the case made in the plaint. It should be carefully seen whether the relief sought may be granted upon the facts stated in the plaint and established by the evidence and whether the variance, if any, between the pleadings and the proof will take the defendant by surprise. 11 C.L.J. 2=3 Ind. Cas. 408.

**—Relief—Plaintiff claiming too much while really entitled to less—Decree.**

A plaintiff ought not, by reason of his having claimed too much, to be precluded from recovering what is really found due to him undoubtedly, when the pleadings in the case are wide enough to cover the latter claim. The question as to whether a decree for the lesser amount is to be passed is hardly one of indulgence. 3 C.L.J. 481=3 A.L.J. 360=28 A. 482=1 M.L.T. 143=8 Bom. L.R. 397=16 M.L.J. 269=10 C.W.N. 626 (P.C.).

**22. Time for raising pleas.****—Time for raising pleas—Where the plea goes to the root of the transaction.**

An objection to the validity of a deed of transfer or relinquishment does not become inadmissible merely by reason of the fact that the period for cancellation had run out, if the person impeaching the validity of the same does so on the fundamental ground of its execution. 128 Ind. Cas. 433=A.I.R. 1930 All. 605.



—Time for raising pleas—Proof of title.

Where it is incumbent upon a person to prove his title and not on the opponent to disprove it, it is not necessary that the objection to sale deed by the prior person in favour of another should have been raised by the opponent, who does not know of the existence of the conveyance until that fact was disclosed by the prior person. A.I.R. 1929 P.C. 303 (P.C.).

—Time for raising pleas—Question of fact.

Plaintiffs cannot be allowed to amend their plaint and found their cause of action on a question of pure fact not alleged in the plaint.

Where plaintiff company alleges in the plaint that its director had interest in the Contract entered into on behalf of the company but does not aver its non disclosure as part of the cause of action, plaintiffs will not be allowed, after issues are framed and evidence is closed, to make the allegation of non-disclosure. (Imperial Mercantile Credit Association v Coleman 6 Ch. App. 558 and Costa Rica Ry. Co. v. Forwood, 1 Ch. 746, Foll.) 115 Ind. Cas. 486=1928 M. W. N. 481 =A.I.R. 1929 Mad. 353.

—Time for raising pleas.

It is desirable that parties should be allowed to state their pleas whenever possible, provided no further delay is caused by such indulgence. 105 Ind. Cas. 288 =39 M.L.T. 273=A.I.R. 1927 Mad. 1007=53 M.L.J. 504.

—Time for raising pleas—Prohibition to adopt.

Plaintiff relying on the rule of prohibition of adoption of daughter's son among regenerate classes should raise the point in his plaint allowing defendant to plead family custom to the contrary. 106 Ind. Cas. 620=6 Pat. 506=8 P.L.T. 34=A.I.R. 1927 Pat. 145.

—Time for raising pleas—Non-compliance with statutory requirements.

Where the plaintiffs sued for damages on a contract of Sea Insurance and there was no 'sea policy' effected within the meaning of S. 7, Indian Stamp Act but the defendants failed to plead the non-compliance of the Statutory enactment:

**Held,** No Court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset. 86 Ind. Cas. 545=27 Bom. L.R. 770=29 C.W.N. 893=23 A.L.J. 105=52 I.A. 126=1925 M. W. N. 257=6 L. R. P. C. 66=52 Cal. 408=A.I.R. 1925 P. C. 83=49 M.L.J. 136 (P. C.).

—Time for raising pleas—Admissibility of a document.

The question as to whether a document is admissible or not for want of registration or irrelevancy is eligible to be raised at any stage of the case. 82 Ind. Cas. 949=A.I.R. 1925 Cal. 370.

—Time for raising pleas—Rule obtained by private party—Plea of misjoinder taken by the Crown at the final hearing.

On a rule obtained by a party against an order for fresh trial, the Crown took the objection of misjoinder for the previous trial for the first time when the rule was about to be made absolute, but their Lordships declined to give effect to it. (1904) 31 C. 710.

23. Variation and new case.

—Variation and new case—Determination of cause—Power of Court.

Where the plaintiff sets up in the plaint the existence of certain things and fails to establish it, the Court has no power to decree a difference in state of things or to introduce the existence of new things when such facts fly in the face of the allegations pleaded. The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. 6 W.R. 57 (P.C.), referred to. A.I.R. 1949 H.P. 7.

—Variation and new case—Suit on title—Plea of adverse possession.

In a suit for declaration of title to and possession of land if title has been pleaded that title can be based on adverse possession extending over 12 years and going into this question does not mean making a new case; (24 Mad. 387. (P.C.). Foll.) 124 Ind. Cas. 710=A.I.R. 1930 All. 576.

—Variation and new case.

A party having claimed on basis of investment in commercial speculations cannot claim on another basis when he finds that the first basis is prejudicial to him. 114 Ind. Cas. 565=1929 A.L.J. 406=49 C. L.J. 335=33 C.W.N. 493=31 Bom. L.R. 710=1929 M.W.N. 422=30 M.L.W. 835=A.I.R. 1929 P.C. 77=57 M.L.J. 581 (P.C.).

—Variation and new case—Contract—Allegation of fraud.

**Per Kemp, J.**—Where the real cause of action alleged in the plaint is one *ex contractu* the plaintiff cannot by merely alleging fraud base a cause of action on fraud. 117 Ind. Cas. 417=53 Bom. 271=31 Bom. L.R. 21=A.I.R. 1929 Bom. 119.

—Variation and new case—Agent—Express and implied authority.

Where plaintiff pleads that an agent, who has purchased goods from him, had an express authority from the principal for making purchases, it does not exclude him from setting up a case of implied authority if a case of implied authority can be made out from the facts and circumstances and other evidence. 110 Ind. Cas. 817=A.I.R. 1928 Cal. 863.

—Variation and new case—Appeal.

A party must not be allowed in appeal to make out a new case or a case inconsistent with the case set up by him in the lower Court. Nor can an appellate Court make out a new case for him which never made himself at any period of the trial. 110 Ind. Cas. 91=5 O.W.N. 435=A.I.R. 1928 Oudh 330.

—Variation and new case.

Plaintiff cannot change his case at the last moment especially when he has made no application to amend his plaint. 107 Ind. Cas. 440=23 S.L.R. 370=A.I.R. 1928 Sind 103.



—Variation and new case—Easement and easement of necessity.

It is not open to a Court to make a new case for a plaintiff which does not arise in the pleadings and give him relief on the basis of an easement of necessity when he fails to establish his claim as to a right on an easement. 99 Ind. Cas. 922=8 L.L.J. 546=27 P.L.R. 771=A.I.R. 1927 Lah. 36.

—Variation and new case—Finding by Court.

A Court is not bound to find the facts exactly as alleged by one party or other. It may rightly hold that the truth lies in between. In such cases the opposite party is entitled to notice of the new aspect of the case. 95 Ind. Cas. 294=A.I.R. 1926 Nag. 385.

—Variation and new case—Ends of Justice.

When it appears to the Court that the plaintiff is entitled to an equitable relief it would be well advised to allow the plaintiff where the defendant has been obviously in default to avail himself of any such equitable relief to which he is entitled under the law and if necessary to treat his pleadings as amended for that purpose even at the appellate stage of the suit. 82 Ind. Cas. 964=A.I.R. 1925 Cal. 434.

—Variation and new case—Property acquired by a co-percener.

If it is stated in the plaint that certain lands were acquired by A about which the plaintiff could not possibly have any definite information, but if in the course of the proceedings it transpires that it was not A but B who had acquired the lands as a member of the Joint Hindu Family for the family there is no variation in the plaintiff's case disentitling him to a decree or discredit his case altogether. 80 Ind. Cas. 432=A.I.R. 1925 Cal. 257.

—Variation and new case—Court finding a new case.

A Court ought not to set up, on behalf of a party, a new case which has never been pleaded by him, but if neither party in his pleadings discloses the entire truth and the evidence adduced discloses a set of facts which is either midway between, or at any rate different from, the case which either party has set up in his pleadings, the Court is obviously bound to take notice of the true state of facts as proved by the evidence, and to give effect to the legal rights which arise on that state of facts. (23 O.C. 104, Ref.) 87 Ind. Cas. 822=2 O.W.N. 364=12 O.L.J. 342=28 O.C. 397=A.I.R. 1925 Oudh 617.

—Variation and new case—Appeal—Principle.

Plaintiff's allegation was that although the consideration was Rs. 3,000 it was deliberately stated to be Rs. 2,000 because they were unable to procure a stamp-paper of the proper value.

**Held:** in such circumstances if they are permitted in second appeal to contradict the statement in the conveyance they would only be permitted to allege that they have violated the law. Under these circumstances the principle applies that a party cannot come into Court with fraud on his lips and ask for a relief

as to such the Courts of Justice are not open. (25 California 622 at P. 657, Foll.)

The parties should not be permitted to depart from the deeds and to establish a case which is contrary to their pleadings. The principle is that the determination of a case should be founded upon allegations in the pleadings or a case involving and consistent with such allegations. 75 Ind. Cas. 557=37 C. L. J. 552=27 C.W.N. 496=A.I.R. 1923 Cal. 570.

24. What is.

—What is—Petition for leave to execute a decree—Whether.

A petition for leave to execute a decree is not a pleading. 2 Pat. L.J. 24=38 Ind. Cas. 85.

25. Miscellaneous.

—Miscellaneous—Admissibility of a document—Objection as to.

The objection to a document for want of registration is not a mere technical objection, but is an objection, of substance going to the fact and the *bona fides* of the whole transaction. 122 Ind. Cas. 158=A.I.R. 1930 Pat. 530.

—Miscellaneous—Premature suit—Scope of plea.

The defendant by taking the plea that the suit is premature, certainly means that the suit should be dismissed, if the Court found that the cause of action had not accrued when the suit was filed. 116 Ind. Cas. 646=A.I.R. 1929 Nag. 137.

—Miscellaneous—'Demurrer'—Plea has not been recognised in India.

It is not desirable to use the word 'demurrer' as the same in English practice has been abolished since the passing of the Judicature Act while the term has never been recognised in India by any of the Codes of Civil Procedure. It can only be used in India by way of analogy to a by-gone English form of procedure. 67 Ind. Cas. 326=24 Bom. L.R. 328=47 Bom. 182=A.I.R. 1923 Bom. 24.

—Miscellaneous—Statute alleged to be ultra vires.

According to the rules of pleading an allegation of infirmity in any statute on the ground of ultra vires is sufficient without assigning further reasons and the question of ultra vires can be considered in its wider application and the Court need not bind itself to the one assigned reason of invalidity. A.I.R. 1921 P. C. 163 (P.C.).

—Miscellaneous—Demurrer—Plea of—Allegation in plaint to be taken as true for purposes of argument.

Where the court is asked to decide a preliminary issue as to whether the plaint discloses a cause



of action, the defendants must be taken to admit for the sake of argument that the allegations in the plaint are true *modo et forma*. In doing so they reserve to themselves the right to show that these allegations are wholly or partially false in the further stages of the action if the preliminary point be overruled, but so far as the preliminary point is concerned everything contained in the plaint must be taken to be true as stated. 40 Cal. 598=40 I. A. 56=17 C.W.N. 541=(1913) M.W.N. 406=13 M.L.T. 406=11 A.L.J. 413=17 C.L.J. 478=15 Bom. L.R. 472=184 P.L.R. 1913=25 M.L.J. 104=18 Ind. Cas. 949 (P.C.).

—Miscellaneous—Failure to prove plaintiff's case.

It is a principle of sound common sense and justice that a plaintiff who brings a case and fails cannot get a decree on the ground that the defendant has failed to prove the counter-case set up in defence by him. 9 Bur. L.T. 114=8 L.B.R. 334=33 Ind. Cas. 163.

—Miscellaneous—Dismissal of suit on.

To non-suit a person because he has not sufficient legal advice to draw up the pleadings as fully and carefully as they might be, would involve great hardship on litigants. (1912) 1 U.B.R. 141=18 Ind. Cas. 568 (L.B.).

—Miscellaneous—Waiver—Validity of plea.

There may be circumstances under which a plea of waiver cannot be entertained by a court of justice as being contrary to public policy. 6 C.L.J. 62, 6 C.L.J. 111, rel. on. 13 C.L.J. 192=9 Ind. Cas. 698.

—Miscellaneous—Value of—Untenable pleading, if other side can avail itself of.

An untenable pleading by one party cannot be availed of by the other party in support of his case. 3 O.L.J. 462=19 O.C. 328=37 Ind. Cas. 23.

—Miscellaneous—Variance—not permitted.

A party cannot be allowed to retire from the position taken up by him on which pleas were recorded and issues drawn. 8 P.L.R. 1913=220 P.W.R. 1913=18 Ind. Cas. 553.

Pledge.

See Contract Act, Ss. 172, 173, 176, 178 to 180.

—Pledgee—Re-pledger—Sale by—Right of pawn-er to sue for conversion—Tender—Necessity—Suit for redemption—Prior tender—If necessary. See Specific Relief Act, S. 10. Illus. (b). 53 Mys. H.C.R. 73.

Pledging of Children's Labour Act  
(II of 1933).

—S. 2 Agreement to pledge labour.

An agreement whereby the labour pledged is not to be expended till after the time by which

the child has become 15 years of age is not one to pledge the labour of a child under 15. A.I.R. 1938 Rang. 359=178 Ind. Cas. 680.

Poisons Act (1 of 1904).

—S. 10 Cl. (a) and (b)—Sale of retail poisons—Offences.

A person acting in contravention of S. 10 and rules made thereunder of Indian Poisons Act by selling retail poisons, if he is not a qualified medical practitioner or a registered chemist or druggist to claim exemption under S. 10, is guilty of an offence. The rules have no application to wholesale sales of poisons. 8 Bur. L.T. 244=16 Cr. L.J. 764=8 L.B.R. 532=31 Ind. Cas. 364.

Police Act (5 of 1861).

—S. 1—'Police officer'—Meaning of—Police patels in Berar.

Primarily the term "Police officer" in S. 25 of the Evidence Act means the same as it does in the Police Act but it can be extended beyond the definition in S. 1 of the Police Act to cover only those persons who like Police officers, coming within that definition are so much more interested in obtaining convictions than any member of the community is, that they might possibly resort to improper means for doing so. That class does not include police patels in Berar. 101 Ind. Cas. 599=23 N.L.R. 23=28 Cr.L.J. 471=8 A. I. Cr. R. 66=A.I.R. 1927 Nag. 222.

—S. 2.—Dismissal of Police officer declared void and inoperative—Officer is entitled to salary withheld.

When a declaration is granted to the dismissed Police Officer that his dismissal is void and inoperative, the Officer continues to be a member of the Police force and is entitled to his salary for the period during which the salary was withheld from him. The Government is under statutory obligation under S. 2 of the Police Act to pay it. A.I.R. 1943 Oudh 368=1943 O. W. N. 118=19 Luck. 163=207 Ind. Cas. 178.

—S. 7—Police discipline.

See for observations in 9 Bom. L. R. 681=31 B. 480.

—S. 7—Charge against—Enquiry entrusted to the hands of Superintendent—Inexpediency.

The inadvisability of directing a District Superintendent of Police to enquire into the truth of charges laid against a Sub-Inspector of Police was also pointed out. (1904) 9 C. W. N. 199=2 Cr.L.J. 51.



**—S. 7—Local Government if can delegate disciplinary powers under S. 7.**

The General Police Act confers the powers of appointment (which connote punishment), on certain designated officers, and the local Government cannot by any rules framed by it, delegate disciplinary powers to those officers. The powers of punishment rest in the officers appointed in such behalf by S. 7, General Police Act, and therefore the delegation of these powers to such officers is ultra vires of the Local Government which is not the authority empowered to punish such authority being the officers designated. A.I.R. 1938 Rang. 181=1938 Rang. L. R. 104=39 Cr.L.J. 614=175 Ind. Cas. 442.

**—S. 7—Offence punishable under S. 7 is also punishable under Penal Code.**

Section 7 of the Police Act deals merely with powers of superiors officers (Police) in regard to the control of their subordinates and does not secure the offender from further prosecution under Penal Code. 26 P. R. 1915 Cr.=16 Cr.L.J. 788=52 P. W. R. 1915 Cr.=31 Ind. Cas. 644.

**—S. 7—Sub-Inspector if a public servant.**

In view of S. 7 of the Police Act as amended by Government of India (Adaptation of Indian laws) order, 1937, it cannot be said that the Sub-Inspector of police is, a public servant 'who is not removable from his office save by or with the sanction of the provincial Government or some higher authority.' This being so S. 197, Criminal P. C. does not apply to him. A. I. R. 1940 Oudh 382=41 Cr.L.J. 695=1940 O. W. N. 494=1940 A. W. R. 250=15 Luck. 740=188 Ind. Cas. 846.

**—Ss. 7 and 29—Suspension pending enquiry—Prosecution under S. 29.**

Section 7 contemplates punishment to be awarded after the police officer has been adjudged by his superior officer to be remiss or negligent in the discharge of his duty. Where the police officer has been suspended, not by way of punishment but under R. 840 of the Orissa Police Manual, Vol. I, 1940 page 364, pending the result of the inquiry into his conduct, S. 7 has no application. Hence, where a police officer has been reported against as having been negligent in the discharge of his duties with the result that a proceeding has been started against him for holding an inquiry into his alleged misconduct and the Superintendent of Police having taken the view that his continuance on duty pending the enquiry would be prejudicial to public interest, places him under suspension and asks the officer to report himself at the headquarters of the district to take his orders from the inquiring officer, the order is not by way of punishment under S. 7. If the officer commits breach of the order he is liable to be prosecuted under S. 29. A.I.R. 1944 Pat. 256=10 C.L.T. 20=11 B. R. 72=23 (Pat.) 225=46 Cr.L.J. 24=215 Ind. Cas. 155.

**—Ss. 7, 29—Suspension and confinement of Police Officer for indefinite period—Legality.**

An order for suspension and confinement of a Police Officer for an unlimited period of time exceeding the limits laid down in cl. (b) of S. 7 of Police Act 1861, is illegal and is not an order which a Superintendent of Police can legally pass at all, nor one which he can pass in the alternative under S. 7 of the Act, and no conviction under S. 29 of the Act for disobeying such an order is maintainable.

To order a Police Officer to live in the Police lines until further orders and not to leave the lines without permission is to confine him in those lines. A.I.R. 1932 Cal. 285=58 Cal. 1132=35 C.W.N. 547=33 Cr.L.J. 15=134 Ind. Cas. 891.

**—Ss. 7, 29—Suspension and confinement for unlimited term—Cumulative punishment, if legal—Police officer.**

An order for suspension and confinement of a Police officer for an unlimited period of time exceeding the limits laid down in clause (b) of S. 7 is illegal and is not such an order which a District Superintendent of Police can legally pass at all nor one which he can pass in the alternative under S. 7 and no conviction under S. 29 for disobeying such an order is maintainable. (1905) 2 C. L. J. 616=3 Cr. L. J. 110.

**—S. 7—Rules under—R. 226, C. P. and Berar Police Regulations is integral part of Act—Order retrospective in effect and contrary to R. 226 is void and inoperative.**

For purpose of interpretation, R. 226 in Part II, Chap. VIII, C. P. and Berar Police Regulations made by Provincial Government by virtue of authority vested in it by S. 7, Police Act should be read as integral part of the Police Act. Hence, an order of dismissal with retrospective effect contrary to the provisions of R. 226, Note, (i) passed by the Inspector-General of Police is void and inoperative. A.I.R. 1945 Nag. 190=1945 N. L. J. 216=I.L.R. (1945) Nag. 469.

**—S. 7—Rules under—Rr. 247 and 249 (Central Provinces)—Applicability.**

Rules 247 and 249, C. P. and Berar Police Regulations apply only to an officer who has been suspended pending the enquiry. Hence, in a case where District Superintendent of Police far from suspending the Sub-Inspector, only recommends reduction of his salary, Rr. 247 and 249 have no application. A.I.R. 1945 Nag. 190=1945 N. L. J. 216=I.L.R. (1945) Nag. 469.

**—S. 7—Rules under—Central Provinces—R. 258—S. 2—Sub-Inspector—Scope and applicability.**

The word "men" in S. 2 does not include a Sub-Inspector and as R. 258, C. P. and Berar Police Regulations is applicable to "men" only, the Inspector-General of Police has no power to make a retrospective order involving forfeiture of pay of a Sub-Inspector. Hence, in a case where the order of the Inspector-General of Police dismissing a Sub-Inspector is void, the Sub-Inspector can claim his salary upto the day he is validly dismissed. A.I.R. 1945 Nag. 190=1945 N. L. J. 216=I.L.R. (1945) Nag. 469.



—S. 8—Scope—Liability of police officer under suspension to prosecution under S. 29.

Under S. 8 of the Police Act, as amended in 1895, a Police Officer does not by reason of being suspended from office, cease to be a Police Officer; hence he does not by reason of suspension cease to be liable to prosecution under S. 29 of the Act for absentsing himself from barrack 1945 P.W.N. 391.

—S. 8—Suspended Sub-Inspector does not cease to be Police Officer.

In the eye of law, a Sub-Inspector who is suspended from service does not cease to be a Police Officer and his responsibilities continue until he is validly dismissed from the service. A.I.R. 1945 Nag. 190=1945 N.L.J. 216=I.L.R. (1945) Nag. 469.

—Ss. 8 and 29—Scope and applicability—Police Officer under suspension is liable to be prosecuted under S. 29.

Section 8, as amended, explicitly declares that Police Officer shall not by reason of being suspended from office cease to be a Police Officer. Therefore the Police Constable, who, while under suspension, is alleged to have absented himself from barrack is liable to be prosecuted under S. 29. 1945 P.W.N. 391.

—S. 9—Leave—Failure to return to duty—Punishment—Order to return to duty—Refusal to obey—Second offence.

The accused, a police constable, did not return to duty on the expiry of casual leave for which he was prosecuted and fined. During the pendency of the trial he was suspended. After his trial he was reinstated and asked to join, which he did not do. He was tried and sentenced to imprisonment. Held, that they were distinct offences and the accused was rightly convicted. 42. All. 22=17 A.L.J. 873=20 Cr.L.J. 575=52 Ind. Cas. 63.

—S. 13 (B), Cl. (c)—Police Constable—Possession of money against orders of Police Commissioner.

A Police Constable who pleads guilty of having money in his possession contrary to the order of the Commissioner of Police but states that he was not on duty cannot be convicted without his defence being considered and adjudicated upon, as his plea merely amounted to an admission of the fact that he had at the time in question money upon his person. 18 C.W.N. 1272=15 Cr.L.J. 703=26 Ind. Cas. 151.

—S. 15 (4)—Burden of proving that in assessing means of person under S. 15 (4), his income from outside disturbed area was taken into account is on that person.

Under S. 15 (4), Police Act, only the means within the disturbed area can be considered. The burden to prove that the Magistrate, in making assessment under S. 15 (4) took into consideration a person's means from outside the disturbed area is on such person because the act being an official act, will be presumed in the first instance to have been regularly performed in accordance with law. A.I.R. 1940 Nag. 123=1940 N.L.J. 18=187 Ind. Cas. 703.

—S. 15 (4)—Magistrate's discretion regarding means of person not illegally exercised—If cannot be attacked in Civil Court.

The Magistrate is given absolute discretion in determining the means of a person under S. 15 (4). That being so, unless it is proved that the Magistrate has exercised his judgment illegally which means to say not in accordance with that section, his decision cannot be attacked in a civil suit. A.I.R. 1940 Nag. 123=1940 N.L.J. 18=187 Ind. Cas. 703.

—S. 15 (4)—“Means”, how determined.

While considering the means of a person under S. 15 (4), Police Act, what the Magistrate is entitled to look to is not only the income derived by the person from the disturbed area but also the means which he had of raising the money required for the assessment. A.I.R. 1940 Nag. 123=1940 N.L.J. 18=187 Ind. Cas. 703.

—Ss. 15, 16—Cost of additional Police quartered in village—Distress warrant for realization given to Assessment Officer—Whether can be endorsed to clerk.

Where a distress warrant for realisation of amount due by way of cost of additional Police quartered in a village is entrusted for execution to the Assessment Officer, there is no provision either in the Code or the rules framed by the Local Government under S. 386 of the Criminal P.C. enabling him to endorse the warrant to his clerk. A.I.R. 1935 Pat. 214=1 B.R. 446=16 P.L.T. 295=36 Cr.L.J. 714=155 Ind. Cas. 421 (2).

—Ss. 15, 16—Property attached, not exclusive property of accused but joint family property—Liability to be attached.

Where the warrant is not for the realisation of fine imposed on any individual but for the realisation of cost of the additional Police quartered in a particular village which was apportioned on the inhabitants of that village, the entire family is the defaulter and the warrant for realization is issued against its head, not in his individual capacity but in his capacity as head of the family which was assessed to that cost and the family property is liable to be seized. The cost may be realized as a fine but is not fine. A.I.R. 1935 Pat. 214=1 B.R. 446=16 P.L.T. 295=36 Cr.L.J. 714=155 Ind. Cas. 421 (2).

—S. 15, Cls. 4 and 16—Apportionment of cost of quartering additional police among inhabitants—Deputy Magistrate if can make.

A Deputy Magistrate has no jurisdiction to apportion the costs of quartering additional police among the inhabitants and the fact that an appeal therefrom to the District Magistrate is dismissed by him will not amount to apportionment by the District Magistrate. 40 Cal 452=17 C.W.N. 315=17 C.L.J. 216=18 Ind. Cas. 112.

—S. 15-A, Cl. 4—Assessment by Collector—No irregularity—Suit for recovery of amount paid—Remedy.



When a statute provides a particular remedy, a general remedy in the Civil Court becomes barred. Section 15-A, Cl. 4 of the Police Act provides that every declaration or assessment made or order passed by a Magistrate of the district under sub-s. (2) shall be subject to revision by the Commissioner of the Division or the Local Government but save as aforesaid, shall be final. A suit in respect of the amount realized from the plaintiff on account of compensation paid to the person injured in a ryot, under the Government Notification under the Police Act, is not maintainable in the Civil Court. Even if it is maintainable, it is maintainable only on the ground of material irregularity in the proceedings of the Magistrate. A.I.R. 1941 Oudh 355=1941 O.W.N. 63=16 Luck. 421=1941 A.W.R. 82=192 Ind.Cas. 545.

—S. 15-A, Cl. (2)—Expression “after such inquiry”—Inquiry by subordinate of Collector under Collector's orders and supervision—Whether inquiry by Collector.

The words “after such inquiry” in S. 15-A, Cl. (2), Police Act, are very material. Where the inquiry was made by the subordinate of the District Magistrate, but under his supervision and he sanctioned the assessment recommended by the Deputy Collector after fully considering it together with the evidence given in its support and the objections made against it, this is a sufficient inquiry of the District Magistrate. A.I.R. 1941 Oudh 355=1941 O.W.N. 63=16 Luck. 421=1941 A.W.R. 82=192 Ind. Cas. 545.

—S. 15-A—“Inhabitant” in S. 15-A—Person having kothris in town, whether inhabitant of the town.

Where a person derives his income from some kothris within the area of a town, and those kothris are not waqf property, the person is an “inhabitant” of the town within the meaning of S. 15-A, Police Act. A.I.R. 1941 Oudh 355=1941 O.W.N. 63=16 Luck. 421=1941 A.W.R. 82=192 Ind. Cas. 545.

—S. 17—Special constables—Qualification—Punitive appointment, what constitutes—Appointment of influential Congressmen as special constables—Validity.

The appointment of a person as a special constable under S. 17, Police Act, is not illegal merely because he is an influential Congressman engaged in an anti-government movement or because he is old.

In appointing special constables under S. 17, Police Act, *prima facie*, it is a straightforward effort to secure the assistance of leading and influential men, whose authority is likely to be respected by the villagers in the preservation of peace and order in the conditions set out in S. 17. Physical force is not the sole or even necessarily a predominant qualification of a Police Officer even in the regular force and still less when the appointment is under S. 17. A.I.R. 1931 Pat. 140=12 P.L.T. 69=32 Cr.L.J. 782=10 Pat. 596=131 Ind. Cas. 785.

—Ss. 17, 19—Special constable, appointment of—Refusal to act—Old age, whether disqualification.

The plea that the accused was too old to act as a special constable must be raised in defence before the Magistrate who tries the charge under S. 19 and not before the High Court in revision. A.I.R. 1931 Pat. 140=12 P.L.T. 69=32 Cr.L.J. 782=10 Pat. 596=131 Ind. Cas. 785.

—Ss. 17 and 19—Appointment of special constables, when legal—Parties to criminal proceedings.

Special constables should be appointed under S. 19 of the Police Act only when it is really intended to use them as Police Officers and to strengthen the ordinary police force, and not otherwise.

It is objectionable to appoint as special constable, parties to dispute against whom complaints have been lodged or proceedings under S. 107, Cr.P.C., are pending, so as to handicap them in their defence. 43 Cal. 277=17 Cr.L.J. 197=20 C.W.N. 855=34 Ind. Cas. 309.

—S. 17—C. P. C., S. 435—Special constables—Appointing order—Revision.

An order under S. 17 of the Police Act appointing special constables is of an executive nature and not open to revision under S. 435, Cr.P.C. 20 O.C. 229=18 Cr.L.J. 900=42 Ind. Cas. 132.

—Ss. 17 and 19—Special constable—Refusal to serve.

The failure of a person appointed as a special constable under S. 17 of the Police Act to obey a lawful notice issued to him to attend a police station amounts to a neglect or refusal to serve as a special constable within S. 13 of the Police Act. 28 Cal. 411, Dist. 19 Cr.L.J. 91=43 Ind. Cas. 251 (Cal.).

—Ss. 17, 18, 19, 29—Special constable—Absence from parade without permission—Breach of duty—Appropriate remedy.

The penalties provided in S. 29 of the Police Act for neglect of duties, etc., by Police Officers were not intended to apply to the case of special constables with regard to whom special provisions have been made in S. 19 of the Act. *Quaere*:—Whether S. 18 of the Act makes the provisions of S. 29 applicable to such cases. Where the offence charged against a special constable was stated to be ‘absence from special constable parade without permission’:—*Held*, that even if S. 29 of the Act applies to special constables, it ought not to be applied to cases of the kind, but recourse should be had to S. 19 which is expressly enacted to meet the very case of special constables. (1888) 2 C.L.J. 565=10 C.W.N. 79=3 Cr.L.J. 178.



—S. 17—Special constable, appointment of, when illegal—Refusal to serve—Penal Code S. 173.

The only legitimate object for appointment of special constables is to strengthen the ordinary police force by the addition of suitable persons to their number when the ordinary force find themselves too few to meet an emergency. In a case of dispute regarding the right to the possession of an estate between two parties one of whom was represented by the Court of Wards, the Magistrate of the District took up the cause of the latter and alleging that it would be impossible to preserve the peace without employing a special police force, appointed the native men of the opposite party as special constables and on the latter refusing to serve as such, proceedings under S. 137 of the Penal Code were drawn up against them. **Held**, that assuming the Magistrate's allegation about the necessity of additional police to be correct, it was an abuse of the law and an act of oppression to appoint the native men on one side as special constables in order to prevent their asserting their alleged rights and so to give an advantage to the opposite party. That the charge under S. 174 of the Penal Code had no relation to the offences alleged and the proceedings thereunder should be quashed. The Magistrate in explanation of his action in this case had stated that he believed that the party which the man appointed as special constables belonged was not in possession. **Held**, that the law contemplates not the opinions of Magistrates on such questions but their judicial decisions. [Decision of 1888] (1886) 10 C.W.N. 82=2 C.L.J. 555=3 Cr. L. J. 169.

—Ss. 17, 19—Circumstances justifying appointment of special constables—Disobedience of order under S. 17, when no offence under S. 19.

The circumstances which justify the appointment of special constables under S. 17 of Act V of 1861 are that a disturbance of the peace is apprehended, and that the police force available is insufficient to preserve the peace and protect the inhabitants of the place where the disturbance is apprehended. In the absence of these circumstances an order under S. 17 is improper and there should be no conviction of the persons appointed special constables for disobedience of the same. 35 Cal. 454=7 Cr. L. J. 186=(1907) 12 C.W.N. 366. (1908) 12 C.W.N. 727=8 C.L.J. 66=35 C. 454.

—S. 19—Special constable—Refusal to go station to take badges and arms:

Refusal to accompany a police officer to the police office situated at some distance not for any purpose

of police duty, but simply to obtain the authority of appointment to serve as special constables and the necessary badges and arms, does not amount to a refusal to serve as special constable, and it does not constitute an offence under S. 19. (1900) 5 C. W. N. 134=I.L.R. 28 Cal. 411.

—S. 22—Assault while on duty—Controlling traffic in a private place.

Where a police officer was deputed in a private place to control the traffic on the road leading from that private place to the public road and he was assaulted while so discharging his duty:

**Held**, the police officer was acting in the lawful discharge of his duty and the accused was guilty of an offence under S. 353, I.P.C. 111 Ind. Cas. 665=29 Cr. L. J. 905=A.I.R. 1928 Lab. 230.

—S. 23—Offences under Excise Laws—Assistance of Police requisitioned under S. 75, Excise Act—Forbearance to send arrested person for trial.

Offences against the Excise Laws are not excluded from the operation of S. 23, Police Act. Section 23 requires Police Officers to prevent the commission of offences and to detect and bring offenders to justice.

When the assistance of Police Officers has been requisitioned under S. 75, Excise Act, it is the duty of the officers to comply with the provisions of the Act. Hence, in forbearing to send an arrested person for trial, they forbear in concert with the Excise Officers to do an official act within the meaning of S. 161 I.P.C. A.I.R. 1943 Pat. 229=22 Pat. 76.

—S. 23—Powers under.

The preventive action of the Police is not restricted to the prevention of cognizable offences only. The Police derive their power, not only from the Criminal P.C., but also from the Police Act and S. 23 of the latter Act gives them wide powers for prevention of offences and breaches of the law generally. A.I.R. 1940 Oudh 413=1940 O.W.N. 655=1940 A.W.R. 305=41 Cr. L. J. 778=16 Luck. 55=189 Ind. Cas. 655.

—S. 23—Oral order requiring subordinate to make search—Legality of.

Where the City Inspector in requiring his subordinate to make a search has not given him an order in writing specifying the place to be searched and so far as possible, the thing for which search was to be



made, the oral order is not an order lawfully issued. A.I.R. 1935 Nag. 237=31 N.L.R. 66 (Sup.)=160 Ind. Cas. 306.

—S. 23—Competent authority.

The Municipal Committee is a competent authority within the meaning of S. 23. 122 Ind. Cas. 258=25 N.L.R. 194=1930 Cr. C. 89=12 N.L.J. 127=31 Cr. L. J. 382=A.I.R. 1930 Nag. 33.

—S. 23—Non-cognizable cases.

There is nothing either in the Police Act, Ss. 23, 24 and 25 or in the Criminal Procedure Code, which would in any way prevent a police officer from lodging a complaint with regard to a non-cognizable offence. 120 Ind. Cas. 297=10 P.L.T. 601=1929 Cr.C. 274=31 Cr.L. J. 55=A.I.R. 1929 Pat. 514.

—S. 23—Cr. P.C., S. 149—Powers of Police.

Section 149, Cr.P.C., does not restrict the police in their preventive action to cognizable offences only. Their powers are defined by Cr.P.C. and the Police Act, S. 23. 8 L.B.R. 329=10 Bur.L.T. 17=17 Cr.L.J. 347=35 Ind.Cas. 523.

—S. 23—Report about suspects.

Section 23 prescribes the duties of a police officer and one of the duties mentioned is to collect and communicate intelligence affecting the public peace. A report, therefore, made by a Sub-Inspector of Police to a Superior Officer regarding suspicions against persons residing within the jurisdiction, falls within the meaning of S. 23, and a suit brought after a month from the date of notice is time barred. 125 Ind. Cas. 379=A.I.R. 1930 Lah. 592=31 P.L.R. 883.

—S. 25—Orders of Magistrate under—executive orders—Revision.

Where a suit for ejectment was dismissed on the ground that the relationship of land-lord and tenant was not proved but subsequently the land-lord presented an application to the Magistrate that the defendant had disappeared and that his moveables should be taken into possession by the police and the Magistrate ordered as prayed on 26th November 1928.

Where the defendant subsequently applied for rescinding the order and the Magistrate dismissed the same on 19th January 1929:

Held, that the first order passed by the Magistrate on 28th November 1928 was passed by him as an executive officer purporting to act under the Police Act and not as a Court of law or as a Magistrate acting in judicial capacity. The second order of 19th January 1929 was merely consequential on the first order and stood or fell therewith. The question of the power of the Magistrate to pass such an order was one to be dealt with by his superiors on the executive side and the High court had no jurisdiction to reverse the said orders under the provisions of the Criminal P.C. 1930 Cr.C. 687=A.I.R. 1930 Lah. 539=31 P.L.R. 725=129 Ind.Cas. 294.

—S. 29.

Applicability—Police Officer under suspension—If immune from prosecution. See Police Act (As Amended in 1895), S. 8. 1945 P.W.N. 391.

—S. 29—Compliance with orders—Order of transfer Rescinding of.

Where a police officer was served with one order of transfer and then with another order which he could reasonably have construed as cancelling the previous order and he did not comply with the first order:

Held, he could not be convicted of wilful breach or neglect of a lawful order made by a competent authority. A.I.R. 1922 Pat. 207.

—S. 29—Cowardice in duty.

A man doing his best to keep rioters out and who is carried into a building by a rush of the very men whom he is trying to protect, is clearly showing no cowardice up to the time that he enters the building, and if after entering the building the persons inside refuse to let him go out, he is not guilty of cowardice. 112 Ind. Cas. 99=5 O.W.N. 256=29 Cr. L. J. 979=11 A.I.Cr.R. 218=A.I.R. 1928 Oudh 285.

—S. 29—Diaries with mukhtar.

A mukhtar who is allowed to have possession of the diary by the Police Officer is guilty of the abetment of the offence under S. 29, Police Act, as the offence continues so long as the diary is in mukhtar's hand. 10 P.L.T. 703=9 Pat. 31=A.I.R. 1930 Pat. 195.

—S. 29—Escape of prisoner.

While the accused, two constables, were taking an under-trial prisoner by a camel cart at night the prisoner wanted to get down to make water and was permitted to do so. The night was dark. The prisoner got himself free from the rope which was tied to his handcuffs and bolted:

Held, that whatever the rule may be against travelling after dark in this case the constables had orders to travel by camel cart and that they committed no breach of rule thereby. 83 Ind. Cas. 663=26 Cr. L. J. 103=A.I.R. 1925 Oudh 281.

—S. 29—Essentials for conviction—Deliberate violation of duty—Escape of prisoner.

Before the police officer can be convicted of an offence under S. 29, it must be found that he is guilty not of mere neglect but of deliberate and intentional violation of duty. Where therefore there is not even mere neglect on his part, let alone intentional violation of duty, offence under the section is not made out: 17 W.R. (Cr.) 34, Rel. on.

The mere escape of a prisoner from lawful custody does not make the constable, in whose charge he was guilty of an offence under S. 29 of the Police Act 103 Ind. Cas. 200=1 L.C. 47=28 Cr. L. J. 664=A.I.R. 1927 Oudh 257.



—S. 29—Failure to prosecute—D. S. P. ordering prosecution.

When the Superintendent of Police asks a Sub-Inspector, Police, to register a case in the Police Diary and send up for trial the person concerned, the Sub-Inspector has no discretion in the matter and a failure to obey the orders of the Superintendent is an offence under S. 29. 95 Ind. Cas. 765=7 L.R.A.Cr. 135=27 Cr. L. J. 845=A.I.R. 1926 All. 562.

—S. 29—Illness—Treatment by private practitioner.

There is nothing in the law to require a Police Officer to enter a Civil Hospital and not place himself under the treatment of a private practitioner when he is ill and therefore, he should not be convicted under S. 29 if he chooses to be treated by a private practitioner. 97 Ind. Cas. 423=27 Cr.L. J. 1111=A.I.R. 1927 Lah. 15.

—S. 29—Illness—Reasonable cause.

Where a police officer who is really ill and is on leave fails to report himself for duty on the expiration of his leave, his failure to report is not without reasonable cause. 97 Ind. Cas. 423=27 Cr. L. J. 1111=A.I.R. 1927 Lah. 15.

—S. 29—Interpretation—Violation of duty.

Section 29 is to be construed quite widely. The words "rules and regulations" refer to such rules and regulations as are properly framed by competent authorities, that is to say, by the Inspector General. So also the words "lawful order" refer to any order which any officer may lawfully give to any individual or specific body of individuals under his command. Offences under S. 29 are not limited to the wilful breaches or neglect of a rule or regulation or a lawful order but include any "violation of duty". 21 Cr.L.J. 465, Rel. on. 124 Ind. Cas. 396=10 P.L.T. 703=9 Pat. 31=A.I.R. 1930 Pat. 195.

—S. 29—Interpretation—Police Officer.

The expression "police officer" applies to all the members of the police force in whatever capacity they may be employed, including constables. 116 Ind. Cas. 611=30 Cr. L. J. 635=13 A.I.Cr.R. 46=A.I.R. 1929 Lah. 325.

—S. 29—Keeping diaries.

The meaning of R. 278 of Police Manual Part I is that the Court officer is to keep the diaries in his own possession and that if the accused or his agent call for the diary in any circumstances other than those mentioned in the earlier part of para. (b) of the rule the Court officer should refuse to comply with the request. 10 P.L.T. 703=9 Pat. 31=A.I.R. 1930 Pat. 195=124 Ind. Cas. 396.

—S. 29—Negligence—Violation of duty.

Every negligence does not amount to "violation of duty," within S. 29 much less when it is not wilful. 107 Ind. Cas. 771=29 P.L.R. 30=29 Cr.L.J. 285=A.I.R. 1928 Lah. 164.

—S. 29—Object—Intentional acts.

Section 29 really is intended to punish intentional or wilful acts of the police officers as described there-

in and the expression "withdrawal from duty" imports intentional refusal or cessation to perform one's duty.

A police constable who had gone to another station to escort an offender, delayed his departure from that station for two days. No order was given to him for the date of his return. There was some evidence to show that under similar circumstances police officers had been given two days' halt:

Held, that he was not guilty under S. 29: 6 Cal. 625 and 6 All. 495, Rel. on. 116 Ind. Cas. 611=30 Cr. L. J. 635=13 A.I.Cr.R. 46=A.I.R. 1929 Lah. 325.

—S. 29—Order by Police Superintendent regulating duties of subordinates—Legality.

An order by a Superintendent of police regulating the duties of mounted police under command, e.g., directing them to groom their horses is a lawful order under S. 29 and a disobedience of such order renders the guilty person liable to conviction. 21 Cr.L. J. 465=56 Ind. Cas. 497 (Pat.).

—S. 29—Overstaying leave.

Where it could not be said that the accused failed without reasonable cause to report himself to duty on the expiration of his leave.

Held, that he could not be convicted under S. 21 for neglect of duty. 66 Ind. Cas. 67=25 C.W.N. 408.

—S. 29—Rules under.

The words "document or information" used in R. 803 of Police Manual Pt. I are comprehensive enough to include the police diaries, although they have been specifically dealt with under R. 278. 10 P.L.T. 703=9 Pat. 31=A.I.R. 1930 Pat. 195=124 Ind. Cas. 396.

—S. 29—Rules under.

Rule 261-A of the Police Manual Pt. I is merely an enabling rule except that in the case of a Magistrate who institutes a prosecution he must be the Magistrate of the Dist: 1 W.R. 5 Cr. and 9 W.R. 36 Cr., Dist. 124 Ind. Cas. 396=10 P.L.T. 703=9 Pat. 31=A.I.R. 1930 Pat. 195.

—S. 29—Rules under.

The object of Police Manual, Chapter XIII, para 314, is to have a record of the opinion of the Magistrate upon the first information reports and final reports in cognizable cases received from stations and outposts. The rule does not apply to Magistrates trying the case. 67 Ind. Cas. 195=3 Pat. L.T. 239=23 Cr.L.J. 371=A.I.R. 1922 Pat. 97.

—Ss. 29, 18, 19—Special Constable—Order of appointment—Interference by High Court on revision—Object of appointment—Executive order—Refusal to act—Punishment—Prosecution.

A person who has refused to act as a special constable cannot be prosecuted under S. 29. The provisions of that section were not intended to apply to special constables, and cannot be interpreted as so applying by the operation of the provision of S. 18. (1906) 10 C.W.N. 322.



## —S. 30. — SYNOPSIS

1. Conditions in licence.
2. Duty of licensee.
3. Interpretation.
4. Liability of processionists.
5. Point of doubt.
6. Scope and powers of police.

### 1. Conditions in licence.

#### —S. 30 — Conditions in licence — Vague and indefinite terms.

In a licence issued under S. 30 (2), there was a condition that the "speed of the procession shall be under the directions of the Ilaka Magistrate and the local police."

Held, that before such a condition can be made the subject of prosecution it must be entered in the licence in clear and unambiguous terms and a licence cannot be prosecuted for the violation of a condition which is so vague and indefinite that it is difficult to hold that the licensee was bound to obey the orders of the Magistrate and the local police as to the speed of the procession. 114 Ind. Cas. 716=30 P.L.R. 261=30 Cr. L.J. 371=10 Lah. 852= A.I.R. 1929 Lah. 404.

### 2. Duty of licensee.

#### —S. 30—Object of licence under S. 30—Duty of licensee.

Per Bhide, J.—The object of the licence is to secure observance of certain conditions by every member of the procession and not merely by the licensee. The licence is granted to the directors or promoters of the procession as a matter of convenience as it will not be practicable to require every potential member of a procession to take out a licence. The directors or promoters of a procession who take out a licence in such a case, therefore, become responsible for the conduct of the processionists. It will obviously be the duty of the licensee in such a case to explain the conditions of the licence to all who wish to take part in the procession.

Obiter : Per Bhide, J.—Where the conditions of the licence merely make the licensee responsible for certain things and there are no conditions binding on the members of the procession as such, the licensee alone can be held liable for breach of conditions of the licence, for, owing to the very nature of the conditions none except the licensee can violate them. A.I.R. 1941 Lah. 372=43 Cr. L.J. 145= I.L.R. (1941) Lah. 820=197 Ind. Cas. 339 (F.B.)

#### —S. 30—Duty of licensee — Responsibility for conditions—Sureties.

It is the applicant for the licence alone to whom the licence can be given and who is bound by the conditions of the licence under S. 30.

Where the names of certain persons were included in the licence as sureties according to the particular form of licence used on the occasion.

Held, that the provision in the licence as to sureties was unauthorised by law. 114 Ind. Cas. 716=30 P.L.R. 261=30 Cr. L.J. 371=10 Lah. 852=A.I.R. 1929 Lah. 404.

## —S. 30—Duty of licensee — Procession before getting licence.

Once an application is made in time the applicant is free to take out his procession whether the licence had by then been issued or not. If the licence has been issued, he is bound to obey the conditions whether it has been delivered or not: If, on the other hand, it has not been issued he is bound only to see that the general law was not broken. 93 Ind. Cas. 986=4 Pat. 795=7 P.L.T. 622=27 Cr. L.J. 522 = A.I.R. 1926 Pat. 173.

### 3. Interpretation.

#### —S. 30 (4) Interpretation—Regulation of music—Order that no procession with music would be allowed to pass within 40 paces of mosque, if amounts to stopping of music or regulation of music.

An order that no procession with music would be allowed to pass within 40 paces from a certain mosque is clearly a regulation of music that falls within the ambit of S. 30 (4). It does not amount to stopping of music. A.I.R. 1943 Nag. 199= I.L.R. (1943) Nag. 295=1943 N.L.J. 352=44 Cr.L.J. 782=208 Ind. Cas. 417.

#### —Ss. 30 and 32—Interpretation — 'Procession', meaning of—Merely carrying idol and immersing it in river, whether amounts to procession.

A 'procession' is the action of a body of persons going or marching along in orderly succession in a formal or ceremonial way, especially as a religious ceremony or on a festive occasion.

Where an image was merely carried down by some four or five carriers and immersed in a river and there was nothing to be described as a body of persons going or marching along in orderly succession in a formal or ceremonial way.

Held, that there was no procession. A.I.R. 1931 Cal. 128=32 Cr. L.J. 482=130 Ind. Cas. 239.

#### —S. 30—Interpretation—'Issue'.

In the Act the word "issue" has not been defined; but it signifies that, if the D.S.P. or Assistant D.S.P. signs the licence and delivers it to some one with directions that it shall in due course be delivered to the applicant, the licence has been issued within the meaning of S. 30. 93 Ind. Cas. 986=4 Pat. 795=7 P.L.T. 622=27 Cr. L.J. 522=A.I.R. 1926 Pat. 173.

### 4. Liability of processionists.

#### —S. 30 — Liability of processionists — Every procession, if requires licence—Joining procession licence for which is not taken out, if offence.

Per Bhide and Ram Lall, JJ.—A licence under S. 30 is not required for every procession. A licence is required to be taken under S. 30 only when a breach of the peace is apprehended by the authorities concerned. It is, therefore, no offence to join a procession merely because no licence has been taken for it under S. 30.

Even when a general or a special notice is issued under S.30, requiring persons directing or promoting a procession to apply for a licence but no licence is obtained and yet a procession is taken out, it is only those persons who are directors or promoters of the procession who can be convicted under S. 32 for disobedience of the order and not ordinary members



of the procession. A.I.R. 1941 Lah. 372=43 Cr. L.J. 145=I.L.R. (1941) Lah. 820=197 Ind. Cas. 339 (F.B.)

—Ss. 30 and 32—Liability of processionists.

Licence given under S. 30 to take out procession—Procession led by person not licensee—Order of Magistrate to procession to move faster while passing mosque—Order disobeyed by leader and resulting in breakout of riot—Leader charged under S. 32 for disobeying order of competent authority and convicted—Conviction, held proper—License, held governed all processionists. A.I.R. 1938 Lah. 425=40 P.L.R. 148=I.L.R. (1938) Lah. 258=39 Cr. L.J. 590=175 Ind. Cas. 503.

—Ss. 30 (2) and 32—Liability of processionists—Ordinary members of procession—Whether liable to conviction—Offence under S. 32, essentials of.

Conviction under S. 32, Police Act, is proper only if it is established that the accused were directors or promoters of a procession and being under an obligation to apply for a licence, did not apply for the same. In the absence of a finding by the Magistrate that they were convening or collecting the assembly, or directing or promoting the procession, the conviction should be set aside. The mere fact that they were at the head of the procession and wearing garlands is not sufficient for a conviction. If the accused were merely ordinary members of the procession, S. 30 (2) does not apply to them. A.I.R. 1933 Cal. 353=34 Cr.L.J. 688=144 Ind. Cas. 185.

—S. 30—Liability of processionists.

Order under S. 30, Police Act, banning procession without licence—Procession taken out without licence—Offence under S. 143, I.P.C. is committed. A.I.R. 1931 Mad. 484=54 Mad. 1025=1931 M.W.N. 489=32 Cr. L.J. 806=33 L.W. 671=61 M.L.J. 842=131 Ind. Cas. 844.

5. Point of doubt.

—Ss. 30 and 32—Point of doubt—Purushothamdas Park in Allahabad, if a public thoroughfare—Court in doubt on the point.

The Purushothamdas Park in Allahabad is not a public thoroughfare and Police authorities are not justified by law in calling the whole of the park a thoroughfare and in issuing an order under S. 30, Police Act, relating to the whole park on the ground that it was a public thoroughfare. If the Court be in doubt on the point, it is the duty of the Court to give the benefit of the doubt to the accused and not to the prosecution in a charge for an attempt of the accused to hold a meeting there. A.I.R. 1933 All. 614=34 Cr. L.J. 1062=1933 A.L.J. 1197=55 All. 862=145 Ind. Cas. 738.

6. Scope and powers of police.

—S. 30 (4)—Scope and powers of police—Music, if can be regulated on future occasion.

Sub-section (4) of S. 30 clearly gives the District Superintendent of Police a right to regulate the extent to which music may be used in the streets on future occasions, and it is not necessary for him to pass a separate order on every occasion. A.I.R. 1943 Nag. 199=I.L.R. (1943) Nag. 295=1943 N.L.J. 352=44 Cr. L.J. 782=208 Ind. Cas. 417.

—S. 30—Scope and powers of police—Power of absolutely refusing permission to take out a procession—Breaking promise not to take out procession.

It is the right of a citizen to use the public thoroughfares, provided that he commits no offence in doing so, and the taking out of a procession is not in itself an offence, nor does it require a special licence, except as provided by S. 30, Police Act. Section 30 empowers the authorities to control processions, and the manner in which they are to be controlled, if it is necessary to control them, is set forth in sub-section (2). Neither in the marginal note, nor in the body of the section, is any express power given to the authorities absolutely to forbid the taking out of a procession. It is impossible to read into the Act any authority for absolutely refusing permission to take out a procession.

To break a promise to the Superintendent of Police made by a person that he would not take out a procession is not to disobey an order issued under the Act and he cannot be convicted. A.I.R. 1985 All. 657=1935 A.L.J. 386=36 Cr. L.J. 782=57 All. 790=1935 A.W.R. 314=155 Ind. Cas. 605.

—S. 30—Scope and powers of police—General order that no one shall take out procession without licence.

Section 30, Police Act, does not empower the Superintendent of Police to issue a general notice that anyone taking out a procession which might pass by a mosque, must take out a licence under that section. The Superintendent of Police has first of all to be satisfied that it is intended by a person or a class of persons to take out a procession or hold a meeting. He has then to take the option of the District Magistrate or the Sub-Divisional Magistrate and if, in the opinion of that officer, such assembly or procession, if uncontrolled, may cause a breach of the peace, he might then issue a notice, general or special, that these persons shall apply for a licence. A.I.R. 1932 Cal. 286=35 C.W.N. 187=58 Cal. 879=32 Cr. L.J. 1005=133 Ind. Cas. 192.

—S. 30—Scope and powers of police—Regulating music in streets.

The District Superintendent of Police under S. 30 is authorized to regulate the extent to which music may be used in the streets on the occasion of festivals and ceremonies, but a prohibition of every kind of music is not covered by the word "regulate", 39 All. 131, Rel. on. 116 Ind. Cas. 814=51 All. 485=1929 A.L.J. 180=10 L.R.A. Cr. 42=11 A.I.Cr.R. 294=30 Cr. L.J. 696=A.I.R. 1929 All. 201.

—S. 30—Scope and powers of police—Operation of notification.

A notification under S. 30 cannot be held to be operative after the occasion which called for the notification has passed away. 106 Ind. Cas. 718=32 C.W.N. 162=29 Cr. L.J. 126=A.I.R. 1928 Cal. 272.

—S. 30—Scope and powers—Power to control procession, but not to forbid.

Section 30 of the Act gives the police power to control processions. In order that this power may be exercised the Act in certain circumstances authorizes the police to require persons to apply for licences. The object of this is that adequate arrangements for



control may be made in time. But the police have no power to forbid the issue of a procession. The power to control does not include the power to forbid. 93 Ind. Cas. 986=4 Pat. 795=7 P.L.T. 622=27 Cr.L.J. 522=A.I.R. 1926 Pat. 173.

—S. 30—Scope and powers of police—Nature and scope of—Enforceability—Procedure.

Where the Superintendent of Police issued the following notice under S. 30 of the Act.

"I prohibit any procession, formed by any person within the municipal area of this district other than under licence granted by me, for a period of 3 months as I consider such prohibition to be necessary for the preservation of the public peace and safety."

Held per Mullick, J.—

(1) that S. 30 only means that the S. P. has to be satisfied that the procession is, in the judgment of the District Magistrate likely to cause a breach of the peace;

(2) that the notification of prohibition though general is within the powers of the S. P. to issue;

(3) that the order is a 'law';

(4) that though it did not follow the exact language of clause (1) of S. 30 the notification was on the whole a substantial compliance and the public were in no error or doubt as to its purport.

Per Das, J.—(1) A notification under S. 30 of the Act cannot be regarded as the "law" for any purpose as there is no provision in that Act giving such a notification the same effect as if they were contained in an Act.

(2) The notification, even if it is a 'law' is not enforceable as such for the following reasons:—

First, the police have no power under the Act to prohibit a procession where the promoters thereof decline to apply for a licence.

Secondly, there is no power to issue an order to have operation for 3 months. The language of the section is perfectly clear that the police have the power to deal with each case as it arises and that the District Magistrate has to exercise his discretion on each occasion. Cr. Ref. No. 32 of 1917, Foll.

Thirdly, assuming the police have the power to prohibit, they have no power to prohibit a procession anywhere within the municipal area. Such a prohibition will be *ultra vires* as it covers even meetings in private houses for a lawful purpose.

Lastly, the Act requires that the judgment shall be exercised by District Magistrate and the order shows that instead of that, the S. P. has exercised his judgment and has thereby arrogated to himself a power not conferred by the Statute.

(3) The only way by which the order under S. 30 could be executed (assuming they could be executed at all) is only by proceeding against the persons opposing such order, under S. 32 of the Act, and not by an order for disposal as such a power is not given by the section. 68 Ind. Cas. 945=3 P.L.T. 585=1922 P.H.C.C. 274=2 Pat. 134=23 Cr.L.J. 625=1 Pat. L.R. Cr. 199=A.I.R. 1923 Pat. 1 (S.B.).

—Ss. 30, 31 and 32—Scope and powers of police—Order of dismissal—Legality of.

Orders passed under Ss. 30, 31 and 32 do not define rights of persons nor decide who is in the wrong in the case of any dispute in public place.

With respect to orders issued by police, the presumption is that they are issued in pursuance of duty.

Whether orders issued by police, are in the exercise of duty and are reasonably necessary, is a question of fact. 15 N.L.R. 51=20 Cr.L.J. 313=50 Ind. Cas. 489.

—S. 30, Cl. (2)—Scope and powers of police—Licence to control procession—Notice on each occasion.

Under S. 30 of the Police Act there must be a notice special or general on each occasion on which an intended assembly or assemblies is or are required by the Superintendent of Police to be controlled by means of licence to be taken out by the persons celebrating the festivals concerned. 20 Cr. L.J. 213=49 Ind. Cas. 773 (Pat.).

—Ss. 30, 31 and 32—Scope and powers of police—Duty of Police—Whether they can regulate persons or they can regulate assemblies under S. 30.

The police cannot regulate persons or class of persons visiting or resorting to a public place. They have no authority under S. 31 to issue a general order while 'keeping order'.

Such order of the D.S.P. was held to be *ultra vires*: The police can only regulate assemblies and processions and music on festivals under S. 30. 39 All 131=14 A.L.J. 1072=17 Cr. L.J. 448=35 Ind. Cas. 1008.

—S. 30-A—Applicability.

S. 30-A of the Act does not apply unless a licence has been got and there is a violation of the conditions thereof. 68 Ind. Cas. 945=3 P.L.T. 585=1922 P.H.C.C. 274=2 Pat. 134=23 Cr. L.J. 625=1 Pat. L.R. Cr. 199=A.I.R. 1928 Pat. 1 (S.B.).

—S. 30-A—Conditions of licence—Carrying of lathi.

Where a person took out a licence for a procession to proceed through Patna City, one of the conditions of which was that no member of it was to carry a lathi or a sword:

Held, that the object of a licence under the Police Act is to ensure the preservation of public order and clearly the licensee must undertake the duty of maintaining order throughout the course of the procession and, therefore, the licensee was responsible for seeing that no member carrying a lathi joined the procession on the way though at the start it had no such member.

The fact that S. 30-A, Police Act, gives the power to the officers mentioned to stop a licenced procession which violates the conditions of the licence does not excuse a licensee from strictly complying with the conditions of his licence. 106 Ind. Cas. 706=6 Pat. 763=29 Cr. L.J. 114=9 A.I. Cr. R. 401=9 P.L.T. 395=A.I.R. 1928 Pat. 166.

—S. 30-A—Procession ordered to disperse—Disobedience—Offence—Penal Code, S. 143.

Where a procession has been ordered to disperse under powers given by S. 30-A, Police Act, because the conditions of a licence have been violated, any person who omits to obey the order to disperse is liable whether he was aware of the conditions of the licence or not. The liability in such a case would be that a



person who neglects or refuses to disperse would be deemed to be a member of an unlawful assembly and punishable under S. 143, I. P. C. This would be an independent offence committed by a processionist just as the act of picking a pocket in the course of the progress of the procession would be an independent offence. A.I.R. 1941 Lah. 372=I.L.R. (1941) Lah. 820=43 Cr. L.J. 145=197 Ind. Cas. 339 (F. B.)

—S. 30-A—Prosecution for breach.

Section 30-A merely gives an additional power to the officers concerned to stop the procession and then, if it does not disperse, to deal with its members as members of an unlawful assembly. It is not a condition precedent to the prosecution of the licensee for violation of the conditions of the licence that action should first be taken under S. 30-A. 114 Ind. Cas. 716=30 P.L.R. 261=30 Cr. L.J. 371=10 Lah. 852=A.I.R. 1929 Lah. 404.

—S. 31—Scope of—Issue of order prohibiting doing of legal act.

Section 31, Police Act, is intended primarily for the purpose of keeping order on the public roads, preventing confusion, regulating traffic and avoiding obstruction. Orders passed in such cases would be well covered by the provisions of that section. But the section does not authorise a Police Officer to issue an order which a Magistrate might have issued under S. 144, Criminal P.C. to refrain from doing a perfectly legal act. Section 31 is obviously intended to empower Police Officers to regulate traffic on public roads, to prevent the commission of offences on such roads, for example, affrays, and also to do their best to prevent obstruction.

Held, therefore, that the act of the accused was a perfectly legal action taking out the bridegroom and the bride in palanquins along public roads or highways, and their failure to agree to carry out the instructions of the Police Officer to dismount did not amount to an illegal act within the meaning of S. 153, I.P.C. because the Police Officer was not empowered to issue such an order. If there had been any apprehension of an immediate breach of the peace, he might have asked the assembly to disperse under S. 127, or if he had previous intimation of it, he might have obtained an order under S. 144 from the Magistrate. Failing to have adopted either of these courses, he could not arrogate to himself the power to order that the bridegroom and the bride should not go in palanquins. A.I.R. 1936 All. 534=1936 A.W.R. 424=1936 A.L.J. 579=37 Cr. L.J. 866=58 All. 934=163 Ind. Cas. 866.

—Ss. 31 and 30—Procession—Obstruction to traffic whether ground for dispersal.

Under S. 31, Police Act, the Police have power to pass any order reasonably necessary for "keeping order" or "preventing obstruction." But the question whether a particular order could be to be legally justifiable under the section must depend on the facts of each case.

The accused were going in a procession on a public road. Though the procession was not disorderly, the Sub-Inspector of Police passed an order under S. 31, Police Act, asking them to disperse on the ground that there was obstruction to the traffic and the accused were convicted for disobedience of that order.

Held, that if the procession caused obstruction to traffic, the Police would have been justified in ordering the processionists to make room for the

traffic; the order for dispersal was, however, illegal in the circumstances of the case, and the accused were not guilty of any offence. A.I.R. 1931 Lah. 33=32 Cr. L. J. 532=32 P.L.R. 52=130 Ind. Cas. 425.

—S. 31—Order dispersing processions which are not disorderly is in excess of S. 31.

Under S. 31 the police have power to pass any order reasonably necessary for "keeping order" or "preventing obstruction." But the question whether a particular order could be held to be legally justifiable under the section must depend on the facts of each case. Where the processionists were not disorderly and all that was alleged was that there was some obstruction to traffic, which the police could have easily prevented by ordering the processionists to make room for the traffic.

Held, that under the circumstances the Sub-Inspector of Police exceeded his powers in giving an order for the dispersal of the procession, 1931 Cr. C. 97=A.I.R. 1931 Lah. 33=32 P.L.R. 52=130 Ind. Cas. 425=32 Cr. L. J. 532.

—S. 31—Oral order.

An order issued under S. 31 may be an oral order. 91 Ind. Cas. 56=27 Cr. L.J. 24=27 A.I.R. 1926 All. 264.

—S. 32 See also S. 30, POLICE ACT.

—S. 32—Applicability—Processionists—Onus of proof.

Per Full Bench.—It cannot be said that S. 32, Police Act, applies only to the licensee and only the licensee can violate the conditions of a licence. Any member of the procession with knowledge of the terms of the licence may be proved to have violated the terms of the licence and consequently, may come within the purview of S. 32.

Per Ram Lall J.—In such a case it is always for the prosecution to prove that a processionist charged with having violated the conditions of a licence was aware of the existence of conditions which are alleged to have been violated before he can be held liable. The mere fact that a person joined a procession or even continued to remain in the procession will not be sufficient to prove this knowledge or shift from the prosecution the onus of proving this knowledge. A.I.R. 1941 Lah. 372=I.L.R. (1941) Lah. 820=43 Cr. L. J. 145=197 Ind. Cas. 339 (F. B.)

—S. 32—Applicability—Licence for procession granted under S. 30 (2)—Persons in procession other than licensee violating condition of licence, if guilty under S. 32.

Under S. 32, Police Act, the person violating the condition of the licence granted under S. 30 (2), Police Act, for taking out a procession need not be the licensee, where the persons in the procession who are aware of the condition, violate it, not only is the licensee guilty under S. 32 but also the persons violating the condition. A.I.R. 1941 Mad. 99=52 L.W. 623=(1940) 2 M.L.J. 819=1940 M.W.N. 1119=42 Cr. L.J. 272 (2)=192 Ind. Cas. 311.

—S. 32—Essentials.

Knowledge of order is a necessary ingredient of the offences punishable under S. 181, I.P. Code and S. 32, Police Act. A.I.R. 1937 Mad. 535=1937 M.W.N. 172=45 L.W. 400=(1937) 1 M.L.J. 473=38 Cr. L.J. 620=168 Ind. Cas. 848.



—S. 32—Breach of licence—Licensee cannot plead want of knowledge.

A licensee assumes responsibility for the entire conduct of the procession and its component members and he cannot repudiate such responsibility by alleging that the violation of the conditions took place without his consent or even his knowledge or in his absence. If any member of the procession is guilty of the breach of the conditions of the licence, the licensee is liable to be prosecuted for it. 114 Ind. Cas. 716 = 30 P.L.R. 261 = 30 Cr.L.J. 371 = 10 Lah. 852 = A.I.R. 1929 Lah. 404.

—S. 32—Interpretation—Expression, “violating the conditions”, meaning explained.

The expression ‘violating the conditions’ which has been used in S. 32, Police Act, connotes the idea of direct violation on the part of the person whom it is sought to prosecute, for example, by carrying a weapon himself or by expressly permitting weapon to be carried or passive violation by not taking due care to see that the conditions of the licence were fulfilled. A.I.R. 1941 Cal. 113 = 44 C.W.N. 706 = I.L.R. (1940) 2 Cal. 122 = 42 Cr.L.J. 325 = 102 Ind. Cas. 850.

—S. 32—Prohibition of organisation—Joining the procession.

When a notice has been issued under S. 30 (2) prohibiting the organizing or promotion of a procession without license and a procession is taken out without such license the mere fact of joining in the procession which was promoted or organized by other persons would not amount to a disobedience of the order. 101 Ind. Cas. 475 = 8 P.L.T. 245 = 28 Cr.L.J. 443 = 8 A.I.Cr.R. 38 = A.I.R. 1927 Pat. 191.

—S. 34—Essentials for conviction—Accused drunk and not capable of taking care of himself—Conviction.

A finding that the accused committed any offence to the obstruction, inconvenience, annoyance, risk, danger or damages to the passengers on the road is an essential ingredient of an offence under S. 34, Police Act. It is not sufficient to find that he was drunk and incapable of taking care of himself. A.I.R. 1937 Cal. 312 = 38 Cr.L.J. 850 (1) = 170 Ind. Cas. 224 (1).

—S. 34. (7)—Essentials for conviction—Obstruction, proof of—Ingredients of offence.

Unless it is proved that an act complained of was the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers, there cannot be a conviction under S. 34 of the Police Act. 20 Cr.L.J. 452 = 51 Ind. Cas. 340 (Pat.)

—S. 34—Interpretation and scope—‘Cause’—C. P. Municipal Act, S. 110—Offence under—Conviction under Police Act, if legal.

The word ‘causes’ in S. 34 of the Police Act, is not a word of art but has the ordinary meaning ‘allows to exist’. A conviction under S. 34 of the Police Act is not illegal merely because the act complained of also constitutes a breach of S. 110 of the C.P. Municipal Act, and as such is punishable under that Act as well. 20 Cr.L.J. 671 = 52 Ind. Cas. 495 (Nag.)

—S. 34, Cl. (b)—Interpretation and scope—‘Riotous’.

The word ‘riotous’ covers the case of a person who creates a room in a thoroughfare. 7 P.R. 1916

Cr. = 35 P.W.R. 1916 Cr. = 17 Cr.L.J. 273 = 34 Ind. Cas. 993.

—S. 34—Keeping car by road side.

Although easing by a man on a public road may constitute an offence inasmuch as it causes annoyance to the residents or passengers, the mere fact that a cart was kept in the partland by the side of the road with a width of 40 feet, cannot raise any presumption by implication that it caused annoyance to the public. (20 Cr. L.J. 452, Rel. on.) 9 Pat. 97 = A.I.R. 1930 Pat. 246 = 125 Ind. Cas. 130 = 11 P.L.T. 615.

—S. 34—Making water.

The expression ‘easing oneself’ comprises within its ambit ‘making water’ so as to constitute it an offence within Cl. 7, S. 34. 51 C.L.J. 342 = A.I.R. 1930 Cal. 444 = 127 Ind. Cas. 261.

—S. 34 (7)—Making water.

Although making water by the side of road was an offence under S. 34 (7) where the Sessions Judge had acquitted the accused on wrong construction of the section, High Court taking into consideration the evidence of annoyance on record and the hour of occurrence refused to set aside order of acquittal. 51 C.L.J. 342 = A.I.R. 1930 Cal. 444 = 127 Ind. Cas. 261.

—S. 34 Offence under - Requisites to be proved - Sentence of rigorous imprisonment for one month in default of payment of fine—Legality.

To constitute an offence under S. 34 of the Police Act, not only is it necessary that there should have been some sort of an obstruction on the road but it must also be proved that the obstruction in question was such as to cause inconvenience or danger to the public. Further in such a case it is the duty of the Police under S. 31 of the Act in the first instance, to require the offender to remove the obstruction and it is only on his refusal that necessary action should be taken.

A sentence of a month's rigorous imprisonment in default of payment of fine for an offence under S. 34 of the Act is not warranted by the section and is illegal. Act. 22 Luck. 181 = 228 Ind. Cas. 637 = 1946 O.W.N. 357 = 1946 A.W.R. (C.C.) 251 = 1946 O.A. (C.C.) 251 = 48 Cr.L.J. 281 = 1946 A.Cr.C. 156 = A.I.R. 1947 Oudh 132.

—S. 34—Playing cards in street.

Playing cards is not an offence and does not come within any of the eight clauses of S. 34, and the act of a constable in prohibiting the men from playing cards is not in the discharge of his duty. So any assault by the persons so playing on the constable does not come under S. 332, I.P.C., but is an offence under S. 323, I.P.C. 92 Ind. Cas. 889 = 27 P.L.R. 74 = 27 Cr.L.J. 377 = A.I.R. 1926 Lah. 250.

—S. 34—Receiving tips for—Supplying water.

The expression ‘exposes for sale’ implies that every person who takes any quantity of it (water) has to pay for it. A person setting up a chauki (wooden board) with an earthen jar filled with water over it and supplying water to all those who wanted it is not guilty under S. 34 (4) merely because sometimes some of the persons who took water did voluntarily give tips. 92 Ind. Cas. 591 = 24 A.L.J. 292 = 27 Cr.L.J. 303 = 7 L.R.A. Cr. 49 = A.I.R. 1926 All 288.



—S. 34—Scope of—Offence under, if cognizable.

It the power to arrest without a warrant is limited to any particular class of Police Officers, that does not prevent the offence being regarded as a cognizable one.

The phrase "it shall be lawful for any Police Officer to take into custody, without a warrant, any person who, within his view, commits any of such offences" in S. 34, Police Act, is to be construed as a conditional power; rather it limits the power to certain Police Officers, not by any category or class, but by the conditions existing at the time of the commission of the offence, and any Police Officer witnessing the offence has an unfettered power of arrest. Consequently, an offence under S. 34 can be regarded as cognizable offence. A.I.R. 1939 Nag. 95 = I.L.R. (1939) Nag. 488 = 1939 N.L.J. 101 = 40 Cr.L.J. 905 = 184 Ind. Cas. 231.

—S. 34—Validity of conviction—S. 279, I.P.C.

The finding of a Magistrate that the accused was not guilty of an offence under S. 34 of the Police Act necessarily and logically means that the accused could not be convicted of an offence under S. 279 of the Penal Code. 88 Ind. Cas. 1 = 23 A.L.J. 436 = 6 L.R.A. Cr. 143 = 23 Cr.L.J. 1057 = A.I.R. 1925 All. 448.

—S. 34—Penal Code, S. 290—Validity of conviction—Public nuisance—Definition—Temporary obstruction of public thoroughfare.

M placed a board in front of his house over the water channel and a considerable portion of the road way, leaving only a small space by which persons could pass by his house. On this board he sat writing and delivering to a large crowd of persons vouchers for bets which they had made with him about the Government opium sales.

Held, that under the circumstances, although M could not properly be convicted under S. 34 he was liable to conviction under Ss. 268 and 290 of the Penal Code. 1906 A.W.N. 317 = 4 A.L.J. 44.

—S. 42—Applicability.

Section 42 refers to actions for "anything done or intended to be done under the provisions or under the general police powers."

Where a suit has been brought against police officer for damages for something done in the exercise of his powers under Criminal P. C., Police Act, S. 42, does not apply. (30 Ind. Cas. 173, Foll.). A.I.R. 1930 All. 742 = 1930 A.L.J. 1443.

—S. 42—Applicability.

S. 42 of the Act is no bar to the trial of a Police Officer for illegal arrest. 65 Ind. Cas. 433 = 23 Cr. L.J. 81 = A.I.R. 1922 All. 264.

S. 42—Interpretation—'Action', meaning of—Notice.

"Action" means a civil action and no notice is required by S. 42, Police Act, for criminal prosecution. A.I.R. 1934 Nag. 206 = 35 Cr. L.J. 1416 = 30 Nag. L.R. 348 = 151 Ind. Cas. 759.

—S. 42—Limitation—Application of Limitation Act.

On the passing of the Limitation Act (9 of 1871) the part of S. 42, Police Act (5 of 1861), which provides a period of three months for suits contemplated

by it was repealed with the result that such suits became subject to the general law of limitation contained in the Limitation Act and the special provision of limitation contained in S. 42, Police Act (5 of 1861), ceased to be operative. A.I.R. 1930 All. 742 = 1930 A.L.J. 1443.

—S. 42—Scope of—False statement by Deputy Superintendent of Police that he caught under by setting a trap.

Section 42, Police Act only deals with anything intended to be done under the provisions of the Police Act, or under the general Police powers thereby given. Where a Deputy Superintendent of Police is accused of falsely saying that he had set a trap and had caught an offender, this cannot be said to be something done under the provisions of the Police Act, or under the general police powers thereby given. He was then acting under his powers of investigation possessed generally by a superior officer over an inferior officer or it may be under Chap. 16, Criminal P. Code, but he was not acting under the Police Act. A.I.R. 1937 Rang. 312 = 38 Cr.L.J. 945 = 170 Ind. Cas. 516.

—S. 42—Scope and extent.

Section 42, Police Act, applies to actions brought for anything done or intended to be done under the provisions of that Act or under the general police powers given by that Act. It does not refer to actions brought for anything done under the Criminal P. C. A.I.R. 1935 Nag. 237 = 31 Nag. L.R. 66 Sup. = 160 Ind. Cas. 306.

—S. 44—Police officer—Authority to order the production of documents or attendance at Police station. See CR. P. CODE, S. 160, 4 Bom. L.R. 644.

—S. POLICE CODE RULES—Construction of.

A mere rule to the effect that when any surveille is at home, proof of his presence can be secured by taking a thumb impression on the report does not cast any obligation upon the surveille to give the thumb impression and he cannot be forced to do so if he objects. (1902) 30 C. 97 = 6 C.W.N. 342.

POLICE CUSTODY—See EVIDENCE ACT, S. 26.

POLICE DIARY—See (1) CRIMINAL P. CODE, SS. 161 and 162, (2) EVIDENCE ACT, SS. 145, 165-167.

POLICE (INCITEMENT TO DISAFFECTION) ACT 22 OF 1922). S. 3—Applicability—Speech attacking police and calculated to create disaffection among them—Written report not in shorthand but only extracts taken by a constable—Conviction based on—Legality—Speech, if should have been addressed to members of the police force.

Where a person was convicted of an offence under S. 3 of the Police (Incitement to Disaffection) Act for making a speech which was not only an attack on the police, but was also calculated to create disaffection among them against the Government and also to incite them to go on strike, on the contentions that the conviction was bad as it was based on a report of a



constable who had not taken down the entire speech in shorthand but only extracts from the speech as and when he could take it down and that the speech was not addressed to the members of the police force.

**Held,** while the Court would not encourage mutilated reporting of a speech to support a conviction, it will not be in the interests of justice not to support a conviction merely because every word uttered by the speaker has not been taken down verbatim. In the circumstances, as there was not only the report but also the oral evidence of the constable who reported the speech as to the general drift of the speech and since it was not proved there were serious omissions that could have given a different aspect to the speech and as there was no doubt as to the general trend of the speech, the speech fell within S. 3 of the Police (Incitement to Disaffection) Act.

**Held,** further; that it is not necessary that the words spoken should be addressed directly to the members of the police force to attract the application of S. 3 of the Act. The speaker must have intended that his words should reach the members of the police force so that they may act according to his appeal. I.L.R. (1948) Mad. 663=1947 M.W.N. 765=A.I.R. 1948 Mad. 270=49 Cr. L.J. 438=60 M.L.W. 718=(1947) 2 M.L.J. 376.

**POLICE INVESTIGATION—See CRIMINAL P. CODE, SS. 155 AND 162.**

**POLICE OFFICER—See (1) CRIMINAL P. CODE, SS. 161 AND 162, (2) EVIDENCE ACT, SS. 25, 26 AND 27.**

**POLICE REGULATION—See BENGAL POLICE REGULATION.**

**POLICE REPORTS—See Cr. P.C., SS. 110-158.**

**POLICE TENURE—See LAND TENURE.**

**POLICY OF INSURANCE—See INSURANCE.**

**POLITICAL AGENT—See Cr. P.C., S. 188.**

**POLYGAMY—See (1) HINDU LAW—MARRIAGE, (2) MUHAMMADAN LAW—MARRIAGE.**

**PORAMBOKE—See (1) LANDLORD AND TENANT, (2) MADRAS ESTATES LAND ACT.**

**PORTS ACT (10 OF 1889)—Licenses under—Boats for hire—Authority of Collector to revoke—Grounds for revocation—Rules framed by Government.**

The Collector has no authority, under the provisions of the Indian Ports Act, or under the rules framed by Government thereunder, to revoke the licenses granted to boats plying for hire, on the ground that the continuance of them would affect the interests of contractors with Government. (1902) 4 Bom. L.R. 773.

**—PORTS ACT (15 OF 1908), — S. 36—Port officer dismissing clerk—If acts on behalf of Secretary of State.**

The Port Officer appointed under S. 36 (1), Indian Ports Act, is the agent or servant of the Local Government appointed by the Local Government to carry out the duties prescribed in that section. All his actions under S. 36 must be attributed to him as a Government servant and not as a private individual, and his actions as a Government servant must be regarded as being actions performed on behalf of the Secretary of State. Where, therefore, the Port Officer

employs a clerk and subsequently dismisses him, he must be regarded as having acted on behalf of the Secretary of State. A.I.R. 1934 Rang. 381=12 Rang. 556=154 Ind. Cas. 212.

**—S. 54 — Interpretation—Disobedience may be unintentional.**

The word "disobey" in S. 54 does not connote intentional disobedience. 87 Ind. Cas. 914=19 S.L.R. 136=26 Cr. L.J. 1026=A.I.R. 1925 Sind 284.

**PROSESSION—See also. (1) ADVERSE POSSESSION. (2) CIVIL P. C., O. 21, RR. 35 AND 95. (3) CO-SHARER. (4) CRIMINAL P. C., S. 145. (5) EJECTMENT. (6) EVIDENCE ACT, SS. 114 AND 101 TO 104. (7) LANDLORD AND TENANT. (8) LIMITATION ACT, SS. 142 AND 144. (9) OWNERSHIPS. (10) PENAL CODE, S. 378. (11) SPECIFIC RELIEF ACT, SS. 8 AND 9. (12) TORT—TRESPASS.**

### SYNOPSIS.

1. Burden of proof.
2. Constructive possession.
3. Co-sharer.
4. Dispossession.
5. Evidence.
6. Meaning of.
7. Nature of possession.
8. Possessory title and right.
9. Presumption about title and possession.
10. Suit for.
11. Miscellaneous.

#### 1. Burden of proof.

**—Burden of proof—Jungle land—Plaintiff alleging adverse possession—Proof.**

In a suit for title to and possession of a jungle it was found that the title was decided to be in the defendant in a previous suit and possession was also decided to be his in proceedings under Criminal P.C., S. 145 out of which the present suit arose. The plaintiff claimed right by adverse possession.

**Held,** that under the above circumstances it lay upon him to establish affirmatively his adverse possession for 12 years prior to the proceedings under S. 145. The possession which the plaintiff has to prove must be adequate in continuity, in publicity and in extent to show that it was possession adverse to the competitor and there was special difficulty in establishing this in the case of uncultivated jungle land in dispute which produced nothing beyond self-sown trees and a seasonal crop of wild grass. 27 Cal. 943 (P.C.) and A.I.R. 1922 P.C. 181, Rel. on. A.I.R. 1930 P.C. 281=57 I. A. 273=32 Bom. L.R. 1559=11 Lah. 638=31 P.L.R. 828=1930 A.L.J. 1369=127 Ind. Cas. 537=59 M.L.J. 399=34 C.W.N. 1101=52 C.L.J. 283=32 L.W. 385 (P.C.).

**—Burden of proof—Limitation.**

In a suit for possession of immovable property plaintiff claimant must prove that his claim is within limitation. 111 Ind. Cas. 577=48 C.L.J. 511=28, M.L.W. 787=55 M.L.J. 302.



—Burden of proof—Limitation.

In a suit for possession the plaintiff cannot succeed without proving possession and dispossession within 12 years, 15 Cal. 473 (P.C.), Foll. 94 Ind. Cas. 417 (Lah.).

—Burden of proof—*Prima facie*, title proved.

Where a person in possession sues for injunction to prevent defendant from disturbing his possession and proves *prima facie* title, the defendant, in order to resist plaintiff's claim successfully must prove superior title in him. 25 Bom. 287 Foll. 87 Ind. Cas. 696=27 Bom. L.R. 474=A.I.R. 1925 Bom. 377.

—Burden of proof—Jungle and—Possession of owner and that of adverse possessor—Distinction.

Where in a suit for recovery of possession of forest lands the plea of the defendant was title by adverse possession and it was proved that the defendants exercised certain fugitive acts of possession:

Held, that where there is a title in plaintiff the defendant should prove the alleged adverse possession has all the qualities of adequacy, continuity and exclusiveness.

Held, further that where the holder of the title proves that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession against another may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from the adverse possessor. 66 Ind. Cas. 451=48 I.A. 395=24 Bom. L.R. 669=26 C.W.N. 666=30 M.L.T. 42=44 Mad. 883=14 M.L.W. 721=1921 M.W.N. 847=A.I.R. 1922 P.C. 181=41 M.L.J. 650.

—Burden of proof—Dispossession—Land unfit for enjoyment.

Where land is shown to have been unfit for actual enjoyment and it continued to be so till within twelve years before suit, the plaintiff was presumably in possession of it until the contrary is shown. 2 U.P.L.R. (Pat.) 111=(1920) Pat. H.C.C. 245=1 P.L.T. 229=56 Ind. Cas. 344.

—Burden of proof—Defendants in possession for 12 years but land is uncultivated.

If the defendants held the land uncultivated though for 12 years the plaintiff is presumably in possession of them. 30 Ind. Cas. 191 (Mad.).

—Burden of proof—Title, proof of.

In a suit for possession it is for the party who comes into Court to oust the other party to establish the alleged superior title. 240 P.L.R. 1914=26 Ind. Cas. 341.

—Burden of proof.

The person out of possession must prove the nature of the transaction by which the person in possession obtained that possession. This rule does not apply when the original relation of the parties is that of mortgagor and mortgagee. The party who alleges that the said relation has ceased must prove it. 5 Bur. L.T. 161=17 Ind. Cas. 913.

—Burden of proof—Jungle lands.

The person entitled to property is presumed to be in possession of jungle lands all along. 15 C.W.N. 887=(1911) 2 M.W.N. 101=10 M.L.T. 157=13 Bom. L.R. 806=14 C.L.J. 319=8 A.L.J. 1176=11 Ind. Cas. 542 (P.C.).

—Burden of proof—Suit—Plaintiff to prove a better title.

In a suit for possession the plaintiff must prove a better title than the defendant. 8 A.L.J. 849=11 Ind. Cas. 981.

—Burden of proof—Suit—Proof by plaintiff of enjoyment and dispossession.

Where plaintiff proves enjoyment and wrongful dispossession by the defendant he is entitled to a decree unless the defendant establishes his title. 9 M.L.T. 409=9 Ind. Cas. 595.

—Burden of proof.

A plaintiff who seeks possession must show the date of suit he was entitled to possession. 19 M.L.J. 347=5 M.L.T. 213=4 Ind. Cas. 30.

2. Constructive possession.

—Constructive possession—Possession of part whether possession of whole.

Possession of part is constructive possession of the whole which is an incident of ownership resulting from title. This doctrine does not apply where the occupant depends on ground of possession only without proving title. (1920) Pat. H.C.C. 146=5 Pat. L.J. 273=56 Ind. Cas. 184=1 Pat. L.T. 760.

—Constructive possession—Symbolical possession.

Symbolical possession in execution proceedings to which judgment-debtor is a party amounts to actual possession as against them. 55 Ind. Cas. 646 (Lah.).

—Constructive—Unoccupied land.

Where a land is unoccupied, the possession must be deemed to be with the person having lawful title thereto. 21 C.W.N. 304=25 C.L.J. 133=38 Ind. Cas. 547.

—Constructive possession—Symbolical possession—Evidence of—Legal fiction—Value of.

A formal delivery of symbolical possession is conclusive evidence that possession was delivered but not that it continued. It is but a legal fiction in most cases any yet is valuable in that it affords a starting point for limitation. 18 C.W.N. 940=23 Ind. Cas. 298.

—Constructive possession.

The doctrine of constructive possession cannot be applied in favour of a wrong doer. 13 C.L.J. 625=6 Ind. Cas. 392.

—Constructive possession—Possession of part—Claim on title.

Possession of part is possession of the whole, if the whole is vacant and if the claim proceeds from title. Occupation of a part by a wrong doer does not mean constructive possession of the whole. 12 O.C. 58=2 Ind. Cas. 63.



## 3. Co-sharer.

## —Co-sharers—Forcible dispossession.

Where forcible possession is taken civil Courts should restore possession without exercising their discretion in the matter of equitable relief to the persons who have taken forcible possession. Thus where a plaintiff co-owner acquires a tenant right for his exclusive benefit the defendant co-owner has a right to claim joint occupancy or occupancy in common in the acquired land but where the latter who is also a lambardar, forcibly disposes the former the Court should pass a decree restoring possession 122 Ind. Cas. 439 = 25 N.L.R. 186 = A.I.R. 1930 Nag. 56.

## —Co-sharers—Building on common land.

Where one of the co-owners builds on the common land without the consent of the rest, the building should not be demolished unless the remaining co-owners can prove that the action has caused them such a material injury as cannot be remedied by partition of the common land. 60 Ind. Cas. 531 = 3 U.P.L.R. (Lah.) 22.

## —Co-sharer—Ouster.

Cases between co-owners should be decided according to justice, equity and good conscience. Ordinarily one co-sharer is entitled to keep possession of a portion of the joint property and to enjoy it in exclusive possession so long as he does not deny the title of his co-owner or oust him in the eye of law. The remedy of the co-owners in these circumstances is to apply for partition or compensation. 3 Pat.L.J. 426 = 46 Ind. Cas. 162.

## —Co-shares—Exclusion.

Possession of co-owners is *prima facie* joint. One co-sharer seeking to defeat another's claim must prove special circumstances justifying exclusive occupation of the joint property. A co-sharer ousted by another from joint property can recover joint possession. 24 C.L.J. 165 = 20 C.W.N. 1258 = 35 Ind. Cas. 36.

## —Co-sharers—Joint possession—Purchaser from tenant-in-common.

Where at a Court-sale the purchaser buys the rights of some tenants-in-common who were never in possession of piece of land sold, a decree for joint possession ought not to be passed in favour of the purchaser. 18 C. 10, Rel. on. 25 M.L.J. 352 = 14 M.L.T. 346 = 21 Ind. Cas. 314.

## —Co-sharers—Existence of tenants settled by co-sharer—If sufficient answer to claim for khas—Occupancy rights.

The mere fact of the existence of tenants settled by another co-sharer is not sufficient answer to a claim for joint khas possession unless rights have been acquired which would form a complete defence, e.g., occupancy right. 13 Ind. Cas. 694 (Cal.).

## 4. Dispossession.

## —Dispossession—Underground rights.

The mere omission of the mineral owner to do anything with the subject-matter of his grant will not be a decision or dispossession of him in favour of the

surface owner. 91 Ind. Cas. 169 = 5 Pat. 80 = 7 P.L.T. 188 = 1925 P.H.C.C. 254 = A.I.R. 1926 Pat. 130.

## —Dispossession—Mutation order.

Where the adoptive father made a declaration in a deed that he was holding certain properties as trustee for the adopted son, and subsequently the Revenue Court on the application of the adopted son ordered mutation in his name **held**, that these constituted clear dispossession of the adoptive father. 69 Ind. Cas. 971 = 20 A.L.J. 945 = 45 All. 169 = A.I.R. 1923 All. 58.

## 5. Evidence.

## —Evidence—Proclamation by Crown.

Where the question was whether the appellant's statement of claim contained an allegation, either express or by necessary intendment, that the land in question ever came into the possession of the Crown or of some agent for the Crown, and it appeared that the only relevant allegation in the statement was one which referred to the provisions of a proclamation by the Crown by which it vested the land in its alleged agent and gave a direction that he should sell the same, **held**, that there was no allegation of possession by the Crown or by its agents. The provisions of the proclamation do not involve and vesting in the agent of possession or of any taking by him of possession. The whole of the duties of the agent under the proclamation could be performed without possession. 31 L.W. 566 = 58 M.L.J. 375 = 131 Ind. Cas. 141 = A.I.R. 1931 P.C. 51 (P.C.).

## —Evidence.

Where parti land has been leased for a special purpose, e.g., bandh, i.e., throwing up earth from the tank, the fact, that the lessee merely used it for scraping grass does not indicate any possession of it by him. 127 Ind. Cas. 524 = A.I.R. 1930 All. 321.

## —Evidence—Order under S. 145, Cr. P. Code.

An order under S. 145 of the Magistrate is admissible as evidence of the fact as to who was declared entitled to retain possession and these orders are admissible against all persons when the fact of possession on the date of the order has to be ascertained. But as between parties to the proceedings such an order is also admissible as evidence as regards possession before two months of the date of the order. 29 Cal. 187 (P.C.) Rel. on. 34 C.W.N. 358 = A.I.R. 1930 Cal. 450 = 57 Cal. 987 = 128 Ind. Cas. 251.

## —Evidence—Entries in survey proceedings.

Where plaintiffs were entered as in possession in the cadastral survey of 1897, and in the revisional survey of 1918 the defendants were entered as in possession, the plaintiffs cannot be presumed to be in possession upto immediately prior to the date of the revisional survey, and the two entries are quite consistent with the fact that the defendants came into possession long before. 12 P.L.T. 543 = A.I.R. 1930 Pat. 410.

## —Evidence—Patta.

Though pattas issued by revenue authorities may not be evidence of title, they are certainly evidence as to possession. 108 Ind. Cas. 760 = 51 Mad. 1 =



27 M.L.W. 611=A.I.R. 1928 Mad. 299=54 M.L.J. 174 (F.B.).

#### —Evidence—Poramboke.

The mere fact that the fishery in a common poramboke village tank was leased out by the temple trustees would not go to establish the ownership of the temple in the tank, and where one of the villagers in the exercise of his right to the common tank fishes in the tank, it is a *bona fide* assertion of a civil right, and not a theft. 92 Ind. Cas. 855=22 M.L.W. 673=27 Cr.L.J. 343=A.I.R. 1926 Mad. 210.

#### —Evidence—Title to zamindari—Payment of revenue and receipt of rent.

The proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zamindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir: 1 I.A. 268.

But the mere fact that the plaintiff is in possession and pays Government revenue for the estate will not prove that he is the nearest heir of the last holder and if the property is not an accretion to the Raj, he cannot succeed only upon his possessory title. 93 Ind. Cas. 454=5 P.L.T. (Sup.) 1=A.I.R. 1925 Pat. 68 (F.B.).

#### —Evidence—Recitals in deed.

A formal recital as to the delivery of possession, like a formal recital as to the price, which is to be found in nearly every sale deed, would be a very weak piece of evidence even between the parties to the deed. The vendor cannot be deemed to have delivered possession by the mere act of executing the deed. 69 Ind. Cas. 409=A.I.R. 1923 Lah. 31.

#### —Evidence—Realisation of rent.

Payment of revenue may or may not be an act of ownership according to circumstances, but the realisation of rent from tenants is, and is evidence of possession. 69 Ind. Cas. 883=A.I.R. 1923 Nag. 95.

#### —Evidence—Nature of.

Word "possession" is a legal term and no importance can be attached to the evidence of witnesses, who come and swear that the land was in possession of somebody or other. The evidence that would satisfy Court would be evidence of acts giving rise to the inference that a party has been in possession. 2 P.L.T. 59=A.I.R. 1921 Pat. 234=57 Ind. Cas. 744.

#### —Evidence—Possession.

In a suit for possession of land by the Secretary of State, it is not necessary to give any further evidence of possession than that of the plot of the land in dispute is a part of *nazul* lands belonging to Government. 12 A.L.J. 894=26 Ind. Cas. 86.

#### —Evidence—Fire arms.

The knowledge of the existence of fire arms found in a hut on search should not without further evidence, be imported to any other person than the occupier of the hut nor would that presumption operate even against him if it could be proved that it was possible the arms might be there without his knowing it.

41 Cal. 350=18 C.W.N. 498=15 Cr.L.J. 385=23 Ind. Cas. 985.

#### —Evidence—Length of possession.

An order as to mutation of names is not sufficient evidence of the actual period of possession. 9 Ind. Cas. 456 (All.).

#### —Evidence of—Proof.

So long as possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession referred to that right rather than to a right contradicting ownership. 33 All. 463=8 A.L.J. 324=9 Ind. Cas. 572.

#### —Evidence of—Presumption.

If the evidence of possession is found to be of equal weight on both sides the presumption is that possession goes with the title. 13 C.L.J. 625=6 Ind. Cas. 392.

### 6. Meaning of.

—Meaning of. See SPECIFIC RELIEF ACT, S. 42.

#### —Meaning of.

Possession is a legal expression and can be proved in many ways. A man can be in possession by cultivating himself through his tenants. 14 A.L.J. 1066=36 Ind. Cas. 427.

#### —Meaning of—Ownership differs from possession.

Ownership and possession are two distinct conceptions and it is not necessary that in every transfer of ownership by act of parties there should be a transfer of possession. 33 All. 683=8 A.L.J. 746=11 Ind. Cas. 762.

#### —Meaning of—Physical contact.

Not merely physical contact, but mere possibility of the person dealing with a thing exclusively constitutes possession. 43 Bom. 550=21 Bom.L.R. 251=20 Cr.L.J. 391=50 Ind. Cas. 999.

#### —Meaning of—Three main divisions.

Possession may roughly be divided into three main divisions: detention, imperfect or qualified possession, and perfect or unqualified possession. Qualified possession is that kind of possession to which the law has always attached the right to possessory remedies. 11 Bom.L.R. 926=4 Ind. Cas. 652.

#### —Meaning of.

Possession means the physical possibility of a person dealing with a property as he likes and not physical possession. 231 P.L.R. 1914=133 P.W.R. 1914=14 P.R. 1915=25 Ind. Cas. 35.

#### —Meaning of—Lawful possession—What is.

Lawful possession means possession which has been got neither by force nor fraud. 1 O.L.J. 225=17 O.C. 157=24 Ind. Cas. 45.

#### —Meaning of—Juridical possession.

Possession could not be said to be juridical where it is taken behind the back of the defendant who did not acquiesce therein but sought to evict the plaintiff as soon as he discovered his dispossession. 9 S.L.R. 220=34 Ind. Cas. 494.



## 7. Nature of possession.

### —Nature of possession—Animus.

When a person has possession of another man's property, the legal character in which he holds it is to be determined by his animus.

N was in possession of property belonging to K. K made a contract of sale of the property to M. Subsequently K sold the property to N.

**Held**, that N had taken possession of the property in his own right under sale deed and that he could not be regarded as having taken possession under any express trust for the benefit of M merely because N had notice of his prior contract of purchase. 116 Ind. Cas. 70=A.I.R. 1929 Nag. 298.

### —Nature of possession—Zamindari—Parti land—Mere possession of.

The parti land of a village is presumed to be in the possession of the zamindar and Court of Wards representing the zamindar must be held to be in possession of the land. Mere physical possession without any title gives no right and, where the defendants are unable to set up any title though they may have been in physical possession of the land, they cannot set up any right. 6 O.W.N. 859=10 L.R.A. (Rev.) 388=A.I.R. 1929 Oudh 447.

### —Nature of possession—Symbolical possession.

All possession of immoveable property, and indeed of all but the smallest pieces of moveable property, is symbolical. The difference between actual and symbolical possession according to the ordinary use of the terms in reference to immovable property, is a difference in the duration of the possession only; possession for short but undefined period, is called symbolical and for any longer period it is called actual. 93 Ind. Cas. 125=A.I.R. 1926 Nag. 328.

## 8. Possessory title and right.

### —Person in possession of immovable property—Rights of.

When a person is in actual physical possession of immovable property, nobody can oust him from his possession except the owner. 5 J. & K. L.R. 194.

### —Possessory title—Nature of.

A person who is in lawful and undisturbed possession of any property though without title, has the right to continue in possession until he is evicted by the person who is the real owner of the property. His peaceful possession is by itself a title which is good against the whole world except the rightful owner. I.L.R. 20 Cal. 834, Rel. on. 1950 A.L.J. 615.

### —Possessory title—Possession of co-sharer.

Mere previous possession will not entitle a plaintiff to a decree for possession except in a suit under S. 9 of the Specific Relief Act. If the previous possession of the plaintiff was merely that of co-sharer, it cannot be said that he was in possession of a share greater than that to which he was entitled and he cannot recover possession of the whole of the property. 82 C.L.J. 320=A.I.R. 1947 Cal. 434.

### —Possessory title—Relief on basis of.

Where a person who had been in peaceful possession of a certain land for a number of years under an un-

registered *patta* from his landlord had been dispossessed by a trespasser, his prior possession is *prima facie* evidence of title sufficient to enable him to recover possession, from the latter who cannot establish a better title to the property. A.I.R. 1947 Pat. 444=29 P.L.T. 17.

### —Possessory title and rights—Right to set up as defence.

Possession is a good title against all except the rightful owner. Where a person purchased certain property in execution of a simple money decree against a Hindu father and it was not provided that the debt for which the property was sold was tainted with illegality or immorality.

**Held**, that he could defend his possession by contesting a suit on a mortgage executed by the father on the ground that it was executed for an immoral or illegal purpose. 128 Ind. Cas. 829=1930 A.L.J. 1528=A.I.R. 1930 All. 852.

### —Possessory title and right—True owner.

A person in actual possession had a possessory title against the whole world and can be dispossessed only by true owner. (137 P.L.R. 1902, Foll.). 117 Ind. Cas. 904=A.I.R. 1930 Lah. 220.

### —Possessory title and right—True owner.

A plaintiff can be given a decree for possession on the basis of his possessory title even in cases other than those under S. 9, Specific Relief Act, but such a decree can be granted only against a person which not the rightful owner. 7 O.W.N. 547=A.I.R. 1930 Oudh 374=126 Ind. Cas. 675.

### —Possessory title and right—True owner.

A decree cannot be given on the ground of possessory title against a true owner unless such a title has ripened into complete ownership by adverse possession extending for more than 12 years. 119 Ind. Cas. 872=A.I.R. 1930 Oudh 184.

### —Possessory title and right—Trespasser.

Where the plaintiffs had a lawful possession of the land and it appeared that the contesting defendants were interfering as mere trespassers.

**Held**, that the plaintiffs could rely on their possessory title and obtain an injunction under S. 54 of the Specific Relief Act. 115 Ind. Cas. 480=10 Lah. L.J. 480.

### —Possessory title and right—Stranger.

Persons in possession whether they have a title to the land or not, are entitled to retain possession as against the persons who are out of possession and cannot prove any title. 111 Ind. Cas. 718=10 L.R.A. Rev. 75.

### —Possessory title and right—True owner.

A possessory title is good against the entire world except against the true owner. 100 Ind. Cas. 315=A.I.R. 1927 All. 760.

### —Possessory title and right—Proof of title.

Possession lawfully attained in the sense that it was not procured by force or fraud but peaceably, no one interested opposing, is entitled to be maintained against



all comers except such as could plead preferential title. fail to prove that he had a title to the land. 78 Ind. 12 All. 51 (P.C.), Foll. 100 Ind. Cas. 278=45 C.L.J. Cas. 228=A.I.R. 1924 Pat. 709.  
126=A.I.R. 1927 Cal. 931.

**—Possessory title and right—True owner—Applicability of English Law.**

The principle of the English Law to the effect that possession is a good title against all but the true owner and entitles the possessor to maintain an action for ejectment against any other person than such owner who dispossesses him has been adopted in India. 97 Ind. Cas. 369=A.I.R. 1927 Lah. 11.

**—Possessory title and right—Trespasser.**

A person is entitled to bring the suit for possession merely on a possessory title and the defendants who are only trespassers cannot plead the title of the true owner. 100 Ind. Cas. 62=A.I.R. 1927 Mad. 572.

**—Possessory title and right.**

A person is entitled to enjoy his own land in the way he chooses to do, unless he interferes with his neighbours or causes them injury or inconvenience. 100 Ind. Cas. 21=A.I.R. 1927 Nag. 378.

**—Possessory title and right.**

No question of possessory right can attach to property frequented by-passers by as if it were a public road. 85 Ind. Cas. 608=6 L.R.A. (Civ.) 122=A.I.R. 1925 All. 348.

**—Possessory title and right—Extension of beyond actual user.**

If user of a wall to support a roof has given the plaintiff any possessory right, that possessory right must exist on those portions of the wall alone which support this buildings or beams. His possessory right cannot be extended by any fiction of law, or as a matter of inference, over any other portion of the wall, a portion only of which is in plaintiff's use. 85 Ind. Cas. 608=6 L.R.A. (Civ.) 122=A.I.R. 1925 All. 348.

**—Possessory title and right—Trespasser.**

Where a plaintiff has been forcibly dispossessed of immovable property by a person having no title, he can sue for possession simply on the strength of the possession which he had before he was dispossessed, provided he sues within the twelve years' period allowed by Art. 142 of the Limitation Act. (78 P.R. 1902; 13 A. 53, Foll.) 75 Ind. Cas. 837=A.I.R. 1925 Lah. 47.

**—Possessory title and right—Trespasser.**

A person in peaceful possession has a right to remain in possession against the whole world except the true owner and a suit for an injunction by such a person against any person except the true owner, who threatened to dispossess him is maintainable. 26 Mad. 514; 20 Cal. 834, (P.C.), Foll. 80 Ind. Cas. 82=20 M.L.W. 14=A.I.R. 1924 Mad. 722.

**—Possessory title and right—Trespasser.**

If a person is in possession of land even without title thereto he cannot be successfully turned out by another person who has so had no title and if such a thing should happen the person first in possession is entitled to be put again in possession even if he should

**—Possessory title and right—Trespasser.**

Plaintiff is entitled to recover possession on the strength of his possessory title if defendant has no title. (26 Mad. 514; 37 Mad. 298 and *Asher v. Whitlock*, (1866) 1 Q.B.D. 1, Foll.) 62 Ind. Cas. 396=1921 M.W.N. 243=41 M.L.J. 78=A.I.R. 1921 Mad. 642.

**—Possessory title and right—Good against all but true owner.**

A person in actual possession has a possessory title against the whole world and can only be dispossessed by the true owner and those claiming under him. (1920) M.W.N. 698=39 M.L.J. 626=28 M.L.T. 342=12 L.W. 598=60 Ind. Cas. 109.

**—Possessory title and right—Trespasser.**

Plaintiff's previous possession even for a shorter period than the statutory period entitles him to a decree against the trespasser. 57 Ind. Cas. 320 (Pat.).

**—Possessory title and right—Good against all but true owner.**

A person in possession of property without title has a good title against the whole world except the true owner. The possessory title is heritable. 54 Ind. Cas. 398 (All.).

**—Possessory title and right—Good against all but true owner.**

A person in possession without a title has the right to maintain his possession against all the world except the rightful owner. The minor possession is itself a root of the title and the prior possessor has all the rights of a true owner except of course against the owner himself. 32 M.L.J. 85=21 M.L.T. 162=5 M.L.W. 690=40 Ind. Cas. 50.

**—Possessory title and right—Trespasser.**

As against a trespasser, possession is title even though it be for less than 12 years if peaceful. 2 Pat.L.J. 280=1 Pat.L.W. 327=(1917) Pat.H.C.C. 164=39 Ind. Cas. 458.

**—Possessory title and right—Trespasser—Ejectment.**

A person in possession though not owner can eject a mere trespasser and the plea of *jus tertii* does not stand unless the trespasser claims through such third person. 39 Ind. Cas. 26 (Pat.).

**—Possessory title and right—Good against all except true owner.**

The person in possession has stronger claim when both the litigants are parties to an invalid transaction. 32 Ind. Cas. 593 (All.).

**—Possessory title and right—Good against all but true owner.**

A person in possession of land is entitled to retain possession of it until some one who can show that he has got a good title sues him and gets a decree. 8 Bur.L.T. 127=8 L.B.R. 165=29 Ind. Cas. 894.



**—Possessory title and right—Trespasser—Entry by.**

A mere trespasser cannot obtain possession in law by an act of entry or by the continuance of that act so long as the act is disputed and resisted. 39 Mad. 57=1 L.W. 911=15 Cr.L.J. 723=26 Ind. Cas. 171.

**—Possessory title and right—Trespasser—Person in possession dispossessed by stranger without title.**

A person in possession though under a defective title cannot be dispossessed by a stranger without title. 36 All. 51=11 A.L.J. 1012=22 Ind. Cas. 622.

**—Possessory title and right—Good against all but true owner.**

Whether possession originated lawfully or not, the person in possession is entitled to the property and the trees thereon as against all the world except the true owner. 2 Lah.L.J. 271.

**—Possessory title and right—Trespasser.**

The true owner of property can retain possession though obtained from a trespasser by force or other unlawful means without bringing himself within the law of estoppel. 36 Bom. 185=13 Bom.L.R. 1200=12 Ind. Cas. 913.

**9. Presumption about title and possession.**

**—Presumption about title and possession.**

There is no warranty of title in a sale in execution of a decree. A person who sets up a title to property by purchase must prove that his vendor had title in the property sold. Where there was no proof of title in the plaintiffs and the defendants were shown to have been in actual possession.

**Held**, that the plaintiff's suit to recover possession must fail and that the presumption under S. 110 of the Evidence Act will apply in the defendant's favour. 116 Ind. Cas. 546=10 Lah.L.J. 488.

**—Presumption about title and possession.**

Ordinarily a person in possession of property must be deemed to be so in his own right unless this presumption can be displaced by proving facts which are sufficient to rebut it. 113 Ind. Cas. 145=A.I.R. 1928 Lah. 959.

**—Presumption of title and possession.**

When plaintiff's title to a vacant plot was not only disputed by Government but was actually taken over formally as nazul to the plaintiff's knowledge.

**Held**, that the principle that where a certain land is vacant legal possession is deemed to be with the owner, would not apply. 108 Ind. Cas. 445=A.I.R. 1928 Nag. 238.

**—Presumption of title and possession.**

Possession goes with title, but this presumption cannot be of any avail in the presence of clear evidence to the contrary. 104 Ind. Cas. 514=8 P.L.T. 817=A.I.R. 1928 Pat. 36.

**—Presumption about title and possession—Jewels.**

The mere fact that a woman wore the jewellery at her wedding would not go far towards proving that

the jewels were hers as Burmans habitually borrow jewellery for great occasions. But her continued possession of the jewellery and her taking it away with her when she went to live at various places with her husband would raise a strong presumption that the jewels were hers. 102 Ind. Cas. 670=39 M.L.T. 544=27 M.L.W. 175=A.I.R. 1927 P.C. 105=53 M.L.J. 629.

**—Presumption about title and possession—Where title is proved.**

Where title is found with the plaintiff in a suit for possession and the evidence of possession is equally balanced, possession must be presumed to follow the title. 100 Ind. Cas. 197=A.I.R. 1927 Cal. 344.

**—Presumption about title and possession.**

Where land is covered with water, possession is determined by title. 94 Ind. Cas. 5=43 C.L.J. 180=A.I.R. 1927 Cal. 97.

**—Presumption about title and possession—Long and continued possession.**

Although origin of possession is not known, wrong and continued possession will raise a presumption of ownership. 10 N.L.R. 188, Rel. on. 99 Ind. Cas. 769=A.I.R. 1927 Nag. 158.

**—Presumption about title and possession—Taking possession—Hindu widow.**

There is a presumption in law that a person takes possession under title rather than as a trespasser, and so possession of a widow of her deceased husband's estate is possession as a Hindu widow. 92 Ind. Cas. 637=1 Luck. 98=3 O.W.N. 267=13 O.L.J. 216=A.I.R. 1926 Oudh. 277.

**—Presumption about title and possession—Vacant site between houses.**

Until the contrary is proved, it may generally be presumed, that the open space in a pole belongs to the owners of the surrounding houses, and it would be for the owners of the other houses and not the municipality nor the Government to protest against any obstructions caused by the owner of one house against their common rights. 76 Ind. Cas. 591=A.I.R. 1935 Bom. 27.

**—Presumption about title and possession—Animus possidendi.**

Where title is not proved the law will raise from definite physical control of part of land, a presumption of possession of that which the possessor has shown a clear and unambiguous intention to possess. 80 Ind. Cas. 544=3 Pat. 915=6 P.L.T. 191=A.I.R. 1925 Pat. 210.

**—Presumption about title and possession—Vacant site.**

In the case of vacant site of which no effective physical possession is feasible the presumption is that possession will follow title. 79 Ind. Cas. 1011=19 M.L.W. 621=34 M.L.T. 287=1924 M.W.N. 628=A.I.R. 1924 Mad. 676=46 M.L.J. 560.

**—Presumption about title and possession—Trees.**

Presumption of ownership arising from possession is stronger in the case of trees than that arising from



the ownership of land. 79 Ind. Cas. 545=5 L.R. Oudh 109=A.I.R. 1924 Oudh 304.

**—Presumption about title and possession—Evidence strong on both sides.**

Where there is strong evidence of possession on the part of the respondents, opposed by evidence, apparently strong also on the part of the appellant in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with the title. 70 Ind. Cas. 555=36 C.L.J. 396=27 C.W.N. 305=A.I.R. 1923 Cal. 228.

**—Presumption about title and possession—Vacant land.**

According to the general presumption the land being waste land the owner would be presumed to be in possession as possession follows title. 69 Ind. Cas. 4=4 L.L.J. 467=58 P.L.R. 1922=A.I.R. 1923 Lah. 25.

**—Presumption about title and possession—Evidence equally balanced—Waste lands evidence of title is sufficient to prove possession.**

The presumption of possession from title can be raised only where the evidence is equally strong on both sides and cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. Where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption because the case set up by him negatives the existence of circumstances which would give rise to the presumption and is inconsistent with it. 67 Ind. Cas. 673=26 C.W.N. 724=A.I.R. 1922 Cal. 557.

**—Presumption about title and possession.**

If a land is such over which nobody can exercise possession, possession would ordinarily follow title. 70 Ind. Cas. 853=A.I.R. 1922 Pat. 503.

**—Presumption about title and possession—True owner.**

Whether possession originated lawfully or not the person in possession is entitled to the property and the trees thereon as against all the world except the true owner. 67 Ind. Cas. 948=2 L.L.J. 271.

**—Presumption about title and possession.**

Land covered by the underground foundations belongs presumably to the person who builds the footings. 38 Cal. 687 foll., 62 Ind. Cas. 199=33 C.L.J. 26=A.I.R. 1921 Cal. 378.

**—Presumption about title and possession—Sale by a Revenue Court.**

Purchaser at a revenue sale should ordinarily be presumed to be in possession of all the zerati lands of the expropriators. 1 Pat.L.T. 659=61 Ind. Cas. 712.

**10. Suit for.**

**—Suit for—Title—Failure to prove—Applicability of S. 9, Specific Relief Act.**

If a plaintiff in a suit for possession claims a decree on the basis of title and further claims a decree for damages, the suit does not come within the purview of S. 9, Specific Relief Act, and if the plaintiff fails to prove his title, either possessory or as a rightful owner he cannot be granted a decree for possession even though the suit may have been brought within six months of the date of dispossession. 103 Ind. Cas. 428=25 A.L.J. 857=A.I.R. 1927 All. 669.

**—Suit for.**

A plaintiff in a suit for possession against defendant is bound to succeed if he is able to show a 'better title in himself than the defendants. 68 Ind. Cas. 601=1922 P.H.C.C. 313=2 Pat 75=4 P.L.T. 267=A.I.R. 1923 Pat. 72.

**—Suit for land—Omission to cultivate—No abandonment of possession.**

Plaintiff respondent worked the land in suit for 2 years, and admittedly paid him revenue for these two years. The land was not cultivated or worked in the third year. The Revenue Surveyor then of his own motion and without reference to plaintiff struck out plaintiff's name and omitted to assess the land to revenue. When plaintiff discovered this, he sent a man to the Revenue Surveyor who demanded plaintiff's personal presence. In the fourth year the defendant-appellant asked the permission of the Revenue Surveyor to enter on the land and did so and was assessed to revenue. In a suit by plaintiff to recover possession from the defendant.

**Held**, that plaintiff had not abandoned the land and had no intention of abandoning the land and his claim should be decreed. 79 Ind. Cas. 817=2 Bur.L.J. 15=A.I.R. 1923 Rang. 138.

**—Suit for—Suit under S. 9, Specific Relief Act and on possessory title—Distinction.**

A suit lies for possession on the basis of possessory title and is not barred by S. 9 by its being brought more than 6 months after dispossession. There is a difference between a suit based on possessory title and a suit under S. 9 of the Specific Relief Act. In the former the Court awards the claim only when it finds that the plaintiff had peaceful possession before dispossession, the plaintiff's previous possession being in law sufficient proof of his title. In the latter, the Court can only go into the question of dispossession within six months before the suit and cannot inquire into the defendant's title. 70 Ind. Cas. 99=1 Bur.L.J. 165=11 L.B.R. 415=A.I.R. 1923 Rang. 54.

**—Suit for—Title in plaintiff—Dispossession under S. 145 Cr. P. Code.**

The plaintiff's title was established in previous litigation in the presence of the Secy. of State and also of the present contesting defendants with whom the land had been settled by the Revenue authorities. The plaintiff was placed in possession in execution of the decree. Thereafter the plaintiff was dispossessed by an order under S. 145 Cr. P. Code. **Held**, it is unquestionably open to the plaintiff to maintain a suit and to seek recovery of possession. 65 Ind. Cas. 833=49 Cal. 57=32 C.L.J. 497=A.I.R. 1922 Cal. 345.



**—Suit for—Defendant's title failing.**

After plaintiff's adoption, his natural father sold plaintiff's property as plaintiff's guardian during plaintiff's minority. After majority plaintiff sued the vendee as trespasser for possession. Vendee relied on the sale but it was proved that the sale was not binding on the plaintiff, not being for his benefit.

**Held**, that it being shown that defendant had no title, plaintiff's suit should be decreed. 78 P. R. 1902, Foll. 67 Ind. Cas. 941=3 L.L.J. 402=A.I.R. 1921 Lah. 397.

**—Suit for—Forfeiture of term—Parties.**

When a suit for possession is based upon forfeiture of term, all persons in possession including constructive possession, at the date of suit, should be joined as parties. 60 Ind. Cas. 969=47 Cal. 907.

**—Suit for—Trespasser.**

Possession in law being a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title, a person in possession of land without title has an interest in the property which is good against all the world except the true owner. Therefore, where a plaintiff has been forcibly dispossessed of immovable property by a person having no title, he can sue for possession simply on the strength of the possession which he had before he was dispossessed, provided he sues within the twelve years period allowed, by Art. 142, Limitation Act. In such a suit, unless defendant proves a title plaintiff should succeed without being asked to prove his own title to ownership, and even if the defendant proves that he has no such title. (78 P.R. 1902 Foll); 60 Ind. Cas. 101=3 L.L.J. 35=A.I.R. 1921 Lah. 149.

**—Suit for—Riayas.**

There can be a suit between riayas for possession of village land appurtenant to a dwelling house where one has ousted the other. 19 O.C. 169=37 Ind. Cas. 116.

**—Suit for—Possessory title—Rights under.**

A person who has a merely possessory title is entitled to a decree for possession against a person who has no title. 17 Ind. Cas. 167 (Mad.).

**—Suit for—Title admitted—Defendant to prove tenancy—Burden of proof—Land in suit contiguous to holding of defendant—Shifting of onus.**

The plaintiff's title as patnidar, being admitted the defendant cannot resist plaintiff claim for khas possession, unless he can show that he has a tenancy entitling him to retain possession. The mere fact that the defendant holds some lands as tenant under the plaintiff does not shift the burden of showing that, in respect of any other land which the defendant may be found to be in possession of he has no right as a tenant. If the lands sought to be recovered are admitted by the plaintiff, to be contiguous to the holding of the defendants or where they have come to the possession of the defendants by encroachment, the plaintiffs must prove that the lands in suit are outside the holding of the defendants. 19 C.W.N. 140 = 11 Ind. Cas. 696.

**—Suit for—Right of possessor to sue in ejectment.**

Possession is good title against all persons except the rightful owner and a suit in ejectment may be

maintained against any person other than such owner 11 Ind. Cas. 537 (Oudh.).

**—Suit for—Trespasser—Suit against by person in possession—Previous possession—Ground.**

A person in possession of property for a long time, dispossessed by a trespasser, is entitled on the strength of his previous possession to recover possession of the same from a mere trespasser. 11 Ind. Cas. 279 (Oudh.).

**—Suit for—Trespasser—Disturbance by defendant of plaintiff's long continued possession—Effect on plaintiff's title.**

Disturbance of long continued possession of plaintiffs by the defendants may be sufficient to entitle the plaintiffs to a decree for possession even if they are not able to sufficiently establish their possession on rights alleged by them. 11 Ind. Cas. 94 (Oudh.).

**—Suit for—House purchased with purchaser's money—Benami.**

If a house was purchased with, the purchaser's own money he is entitled to possession of the house. 29 M. 336, Foll. 8 M.L.T. 283=8 Ind. Cas. 383.

**—Suit for—Title at date of suit.**

In a suit for recovery of possession the plaintiff can succeed only on the title as it stood on the date of the institution of the suit. (1907) 7 C.L.J. 282.

**II. Miscellaneous.****—Miscellaneous—Trespasser.**

A trespasser who enters on another person's land and plants thereon does not thereby become entitled to the produce. 84 Ind. Cas. 961=2 Rang. 488=A.I.R. 1925 Rang. 87.

**—Miscellaneous.**

A person who is entitled to possession of property need not as a preliminary to that set aside document which may have been executed by somebody else from whom the plaintiff does not derive his title. 78 Ind. Cas. 705=3 Pat. 575=5 Pat.L.T. 581=2 Pat. L.R. 306=A.I.R. 1924 Pat. 551.

**—Miscellaneous—Mere user not ripened by prescription.**

A mere user which had not ripened by prescription would not give rise to any right upon which an action could be found unless some kind of possessory title existed in the plaintiff's favour. 70 Ind. Cas. 367=14 M.L.W. 449=1921 M.W.N. 510=A.I.R. 1921 Mad. 627=41 M.L.J. 490.

**—Miscellaneous—User not the sole test.**

Possession is not always the same thing as occupation or actual user. When land is incapable of being used in any of the recognised modes by the proprietor, it cannot be said that in law he is of possession 2 P.L.T. 59=57 Ind. Cas. 744=A.I.R. 1921 Pat. 234.

**—Miscellaneous—Grazing cattle if an act of possession.**

The grazing of cattle occasionally by a person will not amount to an act of possession. Whether an act amounts to an act of possession depends upon that



facts of the case. 7 Ind. Cas. 700, Foll. 13 Ind. Cas. 125 (Cal.).

—**Government Officer delivering possession.**

The Revenue Officers of the Government are not deemed to deprive the village community of their right to the land in giving its possession to a certain person and entering it in the Register kept for **Natham** lands for cultivation. (1910) M.W.N. 443=8 M.L.T. 248 = 6 Ind. Cas. 419.

—**Enforcement of by a person out of possession.**

A person out of possession must enforce his right if any, in lawful manner and not by use of criminal force. 17 O. C. 21=15 Cr.L.J. 232=15 O.L.J. 527 =23 Ind. Cas. 184.

—**Revenue records —Entry.**

An entry in the revenue records does not transfer possession. 7 S.L.R. 169=24 Ind. Cas. 813.

**POSSESSORY LIEN.**

See POSSESSION.

**POSSESSORY RIGHTS AND TITLE.**

See also.

POSSESSION—POSSESSORY TITLE AND RIGHTS.

**Synopsis.**

1. Burden of proof.
2. Co-sharers.
3. Evidence.
4. Incorporeal rights.
5. Presumption.
6. Sufficiency of.
7. Suit based on.
8. Miscellaneous.

**1. Burden of proof.**

—**Burden of proof.**

A person dispossessed but not suing under S. 9 of the Specific Relief Act, must prove a title which is based on adverse possession and must be for at least 12 years. (1918) 3 U.B.R. 125=50 Ind. Cas. 575.

—**Burden of proof—Good against all but true owner.**

Possession is good title against all persons except the true owner. In a suit for possession on the ground of dispossession, the plaintiff must show that he was in continued possession before defendant's entry. 11 N.L.R. 31=27 Ind. Cas. 977.

—**Burden of proof—Government.**

The Government must prove prior possession in itself or disprove the presumption of title in plaintiff arising from his possession at the time of suit. The onus is not discharged by proof that the Government had levied penal assessment on the land in suit. (1912) M.W.N. 881=16 Ind. Cas. 589.

—**Burden of proof—Trespass—Ejectment suit.**

Plaintiff relying for his title on prior possession can get a decree in an ejectment suit if he proves a posses-

sory title with himself or his predecessor. 5 N.L.R. 33=22 Ind. Cas. 25.

**2. Co-sharers.**

—**Co-sharers—Ejectment.**

The peaceful possession of a co-sharer of a plot of a common land will, if disturbed by other sharers give him a right to sue on his possessory title. 104 P.R. 1919=53 Ind. Cas. 569.

**3. Evidence.**

—**Evidence—Decision on—If evidence of title.**

A decree based upon possessory title is *prima facie* evidence of title against a stranger. 15 C.L.J. 1=13 Ind. Cas. 407.

**4. Incorporeal rights.**

—**Incorporeal hereditament.**

There cannot be a possessory right with regard to incorporeal hereditaments. If the enjoyment has not ripened into an easement, then the person in actual enjoyment has no remedy against any interference. 38 M. 280, Foll. 34 M.L.J. 425=(1918) M.W.N. 276=23 M.L.T. 337=45 Ind. Cas. 80.

—**Incorporeal right—Easement—Water—Right to take—Channel running through Govt. lands—Non-user for some years.**

A person having had enjoyment of an easement for less than the statutory period can obtain an injunction against a trespasser. 5 M.L.J. 24; 34 M. 173, Foll. 18 M.L.T. 515=30 Ind. Cas. 989.

—**Incorporeal rights—Easement.**

Easements are not capable in an exact sense of being possessed. There cannot be a possessory right in respect of an easement before the full period of adverse enjoyment. 38 Mad. 280=29 Ind. Cas. 255.

—**Incorporeal right — Enjoyment of water-course—Injunction.**

Where the plaintiffs were in enjoyment of a water-course for less than the prescriptive period sufficient to give them an easement they are entitled to an injunction restraining a trespasser from interfering with their enjoyment. 8 S.L.R. 218 = 27 Ind. Cas. 999.

—**Incorporeal right—River changing course—Right of fishery.**

If a river changes its course, the old course of the river, if not part of the public domain must be taken to become private property, and the owner of the soil is entitled to all Beels in which water remains but which do not communicate with the river except at the time. The proposition that when a tidal and navigable river shifts its course, the fishery rights continue to subsist in the river in its new course, has been followed though in a long series of decisions, with considerable doubt and reluctance. 12 C.L.J. 216=7 Ind. Cas. 140.

—**Incorporeal right—Easement—Jalkar.**

A person who is in possession of Jalkar for 11 years before suit is entitled to possession against all except the true owner. 15 C.W.N. 163=6 Ind. Cas. 806.



**—Incorporeal rights.**

The principle that a person in possession of property for less than the statutory period should be protected applies to the case of incorporeal rights as well. 34 Mad. 173=(1910) M.W.N. 117=7 M.L.T. 352=20 M.L.J. 803=6 Ind. Cas. 266.

**5. Presumption.****—Presumption.**

If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of his right of possession the person having the title is considered as in actual possession. 10 C.L.J. 527=4 Ind. Cas. 442.

**6. Sufficiency of.****—Sufficiency of—Trespasser—Maintainability.**

Possession is not merely evidence of ownership but is also the foundation of a right to possession and is sufficient in point of law to maintain a suit for possession against a mere trespasser. 4 Pat.L.W. 130=43 Ind. Cas. 338.

**—Sufficiency of—Possession after scramble, whether sufficient for decree.**

Where both plaintiff and defendant put a lock to the door of the property in suit, plaintiff possession is not peaceful and exclusive so as to entitle him to a decree on the basis of possessory title. Mere possession, which is sufficient under S. 9 of the Specific Relief Act, is not sufficient. 1 Lah. 588=60 Ind. Cas. 101.

**—Sufficiency of—Infringement—Suit on, when maintainable—Suit for declaration against tenants regarding their status.**

A mere possessory title is not sufficient for the maintenance of a suit against tenants, for a declaration that they are not under-proprietors. Nor is the probability of some danger arising in the future to the exercise of possessory rights sufficient for this purpose. An application by tenants to the revenue Court to be recorded as under-proprietors does not amount to an invasion of, or interference with, the rights of a person whose only right is merely to remain in possession. 6 O.L.J. 499=53 Ind. Cas. 746.

**—Sufficiency of—Obstruction—Damages.**

Where plaintiff has proved only a mere possessory right over a chawl for a period of 40 years.

**Held**, it amounted has sufficient possession to entitle the plaintiff to claim damages for obstruction in the enjoyment of that right. 27 Ind. Cas. 772 (Mad.).

**—Sufficiency of—Suit on—Maintainable.**

A person who has been in possession and has a title to possession, if dispossessed, has a right to possession. 41 Cal. 394=25 Ind. Cas. 76.

**7. Suit based on.****—Receipt of rents.**

Possession by receipt of rents is a possession known to and respected by law and if that is interfered with by a rival landlord a suit is maintainable without impleading the tenants of the land. 37 M.L.J. 544=10 L.W. 496=26 M.L.T. 359=(1919) M.W.N. 815=53 Ind. Cas. 771.

**—Suit based on—Reversionary rights—Vested interest.**

A person entitled to property in present or future can assert his title by suit. The person in possession has no vested right to the application of any specific period of limitation not in force at the date of suit. 69 P.R. 1909=103 P.W.R. 1909=2 Ind. Cas. 981.

**—Suit based on—Trespasser if can set up right of third party.**

A mere possessory title, except under the provisions of S. 9 of the Specific Relief Act, will not in India support a suit in ejectment. A trespasser can therefore set up *jus tertii* successfully unless plaintiff proves his ownership. 42 Ind. Cas. 884 (Cal.).

**—Suit based on—Trespasser—Suit against—Interest enforceable by suit.**

Mere possession of property gives an interest enforceable in a suit against a trespasser. 1 Q.B. 1; 12 A. 51 (P.C.) and 26 M. 514, Foll. 1 L.W. 853=(1914) M.W.N. 784=25 Ind. Cas. 934.

**—Suit based on—Possession of the rightful owner—Intermediate possession of a wrongdoer—Relinquishment by wrongdoer of his possession.**

Plaintiff sued to have it declared that the land in dispute belonged to him alleging that defendant took wrongful possession. It was found that plaintiff's title was proved and that the defendant had made no permanent use of it inconsistent with its being the plaintiff's land.

**Held**, (1) that the plaintiff was entitled to succeed. The proved circumstances of the case invited the application of the presumption that possession goes with the title. 20 W.R. 25 and 13 App. Cas. 798, Foll. (2) That the use by the defendant of the land was no evidence of adverse possession. 16 B. 338, Foll. Where a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession the rightful owner, on the abandonment, is in the same possession in all respects as he was before the intrusion took place. (1909) 11 Bom.L.R. 1087=33 Bom. 712=4 Ind. Cas. 244.

**—Suit based on—Suit for possession based on possessory title of plaintiff's predecessor —**



**Plaintiffs never themselves in possession—Cause of action.**

Per **Aikman, J.** (**Knox, J.** dissentiente)—Possessory title of ancestor coupled with plaintiff's title to inherit to that title is enough to entitle plaintiff to maintain a suit for possession against all but the rightful owner even though plaintiff himself was never in possession. **Wazir Jan**, the owner of certain Zamindari property, died on the 18th of December, 1889, leaving no direct heirs. After her death the property was taken possession of by the four nephews of **Musamat Wazir Jan's** deceased husband. One of these nephews, **Bisharat** died on the 7th of August, 1890, whereupon the share of which he had been in possession was appropriated by his son **Kasim** to the exclusion of **Kasim's** two sisters **Ayesha Begam** and **Kudrat Begam**. While in **Kasim's** possession the property, or part of it, was sold in execution of a decree against **Kasim** and purchased by **Sri Gopal** and others.

On the 7th of August, 1902, **Kasim's** sisters sued to recover their shares of the property as heirs of **Bisharat**.

**Held**, by **Knox, J.** (**Aikman, J.** dissentiente), that inasmuch as the plaintiffs had never at any time been in possession of the property claimed by them, their suit would not lie.

**Aikman, J. Contra.**—The plaintiff's father **Bisharat** having held a possessory title—heritable and transferable—good as against all except the true owner, there was nothing to prevent his heirs bringing the present suit. 1906 A.W.N. 264=3 A.L.J. 775=29 A. 52.

**8. Miscellaneous.**

**—Miscellaneous—Trespasser—Suit against.**

A title by adverse possession though not yet perfected by the lapse of 12 years is heritable, transferable and divisible. But one trespasser cannot be allowed to add to his possession the possession of another previous trespasser whom he dispossessed. 14 N.L.R. 82=43 Ind. Cas. 943.

**—Miscellaneous—Mortgage—Prior and puisne mortgagees.**

Where prior mortgagee bought the mortgaged property under a decree on his mortgage where the puisne mortgagee was not the party and the puisne mortgagee afterwards purchased the same property under a decree in a suit to which prior mortgagee was not a party the prior mortgagee is entitled to possession subject to his being redeemed by the puisne mortgagee or his successor in title. 12 O.C. 133=2 Ind. Cas. 836.

**POST DIEM INTEREST.**

See (1) CIVIL P.C., S. 34, O. 34, RR. 2 TO 7 AND 11.  
(2) INTEREST.

**POSTHUMOUS SON.**

See HINDU LAW—(1) ALIENATION.

(2) DEBTS.

(3) SUCCESSION.

**POST MORTEM REPORT.**

See CRIMINAL P.C., S. 509.

**POST OFFICE ACT (6 OF 1898), S. 3—Charge and conviction—Discovery of postal article outside Post Office—Finder giving it back to Postmaster—In course of transmission.**

**M**, a servant of **K**, having discovered a number of letters lying in a knola opposite a post office, handed them over to his master. One of the letters was addressed to **P** and **K** took it to the addressee who stated that the letter had never been delivered to him. The matter was reported to the Post master **F** who took possession of the letters saying that he would take necessary action in the matter. No action being taken by **F**, the matter was reported to the Postmaster-General with the result that **F** was sent up for trial. The Magistrate framed two alternate charges against him, first under S. 52, Post Office Act and the other under S. 201, Penal Code. The Magistrate found **F** guilty only under S. 210. It was contended that the charge framed by the Magistrate was defective and prejudiced the accused, the alternate charge was illegal and contravened the provisions of S. 236, Cr.P. Code.

**Held**, that the first charge was not defective as, at postal articles in question were "in course of transmission by post" according to S. 3, Post Office Act, when they were made over to **F** by **K** and, therefore, the mere fact that the letters had been posted when **F** was not the Postmaster of the Post Office was immaterial. The framing of the charge in the alternative under S. 201 did not contravene S. 236, Cr.P. Code. A.I.R. 1930 Lah. 460=129 Ind. Cas. 760.

**—S. 6**—The word 'default' is used in S. 6, Post Office Act, in the sense of failure in duty, care, etc. as the cause of some untoward event.

Where an insured cover containing promissory notes was lost and in a suit against the Postmaster, the only fact proved against him was that in the list of insured articles sent to the sorter in the ordinary course of his duties, he did not mention the missing article and the District Judge found that the defendant was not guilty of default:

**Held**, the finding of the District Judge was one of fact. A.I.R. 1932 All. 139=1931 A.L.J. 961=136 Ind. Cas. 569.



**—S. 6—Non-tracing addressee—Liability of the Post Office.**

Where the article sent was never lost in the course of transmission, but all that happened was that by reason of the label having been torn it was not possible to deliver it to the addressee,

**Held**, that S. 6 or 34 did not exempt the Post Office from liability. 79 Ind. Cas. 334=46 All. 455=5 L.R.A. (Civ.) 384=A.I.R. 1924 All. 692.

**—Ss. 19, 61 and 71—Sending cocaine by post—Noxious or dangerous substance—Excise Act, S. 60 (a).**

Cocaine, not being an 'explosive' 'dangerous' 'filthy' 'noxious' or deleterious substance is not an article the sending of which is prohibited by S. 19 of the Act and a person who sends cocaine by post is not guilty under S. 61 of the Post Office Act, though a conviction under S. 60 (a) of Excise Act is proper. 37 All. 289=13 A.L.J. 356=16 Cr.L.J. 319=28 Ind. Cas. 655.

**—S. 20—'Indecent'.**

"Indecent" means immodest and offending against the recognized standard of decency and suggestive of or tending to obscenity. 31 P.L.R. 129=A.I.R. 1930 Lah. 552=127 Ind. Cas. 367.

**—S. 34—Value payable insured article—Article delivered by Post Office but money not collected—Breach of contract—Measure of damages—Claim cognizable by Court of Small Causes—Liability of Secretary of State.**

Where a person sent an article through the Post Office as a value payable insured article after paying the necessary fees and the article is delivered to the addressee but the money was not recovered from him :

**Held**, (1) that the transaction amounted to a contract by which the Post Office became the agent of the sender for the collection of money ; (2) that if the Post Office failed to collect the money when the article was delivered there was a breach of contract for which the Post Office (viz., the Government) was liable in damages ; (3) that the effect of the proviso to S. 34 was that the Post Office did not guarantee the collection of the money but that the provision did not absolve the Post Office from the common law liability to pay damages for delivering a parcel without collecting money ; (4) that the measure of damages was the value of the article sent ; and (5) that the suit for recovery of such damages was not one of tort, was maintainable against the Secretary of State, and was cognizable by a Court of Small Causes. (1904) 15 M.L.J. 226=28 M. 213.

**—Ss. 35, 64 and 74 (1)—Value payable post.**

No order or willingness can be inferred from the silence of the addressee though he does not return the articles sent or reply to any cards sent to him. But if he pays for one of the articles sent and then continued to receive the further issues of the magazine, an order could be inferred. 33 Mad. 511=7 M.L.T. 69=20 M.L.J. 402=11 Cr.L.J. 215=5 Ind. Cas. 738.

**—S. 43—Rules under, R. 100—Petitioner sending money from T to some institution at D—Petitioner then requesting Post Master at T to send telegram to D to stop payment—Amount paid to payee even after receiving telegram—Suit against Secretary of State for damages.**

An omission to do a thing is a "failure" to do it and it is unnecessary that there should have been either an attempt or an intention to do it.

The petitioner sent through the Post Office, Tellicherry, a money-order to the address of the Director, Royal Institute of Technology, Delhi. Having sent off the money order, the petitioner, fearing that the Institute was not a *bona fide* one, wished to stop payment of the money-order and requested the Post Master, Tellicherry, to send an express telegram to the Delhi Post Office to stop payment of the money-order to the addressee and remitted money towards the expenses. The Post Master, Tellicherry, accordingly sent an urgent telegram to the Delhi Post Office and it was received at Delhi. In spite of this, however, the Delhi Post Office paid the money over to the payee. The petitioner used the Secretary of State of India in Council holding him responsible for all damages and costs which he had suffered. The respondent denied liability relying upon R. 276, Post and Telegraph Guide, which is a reproduction of R. 100 made by the Governor-General in Council under the Post Office Act (6 of 1898) and further contended that the payment was made through inadvertance :

**Held**, that there was a "failure" by the Delhi Post Office to stop payment of the money-order within the meaning of R. 100, made under the Post Office Act (6 of 1898) and R. 276, Post and Telegraph Guide, That being so, the Secretary of State was not liable. A.I.R. 1937 Mad. 797=1937 M.W.N. 294=175 Ind. Cas. 231.

**—S. 44 (1)—Money remitted through Post Office—Ownership of—Attachment.**

Money remitted by money order through the Post Office does not cease to be the property of the remitter until it is actually paid to the remitee. 12 Bur.L.T. 105=52 Ind. Cas. 925.



—**Ss. 52 and 53—Offence under—No complaint as required by S. 72—Offence under S. 52 can be taken cognizance of.**

The offence under S. 52 of the Post Office Act can be taken cognizance of without any complaint made by order of or authority from the Director General or Post-Master General according to S. 72. That the acts of the postman also constitute the minor offence under S. 53 of the Act is no bar to the trial of the offence under S. 52. A.I.R. 1941 Mad. 392=53 L.W. 70=1941 M.W.N. 57=I.L.R. (1941) Mad. 345=42 Cr. L.J. 773=(1941) 1 M.L.J. 44=195 Ind. Cas. 555.

—**S. 52—Ingredients of.**

It is a necessary ingredient of S. 52, Post Office Act, that a paper should have been extracted from the parcel and not merely examined. A.I.R. 1939 Mad. 283=1938 M.W.N. 962=40 Cr.L.J. 483=181 Ind. Cas. 364.

—**S. 52—Breach of trust.**

Where a sub-postmaster of 13 years' service taking possession of the V.P.P. cover addressed to him and also of the railway receipt, obtained delivery of the goods, but in order to put off payment manipulated the register maintained in the Post Office, sentence of one year's rigorous imprisonment and a fine of Rs. 100 was adequate punishment. 118 Ind. Cas. 498=29 M.L.W. 522=1929 M.W.N. 275=2 Mad. Cr.C. 90=52 Mad. 534=30 Cr.L.J. 929=A.I.R. 1929 Mad. 447=56 M.L.J. 551.

—**S. 52—Misappropriation—Postmaster opening a V.P. article addressed to himself without paying for it and making false entries in the P.O. books.**

A branch postmaster who was also a shop-keeper ordered a consignment of flour in order to meet the requirements of his shop and a value payable envelope containing the railway receipt for the flour arrived the branch post office. The postmaster opened it, extracted the railway receipt, went down the station where the goods had by that time arrived, and took delivery. After six days he paid the price of the goods into the post office. In the meantime he made in the books of the post office entries and repeated daily "on account of the absence of the addressee."

**Held**, that, although the offence was a technical one in the sense that no loss was incurred by the post office and the money involved was voluntarily returned, it amounted to criminal misappropriation within the meaning of S. 403, Penal Code, and the postmaster was guilty under S. 52, Post Office Act. 109 Ind. Cas. 236=8 Lah. 662=29 P.L.R. 151=29 Cr.L.J. 508=A.I.R. 1928 Lah. 92.

—**S. 52—Suspicion, if ground for decision.**

Where the only evidence against the accused charged with misappropriating a Telegraphic money order is that the account contained entries of delivery on dates different from the actual dates of delivery it simply creates suspicion and is not sufficient to prove misappropriation. 16 Cr.L.J. 3=27 Ind. Cas. 307.

—**S. 55—Sanction—Can be obtained after cognizance of the offence.**

Although S. 72 requires sanction before a postal employee can be prosecuted under S. 55 still as long as sanction is obtained, it does not matter whether it is obtained before the Court takes cognizance of the offence or not. 118 Ind. Cas. 496=52 Mad. 534=29 M.L.W. 522=1929 M.W.N. 275=2 Mad. Cr. C. 90=30 Cr. L.J. 929=A.I.R. 1929 Mad. 447=56 M.L.J. 551.

—**S. 61—Obscene post card, transmission of—Post cards containing advertisement of a patent medicine in obscene language.**

Transmission of post cards containing an advertisement of patent medicine worded in obscene language is an offence under S. 61. (1904) 32 C. 247=2 Cr. L.J. 201.

—**Ss. 61 and 72—Transmission of obscene article—Prosecution—Complaint—Criminal procedure Code, S 4, Cl. (h).**

Prosecution under S. 61 although authorized by the Post Master General is illegal unless such prosecution takes place on a complaint as defined in S. 4, Cl. (h), of the Criminal Procedure Code. (1906) 10 C.W.N. 1029=4 C.L.J. 170.

—**S. 64, Rule 133—Bona fide order.**

The **bona fides** contemplated by rule 133 do not relate to the manner of sending a parcel. 6 A.L.J. 481=9 Cr. L.J. 537=2 Ind. Cas. 228.

—**S. 64—Declaration.**

Though an article which it is proposed to insure must be presented at the post office with the amount, for which the sender wishes it to be insured clearly written on the cover, that writing cannot be held to constitute the sender a person who is required by the Post Office Act or even by the rules framed under it, to make a declaration within the meaning of S. 64 in respect of the article. 125 Ind. Cas. 770=31 Cr. L.J. 934=9 Pat. 126=11 Pat. L.T. 224=1930 Cr. C. 1214=A.I.R. 1930 Pat. 622.

—**Ss. 64, 67, Cl. (2)—V.P. order—Declaration—"Order", meaning of—Conduct of parties—Duty of addressee of paper unordered—Statute—Construction—Bye-Laws.**

According to the general canon of interpretation when a statute empowers the Government or any



other authority to frame rules or bye-laws for the purpose of carrying out the objects of the statute, rules or bye-laws so framed must, if within the scope of such powers, be regarded as part of the enactment. Rule No. 68, Notification dated 5th August, 1908, **Gazette of India**, Part I, August 1908, p. 747, requiring the sender of a V.P. article to make a declaration is a valid one and if the sender makes a false declaration or a declaration which he does not himself believe to be true, he makes himself liable to the penalty prescribed by S. 64 Cl. (2) of S. 74 is obviously meant to meet cases for which no penalty is prescribed by any of the sections of the Act itself. An order cannot be said to have been received by one person from another to send an article by post unless the latter is shown to have communicated a request or a desire to the former to that effect. The communication of the request need not perhaps be made by means of words written or spoken and may be inferred from the previous conduct of the addressee. There is no obligation on the part of the receiver of a paper not ordered by him either to return it or to reply to the sender's letters; and the receipt of the paper, though perhaps indicative of a willingness to pay on the part of the receiver, cannot be construed as an order to send the article by V.P. for realization of the amount due within the meaning of the rule. (1910) 20 M.L.J. 402=5 Ind. Cas. 738=33 M. 511.

#### —S. 64—Want of sanction.

Where the accused was proved to have sent blank papers in an insured cover addressed to himself and claimed the value of the currency notes which he alleged had been enclosed in the cover and he was prosecuted for offences under S. 64 of the Post Office Act and Ss. 420 and 511, I.P.C. and convicted for the latter offences only.

**Held**, that it was doubtful if an offence under S. 64 of the Post Office Act had been committed, and that at any rate the prosecution under S. 64 was rendered unsustainable for want of sanction under S. 72.

**Held** also, that the conviction for the major offences under the Penal Code was perfectly valid. 125 Ind. Cas. 770=9 Pat. 126=11 Pat. L.T. 224=31 Cr. L.J. 934.

### POST OFFICE REGULATION.

#### —Delivery of insured parcels.

The Post Office Regulation under which at the local post office throughout India and Burma parcels insured for Rs. 250 or over are given window delivery only and they are not delivered in the ordinary way to the addressee at his place of address, is designed for the limitation of the post office's liability as insurers and not for the greater safety of the insured parcels. 108 Ind. Cas. 1=6 Rang. 142=26 A.L.J. 377=

32 C.W.N. 593=47 G.L.J. 550=30 Bom. L.R. 818=28 M.L.W. 276=A.I.R. 1928 P.C. 54=54 M.L.J. 545 (P.C.).

### POUNDAGE.

See (1) C.P. CODE, O. 21, R. 93.

(2) MADRAS CIVIL RULES OF PRACTICE.

### POWERS

#### —Joint power—Death of one—Survivor—When can execute.

If power is given to A and B *persona designata* to do an act if and when they think it desirable the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. This cannot be the case after the death of one of them, and the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague, nor can he then do the act, seeing that the authority to do is only given to the two acting jointly. The case is different when the power is vested not in *persona designata* but in the occupants for the time being of a specified office such as executors or trustees. 37 Mad. 199=41 I.A. 51=(1914) M.W.N. 299=12 A.L.J. 315=18 C.W.N. 554=26 M.L.J. 411=15 M.L.T. 285=16 Bom. L.R. 328=23 Ind. Cas. 166 (P.C.).

#### —Construction of—Liberal construction.

Powers are to be construed in accordance with the intention of the donor or grantor; that intention is to be gathered from the instrument itself, although a reference may sometimes be had to the circumstances under which it was given. All powers are to be liberally construed in equity in furtherance of the purpose for which they were created. 17 C.W.N. 319=16 C.L.J. 304=16 Ind. Cas. 817.

### POWER OF APPELLATE COURT.

See CIVIL P.C., S. 107 AND O. 41, R. 33.

### POWER-OF-ATTORNEY.

See also (1) CIVIL P.C.; O. 3, R. 4.

(2) CONTRACT ACT S. 182.

(3) DEED—CONSTRUCTION

(4) LEGAL PRACTITIONER.

(5) POWERS OF ATTORNEY ACT (7 OF 1882).

(6) PRINCIPAL AND AGENT.

(7) STAMP ACT, S. 2 (21), SCH. I, ART. 48.

### Synopsis.

1. Construction—Principles and rules of.
2. Power to alienate.
3. Power to assign decree.
4. Power to compromise.
5. Power to conduct suit.



6. Power to execute or sign pronote.
7. Power to prefer appeal.
8. Revocation.
9. Scope of authority under.
10. Miscellaneous.

# 1. Construction—Principles and rules of.

## —Construction — Principles — Special powers followed by general words—Powers if and how far enlarged or limited.

One of the most important rules for the construction of a power-of-attorney is that regard must be had to the recitals which, as showing the scope and the object of the power, will control all general terms in the operative part of the instrument.

Another rule is that where the special powers are followed by general words, the general words are to be construed as limited to what is necessary for the proper exercise of the special powers and as enlarging those powers only when necessary for the carrying out of the purposes for which the authority is given. 51 Bom. L.R. 1004=A.I.R. 1950 Bom. 130.

## —Construction—Rules.

Powers-of-Attorney must be strictly pursued, and are construed, as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction : (1) The operative part of the deed is controlled by the recitals. (2) Where authority is given to do particulars acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts. (3) General words do not confer general powers, but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose. (4) The deed must be construed so as to include all medium powers necessary for its effective execution. 52 P.L.R. 84.

## —Construction—Principles and rules of—Authority must be express or be necessarily implied.

The Power-of-Attorney must be strictly construed and it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication. 109 Ind. Cas. 737=30 Bom. L.R. 470=A.I.R. 1928 Bom. 225.

## —Construction—Principles and rules of.

Where an act purporting to be done under a power of attorney is challenged as being in excess of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the

instrument either in express terms or by necessary implication. 1893 A.C. 170. Foll. 43 Cal. 527=30 M.L.J. 232=20 C.W.N. 329=3 L.W. 210=19 M.L.T. 176=(1916) M.W.N. 150=14 A.L.J. 217=23 C.L.J. 348=18 Bom. L.R. 387=9 Bur. L.T. 1=8 L.B.R. 436=43 I.A. 48=32 Ind. Cas. 419 (P.C.) (Reversing 7 Bur. L.T. 126=23 Ind. Cas. 516).

## —Construction—Rules of.

Power-of-Attorney should be strictly construed and general powers of borrowing should be restricted to matters *ejusdem generis* with those already stated 39 Mad. 918=38 Ind. Cas. 638.

## —Construction—Principles and rules of.

In a power-of-attorney which should be strictly construed, the operative part being controlled by the recitals, general words following an authority to do particular acts should not be taken to confer general powers, but should be limited to the purpose of the authority or to those necessary for the proper performance of particular acts. 10 S.L.R. 72 =36 Ind. Cas. 968.

## —Construction—Principles and rules of.

Powers of attorney are to be construed strictly. If an act is challenged as being in excess of the power it must be shown that the authority is to be found in the four corners of the power either expressly or by necessary implication.

Per Twomey, J.—A power to sign accommodation notes may well be inferred from a power to sign promissory notes jointly with others. 8 Bur L.T. 1=8 L.B.R. 168=26 Ind. Cas. 253.

## 2. Power to alienate.

### —Power to alienate—Strict construction.

A pardanashin lady executed a power-of-attorney in favour of her husband with full powers to do such acts as were described in it.

The power set out various acts relating to the management of the property and to litigation, and matters relating to execution arising out of the litigation. The power, however, did not mention in explicit terms the authority to sell, mortgage and lease. The husband contracted to sell the property but the sale deed was not executed, whereupon the purchaser brought a suit for specific performance of the contract.

Held, that the husband had no authority to enter into the contract of sale. 11 P.L.T. 121=A.I.R. 1930 Pat. 181=127 Ind. Cas. 457.

### —Power to alienate—Joint Hindu family.

A power-of-attorney executed by two brothers in favour of the third provided among other things "in



respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or Zarpsheshgi-Thika or make mortgage with possession."

**Held**, that these words were quite sufficient to confer the power to execute mortgage for debts for which the joint family, consisting of the three brothers was liable. 101 Ind. Cas. 377=1927 M.W.N. 433=31 C.W.N. 890=39 M.L.T. 270=A.I.R. 1927 P.C. 111=53 M.L.J. 592 (P.C.).

#### —Construction—Power to alienate.

Power-of-attorneys must be strictly construed. Where am-mukhtearnama conferred the power on the agent to borrow any money for any purpose and do any other work as necessity arises,

**Held**, that as no express power to mortgage had been given, it was difficult to say that the terms of the am-mukhtearnama can be construed into a power for giving a mortgage. 7 Cal. 253; 10 Cal. 901 (P.C.), Foll 104 Ind. Cas. 833=54 Cal. 687=A.I.R. 1927 Cal. 836.

#### —Construction—Power to alienate—"Thing" whether includes a mortgage.

A power-of-attorney provided for sale of "goods effects and things belonging to":

**Held**, that a mortgage is included in the word **thing** in the power-of-attorney, as the deed did not suggest that the thing was to be limited to a chose in possession. 13 C.W.N. 1190=3 Ind. Cas. 859.

### 3. Power to assign decree.

#### —Construction—Power to assign decree.

Where a power-of-attorney allowed an agent "to conduct and manage—the estate, property, moneys, affairs concerns of the Zamindar—and in all respects as fully and absolutely as the principal himself—and to do all such acts and deeds whatever as may be considered requisite for the above purpose as amply and effectually as the principal could do in his own person" the words are wide enough to give the agent power to assign a decree to another even less than the decree amount. 38 Mad. 832=15 M.L.T. 143=26 M.L.J. 185=23 Ind. Cas. 235.

#### —Construction—Power to assign decree.

A power-of-attorney must be construed strictly. Such a construction would not prevent the exercise of all powers necessary and incidental to the powers expressly conferred. A power-of-attorney conferring the right to execute a decree does not confer a right to assign the decree. Power expressly conferred in a power-of-attorney to execute the decree does not imply any power to transfer a decree for consideration. A power-of-attorney provided "to execute all decrees in the name of my father or in any other

name on my behalf or otherwise to attach and realize all moneys due thereon."

**Held**, that the agent acting under the power could not assign the decree. 23 M.L.J. 595=12 M.L.T. 528=(1912) M.W.N. 1204=17 Ind. Cas. 139.

### 4. Power to compromise.

#### —Construction—Authority to compromise—If includes power to refer suit to arbitration.

A power-of-attorney authorised the agent "to compromise and to sign compromise petitions." It also contained a general clause in the following words:—"Whatever would be required to be done in the conduct of this suit would be done by the agent and the same would be binding on me as if I had done the same". The Vernacular expression used for the word "compromise" was **ap-sattad-jod**. It was contended that a power to refer the suit to arbitration was not included in the power to compromise and that the general clause was restricted to matters done **in the conduct of the suit** and that it did not include a power to remove the dispute from the jurisdiction of the Court and transfer it elsewhere. It was also contended that the Vernacular expression literally translated meant "to give and take between ourselves."

**Held**, that the general clause read in conjunction with the clause about "give and take" left no doubt that the intention was to confer the wide powers and several meanings which are embraced in the single English word "compromise" which includes a power to refer a dispute to arbitration and that therefore, the power of attorney in this case conferred the power to refer the suit to arbitration. I.L.R. (1946) Nag. 824=229 Ind. Cas. 402=1947 N.L.J. 1=A.I.R. 1947 Nag. 17 (F.B.).

#### —Power to compromise—Legal Practitioner.

For effecting a compromise on another's behalf neither a general power-of-attorney nor the ordinary powers of a pleader are sufficient express authority is absolutely necessary. 41 Mad. 233, Rel. on. 119 Ind. Cas. 430=A.I.R. 1929 Lah. 746.

#### —Power to compromise.

Power-of-attorney for filing a compromise does not necessarily imply an authority for making a compromise on behalf of principal without his knowledge and consent. 111 Ind. Cas. 829=5 O.W.N. 677=A.I.R. 1928 Oudh 386.

#### —Power to compromise—Principal illiterate

The expression as to power to compromise in a power-of-attorney were ambiguous and the principal being illiterate had made only a thumb-mark. It was not proved to the satisfaction of the Court that at the time of making the mark the principal knew or under-



stood that she was authorizing the agent to make compromises on her behalf without her knowledge or consent.

*Held*, that the power-of-attorney was not binding on her in that respect. 111 Ind. Cas. 829=5 O.W.N. 677=A.I.R. 1928 Oudh 386.

———**Construction—Power to compromise suit.**

A power-of-attorney authorising the agent to manage the business of the principal to institute suits and oppose all suits that might be brought by or against the principal in respect of the business does not confer on agent the power to compromise a suit. 23 C.L.J. 436=20 C.W.N. 943=34 Ind. Cas. 394.

———**Construction—Agent—Power to compromise.**

Where a power-of-attorney was executed on behalf of one of the plaintiffs authorising him specifically to engage a pleader to present applications to Court and to refer to arbitration.

*Held*, that the power did not confer an authority upon him to put in a compromise and that the power to compromise or confess judgment was not *ejusdem generis* with the powers set forth by the powers-of-attorney. 50 P.R. 1898, Foll. 20 P.W.R. 1912=28 P.L.R. 1912=13 Ind. Cas. 92.

**5. Power to conduct suit.**

———**Power to conduct suit—Right of agent to act as guardian on behalf of principal.**

A suit was instituted by the general attorney of a minor principal's guardian, without the guardian's knowledge and permission, both on his own behalf and for the minor's guardian, professedly as the guardian's authorized agent.

*Held*, that the minor not being fully represented, the judgment cannot be conclusive as against him. 128 Ind. Cas. 763=A.I.R. 1930 All. 875.

———**Construction—Power to conduct suit—Authority to manage—Jagir—Power to defend suit, and make admissions.**

A power-of-attorney should be strictly construed. A power of authority authorising a person to look after the management of a minor's jagir does not, in the absence of express terms, empower the agent to defend the owner's title to the jagir in a suit. Any admission made by such agent, in the course of a trial is not binding on the owner. 47 Ind. Cas. 528 (Nag.).

**6. Power to execute or sign pronote.**

———**Construction—Power to execute or sign pronotes.**

A lady is not liable on a pronote executed by her agent authorised to borrow on her behalf only for

necessity where he did not purport to borrow on her behalf or for actual necessity. 4 O.L.J. 299=40 Ind. Cas. 452.

———**Construction—Scope of authority—Mortgage—General power to—Power to sign a pronote.**

A general power to sell, mortgage, or pledge property implies a power to borrow money on mortgages on the principal's account, and to create an equitable mortgage by deposit of title deeds, but not to sign promissory note executed. 9 Bur.L.T. 166=36 Ind. Cas. 19.

———**Construction—Power to execute or sign pronote.**

Power-of-attorney must be construed strictly and unless an express power is given to an agent to enter into contracts of guarantee on behalf of his principal or to execute negotiable instruments for his principal jointly with others the person alleging such power must show that the agent had the power to enter into the transaction. 7 Bur.L.T. 126=23 Ind. Cas. 516. [Reversed on Appeal 43 Cal. 527=32 Ind. Cas. 419 (P.C.)].

**7. Power to prefer appeal.**

———**Power to prefer appeal—Legal Practitioner.**

Where in a printed form of the power-of-attorney, the clause authorising an advocate to file an appeal has been struck off by the client, it does not mean that the said power has been taken away from him, if it otherwise existed. It only means that the power was not expressly given. 116 Ind. Cas. 184=A.I.R. 1930 Lah. 68.

———**Power to prefer appeal—Scope of.**

The power to prefer an appeal to the High Court must be liberally interpreted and it must be held that it includes the power to prefer petition for revision. 107 Ind. Cas. 390=A.I.R. 1928 Lah. 244.

———**Power to prefer appeal.**

Where a general power-of-attorney confers upon a person authority to do the acts enumerated below i.e., to take and use all lawful proceedings and means for recovering and receiving debts and advances and also to commence and prosecute and to defend at law all actions, suits, claims, demands and disputes.

*Held*, that the powers are wide and comprehensive enough to include the power to prefer an appeal. 63 Ind. Cas. 748=A.I.R. 1921 Lah. 74.

**8. Revocation.**

———**Revocation.**

Where a power-of-attorney was given to the plaintiffs to recover all sums due to the grantor of the power under a contract with the defendants for doing certain work and under which the defendants are to pay the



plaintiffs only after the production of the power which is to remain in force till the completion of the work under the contract,

**Held**, that the defendant's agent was not justified in making payments to the grantor of the power after production of it by the plff. to the defts., even though the grantor revoked the power afterwards while the work was being done. 105 P.L.R. 1917 = 86 P.W.R. 1917 = 40 Ind. Cas. 280.

—**Revocation of—C.P.C. (1882), Ss. 2 and 39.**

Appointment of attorney cannot be revoked by a letter to the attorney. 36 Cal. 609 = 13 C.W.N. 1172 = 2 Ind. Cas. 830.

### 9. Scope of authority under.

—**Scope of authority under—Power to issue notice.**

Proper execution of am-mukhtearnamas, giving authority to sue in ejectment, confers also power to issue notices but it is not necessary that the authority should be in writing. 120 Ind. Cas. 455 = 33 C.W.N. 559 = 49 C.L.J. 555 = 57 Cal. 10 = A.I.R. 1929 Cal. 651.

—**Scope of authority under—Power to manage temple affairs.**

In the case of temples, a trustee can hardly claim the right to borrow as a matter of course. His right to borrow will arise only in cases of financial necessity, and he will have to use his discretion whether even in such circumstances he should borrow or not. It cannot be assumed, in the absence of words to that effect, that by executing a power-of-attorney to a person to manage the temple affairs by collecting the debts and amounts due to the temple and meeting the necessary expenses, that the trustee authorized the manager to bind the temple by borrowing.

Powers-of-Attorney are to be construed strictly. 113 Ind. Cas. 554 = A.I.R. 1928 Mad. 1059.

—**Scope of authority under—Power to transfer securities.**

A power-of-attorney authorizing the attorney to transfer securities of any description authorizes him to endorse demand promissory notes though there is no express clause empowering the attorney to endorse demand promissory notes. 107 Ind. Cas. 213 = A.I.R. 1928 Sind 89.

—**Scope of authority under.**

An agent who is empowered to conduct a suit in any manner he may deem fit even to the extent of withdrawing it or entering into a compromise has power to bind his principal by an agreement to abide by a special oath entered into with the opposite party. 22 O.C. 181 = 1 U.P.L.R. (J.C.) 89 = 53 Ind. Cas. 453. 12—F.Y.D. 45.

—**Scope of authority under—Power to execute deeds of sale if includes power to execute agreement for sale.**

A power given to an attorney to execute deeds of sale does not authorise him to execute agreements to sell. 16 C.L.J. 119 = 13 Ind. Cas. 637.

—**Scope of authority under—Power to carry on business, if includes power to enter into forward contracts.**

By a power-of-attorney the defendant empowered his manager to contract, superintend and carry on the business of general merchants in Singapore. The manager entered into forward contracts with the plaintiff in respect of sugar. The defendant's firm was accustomed in Calcutta to enter into forward contracts in the sugar trade.

**Held**, that the manager had sufficient authority to enter into the contract sued upon. 10 Ind. Cas. 895 (Cal.).

### 10. Miscellaneous.

—**Miscellaneous—Power under old law—C.P. Code, O. 3, R. 4.**

Where a power-of-attorney is granted before passing of amendment but the appeal is filed after it, the power-of-attorney must be interpreted on the date of the presentation of the appeal in the light of the statutory provisions which were in force on such date. 116 Ind. Cas. 184 = A.I.R. 1930 Lah. 68.

—**Miscellaneous—Repudiation of—Estoppel.**

A general power does not necessarily imply an unlimited authority to borrow and the agent has only such powers as are necessary to carry out the special powers. Where a pardanishin lady deliberately makes herself jointly and severally liable for a debt incurred by her husband on the strength of a power given to him by her, she cannot afterwards repudiate the same. 12 C.L.J. 115 = 3 Ind. Cas. 330.

—**Miscellaneous—Special—Genuineness—Registration.**

Though registration of special Power-of-Attorney is not compulsory yet the court is not bound to presume its genuineness if registered. 43 Cal. 884 = 20 C.W.N. 287 = 23 C.L.J. 297 = 32 Ind. Cas. 395.

**POWERS-OF-ATTORNEY ACT (7 OF 1882), S. 2.** Scope of—If can override specific provision in R. 6 of the Income-tax Rules. See INCOME-TAX ACT, S. 26-A AND INCOME-TAX RULES R. 6, (1946) 1 M.L.J. 332 = I.L.R. (1947) Mad. 167 = A.I.R. 1946 Mad. 411.

—**S. 3.—Scope of.**

Section 3 does no more than indemnify the holder of a power-of-attorney for actions done by him in good



faith if the determination of his power by the death of the person granting it was unknown to him at the time. A.I.R. 1934 Nag. 274 = 31 N.L.R. 57 = 153 Ind. Cas. 251.

—S. 5—Minor married woman—Power to appoint attorney.

By virtue of the provisions of S. 5 of the Powers-of-Attorney Act, 1882, a married woman, even though a minor, can validly appoint an attorney to do any act on her behalf and the presentation of an application by way of appeal to the Registrar by an attorney so appointed is not invalid. A.I.R. 1933 Mad. 407 = 37 L.W. 471 = 64 M.L.J. 449 = 1933 M.W.N. 636 = 142 Ind. Cas. 646.

### POWERS OF LEGAL PRACTITIONER.

See (1) LEGAL PRACTITIONER.

(2) LEGAL PRACTITIONERS ACT.

### POWERS.

See (1) POWER-OF-ATTORNEY.

(2) WILL.

### PRACTICE.

#### Synopsis.

1. Abandonment of plea.
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75. Miscellaneous.

#### 1. Abandonment of plea.

See also C.P.CODE, O. 41, R. 1.

#### —Abandonment of plea—Presumption.

When the appellate judgment is silent on certain grounds of appeal it is to be presumed that that ground was abandoned. A.I.R. 1924 Lah. 107, Foll. 117 Ind. Cas. 905 (Lah.).

—Cross-objections not pressed at time of dismissal of appeal will be deemed to have been abandoned. 70 Ind. Cas. 79 = 25 O.C. 280 = A.I.R. 1923 Oudh. 108.

#### —Abandonment of plea—Point not argued.

Where an appeal which comes before an appellate Court is heard upon the merits, a point which goes to the root of the suit being not argued, must be taken to be abandoned. 40 Ind. Cas. 621 (All.).

—A party, abandoning his case, set up in the trial Court, cannot advance it in second appeal. 63 Ind. Cas. 490 = 3 U.P.L.R. (All.) 179.

—A party ought not to be allowed to be harassed by a superior Court on a point which was either never raised or deliberately abandoned in the Court below.



Hence an appellant who has abandoned on the ground in the lower Court cannot prefer an appeal on that ground. 64 Ind. Cas. 185 = 24 O.C. 181 = A.I.R. 1921 Oudh 41.

**—Abandonment of plea in lower appellate Court.**

Plea given up in lower appellate Court, cannot be advanced in second appeal. 88 P.W.R. 1911 = 11 Ind. Cas. 408.

**—Abandonment of plea—Appellate Court—Point not appealed against.**

Appellate court cannot interfere with lower court's decree on a matter against which no appeal has been preferred. 9 Ind. Cas. 121 (Cal.).

**—Abandonment of plea—Point not pressed.**

If the appellant's counsel does not press his claim in the lower appellate court, it cannot be urged in second appeal. 5 N.L.R. 47 = 2 Ind. Cas. 29.

**—Irrelevant points—Whether can be re-opened.**

A point relevant to liability in a suit, which has been taken or may have been taken and abandoned, cannot be re-opened, but this principle does not apply to points which are irrelevant before decree. 62 Ind. Cas. 273 = 3 U.P.L.R. (All.) 11.

**—Abandonment of plea—Giving up grounds of relief.**

A party to a suit may give up any of the grounds of relief before the case is decided. 2 O.L.J. 335 = 30 Ind. Cas. 207.

**—Abandonment of plea—Proof—Statements in Judgments.**

A statement in a judgment that a point is not seriously pressed in the first court must be taken proof of its having been abandoned. 50 Ind. Cas. 743 (Cal.).

**—Abandonment of plea—Statements in Judgment—Misapprehension—Proof.**

The trial Judge found on the plaintiff's evidence and certain pedigrees produced by him that he was the nearest reversionary heir of a deceased Hindu. The court of appeal reversed the judgment and dismissed the suit, finding that the plaintiff had practically made no attempt to support the finding of the court below and that plaintiff was not entitled to succeed.

**Held**, by the Privy Council that the decree of the First Court must be affirmed, the evidence being sufficient to sustain it, and there having been some misapprehension on the part of the Lower Appellate Court in thinking that no attempt was made to support it. 30 All. 510 = 35 I.A. 166 = 13 C.W.N. 1 = 8 C.L.J. 447 = 5 A.L.J. 701 = 1 Ind. Cas. 175 (P.C.).

**2. Additional Evidence.**

See also C.P.C., O. 41, R. 27.

**—Additional evidence.**

Although the Court may not be justified in ignoring a new defence set up by the defendant, yet if the defendant is allowed to shift his ground after the plaintiff has closed his case the latter is *ex debito justitiae* entitled to rebut the defendant's evidence on the point. 120 Ind. Cas. 277 = A.I.R. 1929 Lah. 507.

**—Additional evidence—Ex parte decree—C. P. Code, O. 41, R. 27—Ex parte case—Formal evidence given.**

Where plaintiff in an *ex parte* case gave formal evidence to prove his case, he might be allowed to give further evidence in appeal from such decree, if the appellate Court disagrees with the decree of the lower Court. 50 Ind. Cas. 363 (Cal.).

**—Additional evidence—Appellate court—Evidence.**

The appellate Court cannot admit evidence which becomes relevant because of the discovery of some documents which were previously out of the reach of the parties. 21 C.L.J. 596 = 30 Ind. Cas. 398.

**—Additional evidence—Appeal.**

Where the importance of a document is realised for the first time in appeal, opportunity for proving the document should be given to the party affected by it. 21 C.L.J. 574 = 22 Ind. Cas. 833.

**—Additional evidence—Second appeal.**

In second appeal, the party cannot urge that he should have been allowed to adduce evidence which was dispensed with in the first court. 13 Bom. L.R. 1021 = 12 Ind. Cas. 691.

**—Additional evidence—Document not admitted in lower Courts—Admission in second appeal.**

A court of second appeal ought not to admit a document which the lower courts refused to admit on the ground that the same was not forthcoming at the first hearing of the case. 11 Ind. Cas. 289 (Oudh).

**—Additional evidence—Trial—Absence of defendant—Right of plaintiff to be allowed to adduce all his evidence.**

When at the trial of a suit, the plaintiff tenders only enough evidence to establish his claim owing to the absence of the defendant, and obtains a decree which is reversed on appeal, on the ground that the plaintiff had not sufficiently proved his case, the Appellate Court, before dismissing plaintiff's suit, should give him an opportunity of putting on record the additional evidence which he had filed in Court



but which he abstained from tendering owing to the defendant's absence. (1910) M.W.N. 612 = 8 M.L.T. 360 = 7 Ind. Cas. 494.

### 3. Adjournment.

See also—

- (1) C.P. CODE, O. 17.
- (2) Cr.P. CODE, Ss. 344 AND 526.
- (3) CRIMINAL TRIAL.

#### —Adjournment—Inherent power.

Every Court and every officer exercising quasi-judicial functions has an inherent power to grant an adjournment. 31 M.L.W. 587 = 1930 M.W.N. 373 = A.I.R. 1930 Mad. 618 = 59 M.L.J. 33.

—Refusal to postpone the hearing for an hour or two to give time for a party to appear can be hardly called proper. 108 Ind. Cas. 879 = 11 N.L.J. 78 = A.I.R. 1928 Nag. 165.

#### —Adjournment of a few hours.

Where on the date of hearing of a small cause case, the plaintiff was not ready with his evidence, but requested only two hours time to produce evidence.

Held, that the Court should grant the time as requested. 95 Ind. Cas. 679 (Lah.).

#### —Pending case.

No pending case should ever be postponed without a date being fixed. 93 Ind. Cas. 1056 = 7 L.R.A. (Cr.) 101 = 27 Cr.L.J. 560 = A.I.R. 1926 All. 421.

#### —Discretion.

It is in the discretion of the trial Court to allow a party to produce a witness for giving rebuttal evidence and to give adjournments for the purpose. 96 Ind. Cas. 1006 = A.I.R. 1926 Nag. 486.

—Medical certificate—Court should not distrust certificate and penalise party without summoning doctor. 74 Ind. Cas. 845 = 21 A.L.J. 500 = 4 L.R.A. (Civ.) 423 = A.I.R. 1923 All. 549.

#### —Party's default.

Where a case has been definitely fixed for hearing and witnesses have been called and expense has been incurred, if it should turn out that owing to some default on the part of one of the parties the Court has no power to hear the case, then apart from any express provision of law to that effect, the Court is not bound to adjourn the case and has discretion to dismiss it. 1921 P.H.C.C. 1 = 5 P.L.J. 390 = 57 Ind. Cas. 250 = 1 Pat. L.T. 666 = A.I.R. 1921 Pat. 76.

#### —Adjournment—Discretion of Court.

Where a case has been definitely fixed for hearing and witnesses have been called and expense incurred,

and if, owing to the default of one of the parties, the court has no power to hear the case, the Court has a discretion to adjourn or dismiss it, but apart from an express provision of law, is not bound to grant an adjournment. 5 Pat. L.J. 390 = 57 Ind. Cas. 250.

—Adjournment and [procedure—Notice of hearing—Parties not getting summonses not served in time—Court, power of.

When parties do not get summonses served on their witnesses in time for them to appear on the hearing day, the Court should deal with the case on the materials at the time before it. 7 Bur. L.T. 310 = 26 Ind. Cas. 240.

#### —Adjournment—Refusal.

At the first hearing, defendant represented that his witnesses were absent and applied for the issue of warrants against them and also for adjournment. The Court adjourned the hearing but did not pass orders on the application for warrants. The defendants took no steps to secure the attendance of his witnesses at the adjourned hearing, when he again prayed for a further adjournment.

Held, that the adjournment was rightly refused. 15 Ind. Cas. 584 (Mad.).

#### —Adjournment—Consent of parties.

A court must always consider the convenience of parties and any contingency which may necessitate an adjournment. But it is not the business of the parties to decide when their suit shall be heard as the regulation of its procedure is entirely in the Court's discretion. 13 Bom. L.R. 161 = 10 Ind. Cas. 748.

#### —Refusal—Prejudice—Retrial.

Where on the day to which a small cause suit had been posted for trial both parties applied for time on the grounds that one of the material witnesses was unwell, that another had not brought the documents summoned, and that a third had not been served, and the Court refused the adjournment and tried the case on the merits.

Held, that it was a proper case for the grant of an adjournment and there should be a retrial. 65 Ind. Cas. 599 (Cal.).

#### —Notice of—Signatures of pleaders of both parties on order sheet.

The form of the order sheet especially requires that signatures of the parties or their pleaders should be taken on the order sheet in token of information of the order of adjournment having been communicated to them. The statement in the order sheet that the case was adjourned at the request of the pleaders does not necessarily imply that they actually came to



know of the date fixed. 93 Ind. Cas. 257 = 4 Pat. 440 = 7 P.L.T. 456 = A.I.R. 1925 Pat. 807.

#### — Adjournment—Costs.

When a case is adjourned, the court should not direct immediate payment of the costs but should direct that the hearing on the adjourned date should be conditional on payment of costs before that date. 36 Cal. 566 = 13 C.W.N. 525 = 11 C.L.J. 150 = 1 Ind. Cas. 366.

#### 4. Administration.

See also (1) ADMINISTRATION. (2) C.P. CODE, O. 20, R. 13.

#### —Administration—Accounts, if may be examined by Court.

The account of the administration need not be investigated by the court, there being no procedure or practice for doing so. 18 C.W.N. 320 = 24 Ind. Cas. 447.

#### —Administration suit by members of family.

In a non-administration suit by one member against another member of the family, the claim should be adjudicated upon on its own merits. 29 M.L.J. 704 = 18 M.L.T. 518 = 31 Ind. Cas. 322.

#### 5. Admissions.

See also—

(1) C. P. CODE, O. 12.

(2) EVIDENCE ACT, Ss. 18, 19 ET SEQ.

#### —Admissions—Pleadings—Admissions in—If can be resiled from.

Where the plaintiff based his claim on an indent alleged to have been signed by the defendant and filed it along with the plaint and the defendant admitted in his written statement the correctness of the averments made in the plaint and where subsequently he resiled from this admission and contended that the admission in the written statement was not in respect of that indent but another indent suppressed by the plaintiff.

Held, that in view of the fact that the indent was filed along with the plaint and was on the record when the written statement was filed, the defendant ought not to have been allowed to resile from the admission and to deny that that indent was the document in respect of which the admission in the written statement had been made. 120 Ind. Cas. 277 = A.I.R. 1929 Lah. 507.

—But where in a general claim for a large sum of money due in respect of professional services a defence was put forward explaining why the defendant refused to accept liability for a sum in excess of a certain amount and that sum was paid into Court in satisfaction of the entire claim and the plaintiff accepted the

sum in such satisfaction under Rule 377 of the Rules of Civil Procedure, Eastern Africa, but he never accepted it in any form which contained an admission that he had been negligent, or that he accepted the calculations by which the defendant had arrived at the amount.

Held, that so far as the plaintiff was concerned all to which he was bound to look was whether the money in Court was the sum which he was prepared to take in satisfaction of his claim, and he might have been influenced by many circumstances in making that decision.

Hence the acceptance of the amount under the words of the rule as satisfaction in full of the plaintiff's claim did not amount to an admission of the grounds of defence set up by the defendant. A.I.R. 1921 P.C. 231 (P.C.).

#### —Admissions—Suit on mortgage—Admission of portion of claim—Dismissal of suit, improper.

If in a suit on a mortgage, the mortgagor admits that a certain sum thought short of the amount claimed, is due to the plaintiff mortgagee, it is not proper to dismiss the suit altogether, on the ground that the mortgagee failed to produce the original mortgage deed. 30 Ind. Cas. 32 (Cal.).

—A Court is entitled to disregard an admission, if it finds its truth inconsistent with other reliable evidence. 98 Ind. Cas. 821 = A.I.R. 1927 All. 175.

#### —Admissions must be taken as a whole.

Where an admission by witness examined by opposite party is relied upon, the whole admission must be taken into consideration. 60 Ind. Cas. 482 (Pat.).

#### —Admission—Adoption—Issue not definitely raised.

The plaintiff claimed the suit properties as the son of his father. The defendant at an early stage of the case, without protest or objection by the plaintiffs, made the case that the plaintiff had been adopted into another family. Deeds under the hands of plaintiff and his natural father containing express statements to that effect were given in evidence by the defendant. Questions directed more or less pointedly to the matter were addressed to the plaintiff's witnesses. Evidence was given by and on behalf of plaintiffs to explain away the admissions and no suggestion was made on behalf of the plaintiffs that they were taken by surprise.

Held, that though it is to be regretted that a definite issue was not framed upon the point and the matter put beyond all controversy, yet in the circumstances of the case, there being no suggestion that the plaintiffs were not fully informed that the question of adoption would be raised, the finding could not on that account be disturbed. (1906) 4 A.L.J. 102 = 5 C.L.J. 115 =



9 Bom. L.R. 267 = 11 C.W.N. 321 = 17 M.L.J. 103 =  
29 A. 184 = 34 I.A. 27 (P.C.).

—Admissions—Defendants—Co-defendants.

An admission by one defendant will not bind another.  
22 Ind. Cas. 916 (Cal.).

6. Amendments.

- (a) Amendment of judgment and decree.
- (b) Amendment of pleadings.

- (a). Amendment of judgment and decree.

See also C.P.C., SS. 151, 152 AND 153.

—Amendment—Clerical error—Judgment—Review.

When during an appeal, an official receiver resigned, a successor was appointed and the High Court ordered the previous official receiver's name to be deleted, the High Court by mistake added his name in the judgment order, it was held that there was a mere clerical error and it ought to be corrected and there was no ground for review. *Quaere*: Whether the decision was vitiated by not bringing the succeeding official receiver on record. 5 L.W. 507 = 32 M.L.J. 520 = 40 Ind. Cas. 170.

—Amendment of decree—Delay—Effect.

On a mere question as to whether they should get such and such a sum of money or little more the Court should refuse to entertain application for amendment of decree after a considerable delay such as of 18 months unless there is a reason justifying delay. 50 C.L.J. 12 = 33 C.W.N. 958 = A.I.R. 1929 Cal. 676.

—Amendment—Decree—Appellate Court.

The lower court cannot add to the decree of the appellate Court a direction which has been omitted, though wrongly by the latter. 1 O.L.J. 193 = 24 Ind. Cas. 113.

- (b). Amendment of pleadings.

See also—

- (1) C.P.C., O. 6, R. 17.
- (2) PLEADINGS.

—Amendments—Appellate Court allowing defendant to raise the plea by allowing amendment—Plaintiff ought to have been allowed to meet the case.

A trial Judge after reserving judgment decided the case in the defendant's favour on an issue or a plea that had not, throughout the proceedings, been raised or tried. The Court of Appeal allowed the defendants to amend their plea so as to raise the defence discovered by the trial Judge.

Held, that an opportunity should have been afforded to the plaintiffs of dealing with the matters involved on the new basis which that amendment established. 122 Ind. Cas. 30 = 31 M.L.W. 12 = A.I.R. 1929 P.C. 306 (P.C.).

—Court—Power to amend plaint or to direct amendment of plaint.

The law does not authorise a Court to amend a plaint or to direct the amendment of the plaint. The Court can only allow the amendment of the plaint and, if the plaintiff chooses not to amend it, the Court has to decide whether the said suit as framed can proceed or not. 116 Ind. Cas. 890 = A.I.R. 1929 Lah. 820.

—Plea of limitation.

Where the Appellate Court ordered that the plaintiff be permitted to amend his plaint subject to the law of limitation, it is open to the lower Court to consider the question whether at the time when the amendment was allowed, a new suit on the cause of action would be barred by limitation or not. 110 Ind. Cas. 529 (Cal.).

—(Obiter).

A plaintiff cannot be allowed without amending his plaint to succeed in a case which directly negatives everything he has alleged in his plaint. 101 Ind. Cas. 346 = 33 M.L.T. 205 = A.I.R. 1927 Mad. 1116.

—Suit on allegation of tenancy falling—Plaintiff was not allowed to succeed on title.

The plaintiffs brought a suit on the footing that the defendants were their tenants. The defendants pleaded that they were not tenants under plaintiffs. The defendants proved their case. The third party whose title was set up by the defendants was not a party to the case. That party was in possession.

Held, that it was not open to the plaintiffs to shift their ground and claim to eject the defendants as trespassers and that the plaintiffs should not be allowed to amend or implead the said third party. 89 Ind. Cas. 103 = 6 L.R.A. (Civ.) 348 = A.I.R. 1925 All. 705.

—Where a plaintiff has framed his suit *bona fide* believing that consequential relief is not open to him and that he is entitled to a declaration, the Court would be justified in allowing him to amend the plaint even in appeal.

And the cases have been gone so far as to permit a plaintiff who is suspected of asking for a declaratory decree simply for the purpose of evading stamp duty, to amend his plaint at the appellate stage in the High Court upon its being shown that consequential relief was available and upon his offering to pay the neces-



sary Court-fee. 76 Ind. Cas. 347 = 2 Pat. 919 = 5 Pat. L.T. 315 = A.I.R. 1924 Pat. 310.

—C. P. Code, O. 6, R. 17.

Suit for pre-emption based on custom cannot be decreed on the basis of contract not set up. 65 Ind. Cas. 242 = 20 A.L.J. 15 = A.I.R. 1922 All. 5.

—Powers of Court.

The Courts do not sit as disciplinary bodies to punish parties for inept procedure when their right is clear, and no misunderstanding, surprise or prejudice can occur to the other side. Where the real meaning of the application is perfectly well understood by both parties, and by the Court, the application ought to be amended in suitable form. 63 Ind. Cas. 184 = 19 A.L.J. 549 = A.I.R. 1921 All. 321.

—Amendment—Reliefs.

Where in a suit upon a mortgage a decree for sale is asked for, the court can even at a late stage allow the plaintiff to amend the plaint by adding an alternative prayer for a simple money decree. 3 O.L.J. 164 = 34 Ind. Cas. 397.

—Amendment—Procedure—Pleadings.

Different procedure and sanctions, apply to (1) amending pleadings, (2) furnishing particulars and (3) presenting a pleading subsequent to written statement, though it may be that disobedience to an order to do any of them may have the same result (*i.e.*) adverse decision in the suit. (1915) M.W.N. 122 = 17 M.L.T. 48 = 26 Ind. Cas. 927.

—Amendment—Trial Court.

The order of amendment by the lower appellate Court is bad when the High Court directed an amendment to be made by the first Court. 19 C.W.N. 200 = 22 Ind. Cas. 778.

—Amendment—C.P.C., S. 27.

The plaintiff is entitled to an amendment under S. 27, C.P.C., if it is found that he along with others is interested in the suit debt, as partners. 17 B. 413, Foll. (1902) 27 B. 157 = 4 Bom. L.R. 968.

—Amendment—Party—Addition of.

Prayer for amendment is not to be refused merely because another party will have to be joined and against him the suit would be time-barred. 7 N.L.R. 43 = 10 Ind. Cas. 737.

—Written statement—Amendment of written statement—When allowed.

It is a general rule of pleading that the defendant must raise all such grounds of defence as if not raised would be likely to take the opposite party by surprise or would raise issues of facts not arising out of the

previous pleadings as for instance, release payment, performance, etc. So too all facts which show a subsequent discharge of a once subsisting cause of action must be specially pleaded, such, for instance, as that the defendant had paid the debt or that it had been released. The rule as to amendment of pleadings rests upon a deduction from the broad principle of estoppel. The test is whether owing to the party who wishes to amend having kept back either intentionally or through carelessness an attack or defence which he afterwards wishes to use and thereby placed his opponent in such a position that if the use of that defence or attack turns the scale against him, he could not be restored to the same position as he would have been in had it been disclosed to him at the proper time, then it cannot be allowed. (1909) 11 Bom. L.R. 926 = 4 Ind. Cas. 652.

—Plaint amendment to be allowed, when objection is taken for the first time in second appeal. See 11 C. W.N. 889 = 6 C.L.J. 410 = 34 C. 999.

—Amendment, when to be deprecated. 25 B. 337 = 27 I.A. 216 = 10 M.L.J. 368 (P.C.).

7. Appeal.

See also—

(1) APPEAL.

(2) C.P.C., SS. 2, 96, 100, 105 AND 107; O. 41 AND O. 43, R. 1.

- (a) Competency and Right of.
- (b) Connected suits.
- (c) Conversion into revision.
- (d) Court-fee.
- (e) Delay in filing.
- (f) Forum.
- (g) New Plea.
- (h) Procedure.
- (i) Reversing judgment.
- (j) Right of Respondent.
- (k) Miscellaneous.

(a). Competency and Right of.

—Appeal—Competency of Judge.

Provincial Insolvency Act, Ss. 43 and 48—Judge ordering prosecution under, is not disabled from hearing appeal from conviction. 71 Ind. Cas. 363 = 21 A.L.J. 90 = 24 Cr.L.J. 144 = 4 L.R.A. Cr. 12 = A.I.R. 1923 All. 193.

—Appeal—Maintainability—Parties—Non-contesting defendant left out in appeal by contesting defendants.

Where in an appeal by contesting defendants non-appearing defendants against whom proceedings were *ex parte* were left out, the subsequent appeal by the



plaintiff is not incompetent by reason of the fact that such defendants were not impleaded as parties respondents. 34 C.W.N. 642 = A.I.R. 1930 Cal. 748.

—An appeal against a decision is not incompetent merely because the appellant has subsequently filed a suit in pursuance of the adverse finding as a precaution. 11 P.L.T. 483 = A.I.R. 1930 Pat. 521.

#### —Second appeal.

Where the lower Appellate Court entertains an appeal which does not lie to that Court a second appeal lies against the decision of that Court. 122 Ind. Cas. 589 = 11 P.L.T. 156 = A.I.R. 1930 Pat. 280.

#### —Two appeals from same decree.

There is no legal bar to the institution of two suits on the same cause of action, although under S. 10, C. P. Code, one of them will have to be stayed; and the same rule applies to two appeals from the same decree. 114 Ind. Cas. 62 = 10 Lah. 447 = A.I.R. 1929 Lah. 1.

#### —Appeal—Competency.

Same Judge presiding over Small Cause Court and Township Court and by mistake trying suit of Small Cause nature as Township Court—No appeal lies from his decree. 121 Ind. Cas. 803 = 7 Rang. 809 = A.I.R. 1939 Rang. 139.

—It is not necessary or desirable that the law should regard an appeal as incompetent unless there is sound reason in principle. 119 Ind. Cas. 814 = 33 C.W.N. 359 = 56 Cal. 622 = A.I.R. 1929 Cal. 519.

—C.P. Code, O. 31, R. 6—Order for security and order for attachment combined—Combined order is not always proper—if combined order leads to doubt as to competency of appeal, benefit of doubt goes to appellant. 101 Ind. Cas. 9 = 31 C.W.N. 432 = A.I.R. 1927 Cal. 354.

—Doubt as to right of appeal—Appellant should get benefit. 97 Ind. Cas. 1038 = 30 C.W.N. 850 = 44 C.L.J. 414 = A.I.R. 1926 Cal. 1113.

—Right to—Parties requesting the Court to have a local inspection and agreeing to abide by its decision after such inspection—Right of appeal is not lost—Appeal.

Held, that the Court did not act as arbitrator nor the agreement before the Court in that case amounted to an agreement that the Court should act *extra cursum curiae*. The right of appeal of the parties is not therefore barred. 72 Ind. Cas. 149 = 47 Mad. 39 = 17 M.L.W. 303 = 1923 M.W.N. 154 = A.I.R. 1923 Mad. 444 = 44 M.L.J. 258.

#### —Appeal—Right to—Defendant—Dismissal of suit.

A defendant against whom the suit has been dismissed cannot appeal against the decree. 22 Ind. Cas. 916 (Cal.).

#### —Appeal—Right to Suit where appeal is open.

Where under the rules an appeal is provided against the order of a Municipal committee refusing refund of customs duty, a suit for compensation for such refusal is premature before the institution of the appeal even though the procedure by way of appeal may be onerous. 118 P.L.R. 1911 = 38 P.R. 1911 = 97 P.W.R. 1911 = 9 Ind. Cas. 1000.

#### —Appeal—Rights of—Party can contend for all legal consequences arising out of facts.

In an appeal so long as the facts given in the pleadings are not altered, it is open to a party to contend for the legal consequences arising out of those facts. 6 O.W.N. 1109 = A.I.R. 1930 Oudh 54.

#### —Appeal—Right subject to grant of leave—Procedure.

Wherever any matter is appealable only after leave to appeal has been obtained, the memorandum of appeal should be accompanied by a petition for such leave. 33 Ind. Cas. 773 (All.).

#### (b). Connected suits.

##### —Appeal—Connected suits.

C.P. Code, O. 2, R. 3—Connected suits decided by only one judgment—Only one defendant appealing—Other decrees are unaffected unless appellate decree affects them specifically. 1923 P.C. 118 (P.C.), Foll. 91 Ind. Cas. 121 = 2 O.W.N. 894 = A.I.R. 1925 Oudh 732.

—Two suits having common issue tried together—One appealable to District Judge while the other is to the High Court—Joint trial of both appeals demanded—Procedure.

The right way is to appeal to the District Judge from the decision appealable to that Court and an application for transfer should then be made to the High Court, but if the appellant has failed to adopt this course, it would be a manifest abuse of the process of Court to put the appellant to the unnecessary trouble of going first to the District Court when there is no intention of permitting that Court to take any action beyond registering the appeal. 101 P.R. 1912, Foll. 99 Ind. Cas. 682 = 27 P.L.R. 775.

#### (c). Conversion into revision.

See also C.P.C., S. 115.

##### —Appeal—Conversion into revision.

In a case where substantial justice has been done, the High Court will not convert a second appeal which



is found to be incompetent into a revision petition. 120 Ind. Cas. 174 (Lah.).

—The High Court has power to convert a Memorandum of Appeal into a revision petition in a suitable case. 63 Ind. Cas. 730 = 14 M.L.W. 85 = 1921 M.W.N. 487 = A.I.R. 1921 Mad. 612 = 41 M.L.J. 54.

—Appeal—Conversion into revisions—Technical objection—Revision.

The High Court can mete out substantial justice treat an appeal presented to it as a revision petition where technical objections as to adequacy of court-fees, etc., prevents its entertaining the appeal. 19 A. 142: 22 A. 380, Foll. (1917) M.W.N. 306 = 40 Ind. Cas. 846.

—Appeal—Conversion into revision.

Where an appeal filed in a matter wherein there is no such appeal, the appeal could be treated as revision under the special circumstances of the case. 3 O.L.J. 201 = 34 Ind. Cas. 689.

—Appeal—Conversion into revision.

An appeal was treated as a revision. 5 S.L.R. 61 = 10 Ind. Cas. 211.

—Appellate Court—Case filed as second appeal—Judge admitting it as revision—At the hearing it can be treated again as appeal even by the admitting judge. 98 Ind. Cas. 993 = 49 All. 178 = 24 A.L.J. 1036 = A.I.R. 1927 All. 120.

#### (d). Court Fee.

—Appeal—Court-fee.

Suit for accounts—Preliminary and final decrees—Single appeal from both is permissible but Court-fee merely in respect of final decree is not enough. 70 Ind. Cas. 392 = 14 M.L.W. 389 = 1921 M.W.N. 558 = A.I.R. 1921 Mad. 406.

—Appeal—Delay—Court-fee—Delay in payment.

According to the practice of the Madras High Court an order of the Admission Judge excusing delay in payment of deficient court-fee is subject to objections by the other side before the Court hearing the appeal and its decision therein. 1 L.W. 440 = 23 Ind. Cas. 946.

#### (e). Delay in filing.

—Appeal—Delay in filing—Implied extension of time by hearing appeal on the merits.

Held, that by allowing the appeal to be argued on the merits and deciding it, the High Court had in effect extended the time for filing the appeal. 43 Mad. 550 = 38 M.L.J. 444 = 22 Bom.L.R. 568 = 18 A.L.J. 489 = 28 M.L.T. 28 = 12 L.W. 92 = (1920) M.W.N. 419 = 2 U.P.L.R. (P.C.) 118 = 56 Ind. Cas. 163 (P.C.).

—Appeal—Delay in presentation—Procedure—Endorsement on memorandum of appeal.

The question of delay in presentation of an appeal is to be determined at the stage of admission and not to be postponed till the final hearing. If an appeal is presented out of time the court should endorse on it the date of presentation and direct notice to the Respondents. 43 Bom. 376 = (1919) M.W.N. 254 = 23 C.W.N. 753 = 21 Bom.L.R. 1148 = 46 I.A. 15 = 52 Ind. Cas. 897 (P.C.).

—Appeal—Delay in filing—Sufficient cause—Question of, to be determined before admission.

Where there is delay in filing an appeal the question of excusing it for sufficient cause ought to be determined at the stage of admission of the appeal after notice to respondent. The practice of admitting the appeal subject to objections at the hearing condemned. 41 Mad. 412 = 45 I.A. 25 = 34 M.L.J. 63 = 4 Pat. L.W. 54 = 16 A.L.J. 57 = 7 L.W. 156 = 23 M.L.T. 101 = 27 C.L.J. 253 = 2 P.L.R. 1918 = 22 C.W.N. 481 = 21 Bom L.R. 541 = 11 Bur. L.T. 121 = (1918) M.W.N. 906 = 43 Ind. Cas. 493 (P.C.).

#### (f). Forum.

—Appeal—Forum—Change in law—Effect of.

An appeal should lie to the Court to which an appeal lay at the time the suit was filed in spite of subsequent change in the law applicable to the case, whether the Act provides for an appeal or not. 118 Ind. Cas. 380 = 1929 A.L.J. 864 = 10 L.R.A. Rev. 600 = A.I.R. 1929 All. 756.

—The course of appeal is determined not by what the Court should have done but what the Court did or purported to do. 108 Ind. Cas. 400 = 29 P.L.R. 270 = A.I.R. 1929 Lah. 376.

—Suits—Valuation—Accounts, suit for—Jurisdiction—Appellate forum.

In a suit for accounts where the plaintiff has valued his claim at a sum not exceeding Rs. 5,000 the appeal against the preliminary decree passed in favour of the plaintiff lies to the Divisional Court and not to the Chief Court. When in a case appeal lies to the Chief Court but is filed in and heard by the Divisional Court and a further appeal is filed in the Chief Court, the further appeal may be converted into a first appeal if this course does not prejudice any of the parties. 87 P.L.R. 1909 = 4 Ind. Cas. 929.

#### (g). New plea.

—Modification regarding matters left undecided—Legality.

Where in a scheme suit the trial Court framed a scheme and at the same time permitted the parties to apply subsequently for further directions.



**Held**, that the Appellate Court cannot modify the scheme in respect of matters not decided by the trial Court. 12 Lah. L.J. 199. = 31 P.L.R. 1018 = A.I.R. 1930 Lah. 1056.

—New plea—Decision on facts found not bad.

Where the decision of the lower Court proceeds upon a ground of law arising out of facts as were either admitted or fully proved from the evidence on the record it cannot be objected on the ground of new plea having been entertained. 135 Ind. Cas. 840 = 7 O.W.N. 652 = A.I.R. 1930 Oudh 508.

—Appellant cannot be allowed to raise a point in argument long after limitation for appeal has expired, where such a point was not raised in the grounds of appeal. 67 Ind. Cas. 44 = 3 L.L.J. 165 = A.I.R. 1921 Lah. 228.

(h). Procedure.

—Appeal—Necessaries of—Formal order—Production.

Elementary practice both on the Original Side and in the English High Court is that an appeal lies not from what a Judge says but from what he orders and that what he orders is to be found in the sealed or signed formal order which is entered in the records of the Court. Apart from urgency or some special ground no appeal should be determined without the production of the formal order under appeal. 77 Ind. Cas. 83 = 24 Bom. L.R. 1111 = 47 Bom. 349 = A.I.R. 1923 Bom. 177.

—Appeal—Form of—Oudh Court—Persons jointly tried and convicted—Appeal on one petition and one copy of judgment, if valid.

In Oudh, it is not practice to permit persons convicted together and not in jail to prefer an appeal on one petition of appeal and one copy of judgment. 4 O.L.J. 82 = 18 Cr.L.J. 512 = 39 Ind. Cas. 480.

(i). Reversing judgment.

—Appeal—Reversing judgment—Decree reversed on some point only without expressing opinion on other points.

Where the Privy Council reverses a decree on one point only without expressing an opinion on other points, their judgment cannot be taken to have decided inferentially any other of those points in favour of the appellants merely because the appeal was liable to be rejected if the other points had not been decided in appellant's favour. 32 P.W.R. 1911 = 9 Ind. Cas. 966.

—Appeal—Reversal of order—Effect of.

The order of the High Court setting aside the order allowing an objection of limitation taken by the judg-

ment-debtor before the executing Court in a transferred decree, puts the parties in the same position, in which they were before the papers were returned by the executing court to the original trying Court; and so after the order the executing Court can proceed with the execution application, as if no order of Appellate Court allowing the objection was passed and no certificate required under S. 41 of the C.P. Code was sent. 58 Ind. Cas. 987 (Pat.).

(j). Right of Respondent.

—Appeal—Evidence.

Where a party has raised a matter in his grounds of appeal in the lower Court, he can support the judgment of that Court in second appeal by referring to documents which that Court disregarded. 116 Ind. Cas. 315 = A.I.R. 1928 Lah. 964.

—Appeal—Right of respondent to support decree.

When all the facts are before the appellate Court, the respondent can support the lower Court's judgment even on ground not taken in the Court below. 17 O.C. 108 = 24 Ind. Cas. 542.

—Appeal—Respondent's case.

A respondent can without filing cross-objections support the lower Court's judgment on all points which may have been found against him by the Lower Court on failure to do so, the appellate court will simply accept the findings of the lower court on those points. 24 Ind. Cas. 69 (Cal.).

—Appeal—Ex parte—First hearing of an appeal—Respondent not appearing—Right to appear at subsequent stages.

It is doubtful, whether a respondent who fails to appear at the first hearing can appear at subsequent stages as a matter of right. 24 Ind. Cas. 1007 (Mad.).

(k). Miscellaneous.

—Appeal—Acceptance of inadmissible evidence—If ground for interference.

Section 167, Evidence Act, provides that acceptance of inadmissible evidence is no ground for setting aside judgment or granting new trial, if there is new evidence upon which finding could be arrived at. It cannot be said that because inadmissible evidence has been admitted, the judgment is not in accordance with law. A.I.R. 1934 Pat. 55 = 150 Ind. Cas. 841.

—Appeal—Minor.

It would be simplifying procedure if an appeal were allowed to be preferred within the time allowed by law by another next friend, coupled with an application for the removal of the guardian ad litem on any of



the grounds mentioned in O. 32, R. 1, and if such an application is ultimately granted, the appeal may be treated as having properly filed. 124 Ind. Cas. 474 = 1930 A.L.J. 771 = A.I.R. 1930 All. 456.

**—Appeal—Pleader's fees—Appeals under S.47, C.P. Code.**

That appeals from orders under S. 47 appear in the same register as appeals in regular suits is no reason for regarding them as such for the purposes of calculating pleader's fees. 118 Ind. Cas. 816 = 6 O.W.N. 391 = A.I.R. 1929 Oudh 287.

**—Appeal—Review—Decree amended on review—Need for filing fresh appeal.**

It is possible for a party to make an application for review and at the same time before that is decided to file an appeal. The right course where parties adopt simultaneous remedies or endeavour to do so if the review measures are successful to any extent whatever is that a new decree should be drawn up and the party choosing to file an appeal should file it against the decree as it appears in its final shape.

Per **Suhrawardy, J.**—In a proper case the Court may grant time to a party to file an appeal from the final decree in the place of the appeal from the original decree. 34 C.W.N. 1002 = A.I.R. 1931 Cal. 323.

**—Refractory conduct—Party's deposition wrongly discarded—Party is justified in refusing to produce further evidence and obtaining a dismissal of application and appealing against the dismissal.** 91 Ind. Cas. 675 = A.I.R. 1926 Cal. 979.

**—Order setting aside ex parte decree cannot be challenged in appeal from the decree in the suit.** 24 All. 464; 25 All. 280; 3 A.L.J. 30; 14 A.L.J. 610, Foll.; 79 Ind. Cas. 69 = 5 L.R.A. (Civ.) 345 = A.I.R. 1924 All. 929.

**—Appeal—Execution proceedings—Interlocutory order.**

An appeal need not be preferred against every order in an execution proceedings. The aggrieved party may challenge in appeal from the final order, the propriety of interlocutory orders passed in the course of proceedings. 36 Cal. 422 = 9 C.L.J. 251 = 2 Ind. Cas. 338.

**—Appeal—Technical defect—Mere omission to frame an issue.**

If there is no issue framed on a question but the parties have adduced evidence and discussed it before the Court, and the Court decides it as if there was an issue about it, the decree need not be set aside in appeal on the ground merely that no such issue was framed. 96 Ind. Cas. 827 = 28 Bom. L.R. 743 = A.I.R. 1926 Bom. 384.

**—Appeal—Grounds.**

The Appellate Court did not in its judgment express a finding on one of the grounds of appeal which was as follows:—“7. That the lower Court should have held that the deed dated the 10th September, 1894, was executed for legal necessity.”

The deed of the 10th September, 1894, was a mortgage of the village Pakauri granted by the widow while she was in possession of a Hindu widow's interest in the estate. On that mortgage a decree for sale was made and at the sale the two-thirds share in the village claimed by the appellant was purchased by some of the defendants to this suit. The trial Court had found in this suit that the mortgage was not made for necessity.

The Appellate Court said in its judgment: “They the defendants denied the adoption and they denied the widow's power to adopt. They also plead that even if the adoption was proved, it could not affect the interest acquired by the purchasers before the adoption: on this last pleading no issue was framed and nothing has been said in argument in appeal. It must therefore be taken to have been dropped.”

**Held**, the question as to whether the mortgage was or was not granted for necessity was involved in the question as to whether the purchasers at the sale under the decree had acquired title by their purchase. Under the circumstances the lower Appellate Court was justified in holding as it did, that the only question which remained for it to decide in the appeal was the question as to the validity of the adoption. 73 Ind. Cas. 244 = 18 M.L.W. 88 = 26 O.C. 228 = 50 I.A. 179 = 1923 M.W.N. 620 = 38 C.L.J. 299 = 33 M.L.T. 289 = 10 O.L.J. 379 = 23 C.W.N. 790 = A.I.R. 1923 P.C. 90 = 45 M.L.J. 215 (P.C.).

**—Appeal—Letters patent—Whole case open.**

In an Appeal under Letters Patent, the whole case is open. 32 Mad. 95 = 4 M.L.T. 110 = 18 M.L.J. 497 = 1 Ind. Cas. 977.

**—Appeals (criminal) against acquittal by Sessions court on preliminary point—High Court could go into facts and need not remand.**

Where there was an appeal against an order of acquittal by a Sessions Court on a preliminary point, the High Court could go into the facts and come to a finding, and need not remand. 1901 A.W.N. 10.

**8. Appellate Court.**

See also NOTE 7 (H).

- (a) Absence of finding.
- (b) Duty of.
- (c) Evidence.
- (d) Onus.
- (e) Powers of.
- (f) Remand.
- (g) Miscellaneous.



## (a). Absence of finding.

## —Appellate Court—Absence of finding.

Point not mentioned in judgment was held to have been not pressed. 113 Ind. Cas. 465 = 56 Cal. 813 = 51 I.A. 74 = 33 C.W.N. 289 = 49 C.L.J. 112 = A.I.R. 1929 P.C. 50 (P.C.).

## —Inference of not pressed.

Where the lower Court failed to give any finding on the pleas of adverse possession and of limitation directly raised by the defendant, the Appellate Court did not draw a conclusion that the points which had not been determined by the lower Court were not pressed before it. 117 Ind. Cas. 663 = 29 P.L.R. 607 = A.I.R. 1929 Lah. 81.

—Plea—Judgment not referring to—Abandonment will be presumed. 68 Ind. Cas. 740 = A.I.R. 1923 Lah 124.

## (b). Duty of.

## —Appellate Court—Duty of—Criticism of lower Courts' decisions should be temperate and grounds of criticism should be stated.

It is wrong for an appellate Court to say of the judgment of the trial Court that from beginning to end it was full of misstatements and special pleading without specifying any of the alleged misstatements. It is no doubt the right and the duty of an appellate Judge to criticise fearlessly where necessity arises by pointing out judicial shortcomings in a lower Court but respect for the judicial office and common fairness require both that the criticism should be expressed temperately and that the grounds for the criticism should be stated. 123 Ind. Cas. 557 = 34 C.W.N. 593 = A.I.R. 1930 P.C. 170 = 58 M.L.J. 629 (P.C.).

## —“Local inspection.”

An Appellate Court is not bound to make any local inspection. 122 Ind. Cas. 685 = 1930 A.L.J. 452 = A.I.R. 1930 All. 127.

—A final Court of fact must always ascertain on evidence as to whether a case made out before it is one which can be sustained on the evidence and not depend merely on the admissions and statements of the counsels. A.I.R. 1930 Cal. 559 = 126 Ind. Cas. 715.

—Party alleging gross mismanagement of case in trial Court and calling upon appellate Court to take judicial notice of facts—Court is not bound to do so. 119 Ind. Cas. 881 = A.I.R. 1929 Pat. 559.

—C.P. Code, O. 34, R. 4—Appellate Court confirming lower Court's preliminary decree is not bound to fix period of six months for repayment. 118 Ind. Cas. 670 = 1929 A.L.J. 976 = A.I.R. 1929 All. 677.

—The chief functions of an appellate court is to redress the error of the court from whose decision it has jurisdiction to entertain an appeal. 72 Ind. Cas. 394 = 9 O.L.J. 543 = A.I.R. 1923 Oudh. 18.

—Appellate Court is bound to give decision only on those pleas which are urged and argued and not on every plea. 66 Ind. Cas. 935 = 3 L.L.J. 26 = A.I.R. 1921 Lah. 229.

## —Appellate Court—Duties of.

The functions of an Appellate Court are not the same in England and America as in India and consequently great care has to be exercised before the decisions based on practice and procedure of a highly technical character are followed in considering questions arising under the C.P. Code. 30 M.L.J. 379 = 19 M. L. T. 268 = (1916) 1 M.W.N. 223 = 33 Ind. Cas. 9.

## —Appellate Court—Duty of.

In an appeal the Appellate Court should not reverse the decree unless it is clearly shown to be erroneous. 12 Bom. L.R. 801 = 7 Ind. Cas. 986.

## —Appellate Court—Duty of—Decree dismissing claim—When to be set aside.

A decree dismissing a suit should not be set aside, unless the court of appeal can decree the plaintiff's claim, in whole or in part or direct the Lower Court to take some other action. 5 L.B.R. 11 = 2 Ind. Cas. 357.

## (c). Evidence.

## (i) Commission.

## (ii) Documents.

## (iii) Findings of fact.

## (i). Commission.

## —Appellate Court—Evidence on commission—Trial Court dependent on printed records alone—Weight to its appreciation.

In an action for damages for breach of contract brought by the respondents, shipowners, against the appellant a shipper, the latter admitted the contract and the non-performance of it, and pleaded that the contract had before breach been duly rescinded by mutual consent. All evidence upon the vital issue of rescission had before the hearing been taken on commission, and the Trial Judge had, therefore, not had the advantage of seeing the witness in the box. The Trial Judge held that the appellant had made good his plea of rescission and dismissed the suit with costs. On appeal, the Appellate Bench of the High Court, however, held that the appellant had failed to establish his case of rescission, and decreed the suit.

On further appeal to the Privy Council, held, that the judgment of the Appellate Court expressed on the evidence was the only conclusion judicially



permissible. 32 M.L.W. 223 = A.I.R. 1930 P.C. 309 = 123 Ind. Cas. 705 = 59 M.L.J. 1. (P.C.).

—**Bulk of evidence recorded on commission.**

No doubt a Court of appeal should not lightly interfere with a finding of fact by the trial Court. But when the bulk of the evidence is recorded on commission, that preponderating weight should not be attached to the findings of fact by the trial Court. 112 Ind. Cas. 722 = 23 S.L.R. 97 = A.I.R. 1928 Sind 179.

(ii). Documents.

—**Appellate Court—Evidence—Documents.**

Courts should refrain from sending for the records in an informal manner for the purpose of looking into documents which had never been legally tendered in evidence. A.I.R. 1930 Lan 750 = 126 Ind. Cas. 437.

—Document admitted in trial Court without formal proof—Appellate Court cannot reject on the ground of its not having been proved. 98 Ind. Cas. 301 = A.I.R. 1927 Mad. 60 = 51 M.L.J. 637.

—**Appellate Court—Construction of document.**

Where two inferences can be drawn in the construction of a document, the one chosen by the lower Court should be accepted. 46 Ind. Cas. 794 and 21 Bom. 91, Foll. 97 Ind. Cas. 293 = 27 P.L.R. 693 = A.I.R. 1926 Lah. 672.

(iii). Findings of fact—Interference.

—**Examination of witness—Judge taking witnesses out of hands of counsel and examining and cross-examining them—Propriety and effect of—Observations of trial judge as to demeanour of witness—Value of in appeal.**

It is improper for a trying Judge to take the witnesses out of the hands of counsel and examine and cross-examine them himself. Such a practice is undesirable and ought to be deprecated. Where the Judge does so, any significance that might attach to the observations of the trial Judge as to the demeanour of the witnesses is entirely lost, and the appellate Court in such a case will be entitled and indeed bound to attach no importance to the trial Court's remarks about the demeanour of the witness and to decide the case for itself on the record as it stands. 51 Bom. L.R. 523 = A.I.R. 1949 Bom. 346 = I.L.R. (1950) Bom. 110.

—**Appellate Court—Interference with findings of fact.**

Generally speaking it is undesirable for an Appellate Court to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit

which attaches to one or other of conflicting witnesses. Therefore, the view of the trial Judge should not be put aside on a mere contention or probabilities by the Appellate Court and in order to succeed the appellant must prove that the judgment appealed from is wrong and if all he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the other being right, he cannot succeed. A.I.R. 1915 P.C. 1 and A.I.R. 1922 P.C. 39, Foll. 6 O.W.N. 1046 = A.I.R. 1930 Oudh 108.

—**Appellate Court—Interference with finding.**

Trial Court—Opportunity to note demeanour of witnesses—Conclusion as to evidence being reliable—Interference by appellate Court. 7 O.W.N. 135.

—Appeal—Trial Court influenced by witness' demeanour—First appellate Court can come to a different conclusion. 99 Ind. Cas. 769 = A.I.R. 1927 Nag. 158.

—Finding of fact based on demeanour of witnesses should not be lightly set aside on appeal, but where finding is based on supposed discrepancies, Court of first appeal can give its own findings. 103 Ind. Cas. 163 = 5 Bur.L.J. 249 = A.I.R. 1927 Rang. 200.

—Disbelief in witness owing to his demeanour is generally not upset by Appellate Court. 94 Ind. Cas. 916 = 4 Rang. 513 = 1926 M.W.N. 489 = 3 O.W.N. 735 = A.I.R. 1926 P.C. 29 (P.C.).

—**Circumstances entitling Appellate Court to differ from trial Court.**

Where the Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence, but of the attitude, the trustworthiness of the witness, and of the effect of his whole demeanour in the witness box. 77 Ind. Cas. 63 = 29 C.W.N. 610 = 1 Rang. 451 = 2 Bur. L.J. 260 = 33 M.L.T. 361 = 1923 M.W.N. 711 = A.I.R. 1923 P.C. 156 = 46 M.L.J. 334 (P.C.).

—Witnesses' credibility—From demeanour trial Court alone can judge—If found upon arguments on proved facts then Appellate Court is equally competent, as the trial Court is, to judge. 70 Ind. Cas. 949 = 27 C.W.N. 414 = 17 M.L.W. 1 = 31 M.L.T. 307 = A.I.R. 1922 P.C. 315 (P.C.).

—Generally speaking it is undesirable to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which



attached to one or other of conflicting witnesses. 8 O.L.J. 4 = A.I.R. 1921 Oudh 42 = 61 Ind. Cas. 135.

—Appellate Court—Appreciation of evidence.

The Appellate Court should be guided in believing a witness by the impressions made on the judge who saw the witness' manner and demeanour, but other circumstances showing the contrary, if existing in the case, should be taken into account. 14 A.L.J. 1066 = 36 Ind. Cas. 427.

—Findings of fact of trial Court—Value to be attached—Question of pedigree.

The findings of the trial Court in pedigree cases, in so far as they are based on an appraisalment of the oral evidence are entitled to great weight, though the weight to be attached to them would not be so great as it would be if the trial Judge has based his decision on the worth of any witness on the demeanour of that witness while giving evidence. 22 Luck. 249 = 231 Ind. Cas. 203 = 1947 O.A. (C.C.) 83 = 1947 A.W.R. (C.C.) 83 = 1947 O.W.N. 197 = A.I.R. 1947 Oudh 164.

—Finding of fact—Lower Court not basing decision regarding credibility of witnesses on personal observation but merely giving argumentative reasons for view taken by it as to effect of evidence—Appellate Court can examine evidence again. A.I.R. 1930 Pat. 293 = 126 Ind. Cas. 369.

—The pronouncement of the trial Court with respect to the credibility of a witness ought not to be lightly set aside by the Court of appeal but it is within the rights of the Appellate Court to believe the evidence of a witness who is disbelieved by the trial Court, not on account of his demeanour in the witness box but because it thought that he was gained over by the other party on account of certain inconsistency or discrepancy in the evidence. A.I.R. 1930 Pat. 328 = 126 Ind. Cas. 897.

—An appellate Court ought not to set aside the decision of a trial Court based upon oral evidence without giving some substantial reason for differing from the findings of the trial Court before whom the witnesses had actually given evidence. 123 Ind. Cas. 390 = A.I.R. 1930 Pat. 568.

—Finding of fact—Oral evidence conflicting—No documentary evidence to balance either way—No sufficient balance of improbability to displace trial Judge's finding—Finding should not be disturbed. 112 Ind. Cas. 375 = 29 M.L.W. 155 = A.I.R. 1929 P.C. 15 (P.C.).

—Conflict between testimony of parties—No sufficient ground to reverse trial Court's judgment—Finding of reversal was disturbed. 111 Ind. Cas. 169 = 28 M.L.W. 737 = A.I.R. 1928 P.C. 277 (P.C.).

—Conflict in—Weight must be given to the impression of trying Judge. 90 Ind. Cas. 624 = A.I.R. 1926 Cal. 116.

—Findings of fact—Case depending on credibility of witnesses—Finding should not be disturbed unless clearly erroneous. 112 Ind. Cas. 375 = 29 M.L.W. 115 = A.I.R. 1929 P.C. 15 (P.C.).

—Where the trial Judge applies his mind fairly and intelligently to the examination of evidence the value of the Judge's opinion is very great. 121 Ind. Cas. 91 = 6 O.W.N. 725 = A.I.R. 1929 Oudh 469.

—No doubt the appellate Court is bound to have great weight to the fact that the trial Judge saw the witnesses, still it is not bound to accept the conclusion if it does not agree with it. 112 Ind. Cas. 20 (Oudh).

—It is the duty of the Court of appeal to consider the matter before it both as regards law and fact *de novo*, but where there is a decision upon facts depending upon the credibility of witnesses, the appeal Court ought not to interfere with the decision arrived at unless it is satisfied that the decision which was reached in the lower Court was wrong. 103 Ind. Cas. 700 = A.I.R. 1927 Cal. 830.

—It has been the practice of Sind J.C's Court following the practice of the Bombay High Court to accept the finding of fact of learned Additional Judicial Commissioner trying an original suit. 17 Bom. L.R. 455 : 39 B. 386, (P.C.), Foll.

Where the conclusion of the trial Judge turns on the construction of documents as well as on the appreciation of oral evidence, but the documents or the accounts of a Hindu family of Sind and the trial Judge is himself a Sindhi and a Hindu and is perfectly acquainted with the systems by which the joint Hindu families and separate Hindu families keep their accounts, the appellate Judge, if a member of another community and of another faith, would be reluctant in the extreme to vary the trial Judge's finding on facts concerning the incidents of a Hindu family. 97 Ind. Cas. 505 = 20 S.L.R. 295 = A.I.R. 1926 Sind 216.

—Appellate Court must discuss evidence independently and give its own finding. 97 Ind. Cas. 853 = 1 Luck. 489 = 3 O.W.N. 645 = 13 O.L.J. 696 = A.I.R. 1926 Oudh 578.

—Conjectural grounds.

Per Simpson, A.J.C.—It would not be right for an appellate Court to set aside the decision of the Court of trial on conjectural grounds of what might have happened in the face of the sworn testimony of what actually did happen.

Wazir Hasan, A.J.C.—Questions of fact may be decided by the trial Court on two different lines alto-



gether. One line may be the drawing of inferences from proved and admitted facts and a finding of fact on the other line may be founded upon credibility of witnesses alone. In the former case the Court of appeal is in as good a situation as the trial Court. The latter case may give rise to two positions: (1) Where the credibility of witnesses is based on their demeanour in the witness-box and impression which that demeanour creates on the mind of the Judge who sees and hears the witnesses. In such a case the finding of fact arrived at by the trial Court should not be lightly disregarded. On the other hand considerable weight should be attached to it, but the finding is not binding. The second position arises where the judgment of the trial Court is not founded on the demeanour of the witnesses and the impressions derived therefrom. In such a case the Court of appeal is free to come to its own conclusions as to the credibility of a particular witness. It is an unjust ridicule to characterize probabilities and presumptions of facts as conjectures. If probabilities and natural presumptions were ruled out of order the jurisdiction of Courts would be reduced to a wooden constitution. 93 Ind. Cas. 1025 = 2 O.W.N. 931 = 27 Cr.L.J. 529 = A.I.R. 1926 Oudh 120.

**—The decision in A.I.R. 1923 P.C. 156—General application of.**

The remarks of Privy Council in A.I.R. 1923 P.C. 156 on the duties of the Appellate Court on questions of fact should be read with reference to the special aspects of that particular case in which a witness had been examined at very great length and had been severely cross-examined by an able advocate and his credibility had been especially commented on, discussed and accepted by the Judge who had tried the case and challenged by the Appellate Court. It should not be treated as having a too general application. 89 Ind. Cas. 361 = 3 Rang. 177 = A.I.R. 1925 Rang. 308.

—The principle that Appellate Court should not reject trial Court's conclusions of facts except in exceptional cases, applies specially where the trial Judge is a judicial officer of great experience. 84 Ind. Cas. 415 = 3 Bur. L.J. 200 = A.I.R. 1925 Rang. 117.

**—Working rule is not to lightly interfere—But rule not to be pressed too far.**

In all cases where there is an appeal on questions of fact, it is a good working rule that the appellate tribunal will not lightly interfere with the findings of the fact of the Court below. This rule applies most strongly where there has been a conflict of oral testimony and the Judge had the advantage of seeing the witnesses and of observing their demeanour. But it is a rule which should not be pressed too far for there

are many cases where there has been a conflict of evidence in the Court below in which the Court of appeal is bound to give effect to its own view of it if it differs from that of the Judge, *e.g.*, probabilities may be strongly against the view of the Judge or there may be documents consistent with the evidence of appellant and inconsistent with that of respondent, etc. The demeanour of witnesses is not invariably a safe guide to the truth of their evidence. 70 Ind. Cas. 736 = 1922 M.W.N. 434 = 31 M.L.T. 40 = A.I.R. 1923 Mad. 103 = 43 M.L.J. 199.

**—Trial Judge's opinion as to veracity of witnesses—Weight of.**

The verdict of a Judge trying the case should not be lightly disregarded by the Appellate Court where the issue is simple and straightforward and the only question is, which set of witnesses is to be believed. But where the determination of the question of genuineness of anything depends not merely upon the assertion of witnesses but upon surrounding facts and circumstances whose existence is either admitted or indisputably proved, the judgment of the trying Judge may be vitiated by his failure to test the veracity of the witnesses by reference thereto. Two conflicting viewpoints have thus to be reconciled, namely, on the one hand, the undoubted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences and conclusions and on the other hand, the unquestionable weight which must be attached to the opinion of the Judge of the Primary Court, who had the advantage of seeing the witnesses and noticing their look and manner. 66 Ind. Cas. 782 = 49 Cal. 132 = 34 C.L.J. 384 = 25 C.W.N. 779 = A.I.R. 1922 Cal. 260.

—An appellate Court ought not to differ from the trial Court on questions of fact unless there are strong and weighty reasons for doing so. The appellate Court has, however, certain responsibilities, as an appellate Court and it is bound to examine the evidence with a view to see whether the trial Court in giving its judgment did not misdirect itself. 67 Ind. Cas. 57 = A.I.R. 1922 Pat. 111.

—Appellate Court should be convinced that Trial Court's decision is wrong before upsetting it—Due allowance should be made to Trial Courts having seen and heard the witnesses. 66 Ind. Cas. 745 = 34 C.L.J. 178 = 25 C.W.N. 519 = A.I.R. 1921 Cal. 543.

**—Appellate Court—Findings of fact—Appreciation of evidence.**

Per Richardson:—A Court of Appeal should in general be slow to differ from the trial Court on a question of fact depending on the credibility and veracity of witnesses. But there are cases where the trial Judge had approached the evidence from a wrong



stand-point or has applied to that evidence wrong standards of probability or improbability. If a trial Judge says that a servant speaking for his master ought never to be believed, the appeal Court is not obliged to accept his estimate of the servant's evidence. In such a case the question is not merely a question of the credibility of the particular witness but the witness has not been given a fair chance. They are verdicts or findings which are contrary to the weight of evidence. 24 C.W.N. 800 = 58 Ind. Cas. 879.

#### —Appellate Court—Finding of fact.

Appellate Court may arrive at a finding as to intention if omitted by the trial Judge provided the trial was without jury. 47 Cal. 254 = 31 C.L.J. 209 = 24 C.W.N. 425 = 21 Cr.L.J. 522 = 56 Ind. Cas. 778.

#### —Appellate Court—Evidence—Appreciation of.

Where the appellate Court disagrees with the finding of the trial Court, it should come to an independent finding of its own upon the evidence on record. 56 Ind. Cas. 248 (Cal.).

#### —Appellate Court—Findings of fact—Interference.

A court of appeal should be slow to differ from the primary court on a question of estimate of oral testimony. But this rule does not apply to a case where some of the important witnesses never appeared before the Judge but were examined on commission and others examined by the appellate Court itself. 30 C.L.J. 475 = 24 C.W.N. 662 = 55 Ind. Cas. 689.

#### —Appellate Court—Question of fact—Decision of trial Judge, not to be lightly set aside.

Where the issue involves a simple question of fact to be decided chiefly, if not solely on oral evidence, a court of appeal should be slow to set aside the finding of the trial judge who had the witnesses before him. 30 C.L.J. 433 = 54 Ind. Cas. 736.

#### —Appellate Court—Findings of fact—Appreciation of evidence.

Per Kanhaiyalal, A. J. C.—The object of an appeal is to obtain a pronouncement from the Appellate Court both on law and facts, and the discretion of the Appellate Court is unrestricted. In many instances a trial Judge is in a better position to appraise the value of the oral evidence before him and where the issue is simple and straightforward, the findings of facts arrived at by him are entitled to weight. But where the evidence in a particular case, consists of the statements of the persons whose evidence is tainted, and there are circumstances showing that the signature and the handwriting of the alleged testator on the will are not genuine, the Appellate Court would look into the evidence as a whole and come to such conclusion as the materials placed before it and the circumstances

proved might justify. 6 O.L.J. 178 = 51 Ind. Cas. 419.

#### —Appellate Court—Findings of fact by trial Judge.

Per Seshagiri Iyer.—The question which an appellate Court has to put before itself on a question of fact is not what its decision would have been, had it been the trial Court, but whether there are sufficient grounds for not accepting the conclusion of the trial Court. (1919) M.W.N. 52 = 9 L.W. 385 = 25 M.L.T. 204 = 49 Ind. Cas. 929.

#### —Appellate Court—Findings of fact—Reversal of.

A court of appeal should not readily disturb the findings of fact arrived at by the trial Judge even if it might be inclined to take a different view from reading the evidence but if the Appellate Court is satisfied beyond all reasonable doubt on considering the evidence that the findings were erroneous then it ought to interfere. 3 Pat. L.J. 663 = 7 Pat. L.W. 1 = (1919) P.H.C.C. 162 = 48 Ind. Cas. 625.

#### —Appellate Court—Question of fact—Weight due to the trial court's decision.

Where a case has been decided on oral evidence weight should be given by the Appellate Court to the opinion of the trial Judge who saw and heard the witnesses. The Court of Appeal should not allow an appeal unless it is satisfied that the Court below is wrong, the burden of proof being upon the appellant to show grounds for reversal. 28 C.L.J. 306 = 48 Ind. Cas. 561.

#### —Appeal—Finding of fact—Not attacked.

The Court should not question a fact not disputed by the parties themselves. 3 O.L.J. 367 = 35 Ind. Cas. 713.

#### —Appellate Court—Finding of fact—Collision cases—Decision of trial Judge—Weight to be attached to.

In collision cases, where questions of fact alone arise, a Court of Appeal should be most slow to interfere with the decision of a trial Judge who sees the witnesses and has the opportunity of forming his estimate of them by their demeanour. In exceptional cases and for special reasons such a Court should reverse the judgment of the trial judge on questions of fact. 20 C.W.N. 1022 = (1916) 1 M.W.N. 446 = 31 M.L.J. 159 = 4 L.W. 176 = 35 Ind. Cas. 193 (P.C.).

#### —Evidence—Appreciation of—Appellate Court.

When the appellate Court reverses a finding of fact it ought to apply its mind to the consideration of the whole evidence in the case. 31 M.L.J. 311 = (1916) 2 M.W.N. 133 = 20 M.L.T. 228 = 35 Ind. Cas. 421.



**—Appellate Court—Questions of fact—Opinion of trial Judge—When to be differed.**

The opinion of a trial judge on a question of fact proved after seeing the witnesses and hearing their evidences ought not be differed from by the Court of appeal except upon very clear grounds. 20 C.W.N. 304 = 23 C.L.J. 314 = 34 Ind. Cas. 707.

**—Appellate Court—Duties of—Weighing of evidence.**

The appellate Court must weigh conflicting evidence and draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, should make due allowance in this respect. If the decision of a question depends to a large extent upon the verbal evidence of witnesses examined before the trial Court which had the advantage of seeing and hearing the witnesses, the Appellate Court ought not to interfere with such a decision unless it is clear that Court has come to a wrong decision. Per Woodroffe, J.—If after arguments an appellate Court has a conviction that the judgment under appeal is erroneous, it should not be affirmed and this is not the less so because the judgment raised a question of fact. 43 Cal. 833 = 23 C.L.J. 190 = 34 Ind. Cas. 807.

**—Appellate Court—Finding of fact on oral evidence by trial Judge—Weight due to.**

Upon a question of fact, great weight ought to be attached to the opinion of the trial judge who had the advantage of seeing and hearing the witnesses and who might presumably be acquainted with the manners and customs of the people among whom the transactions in question is alleged to have occurred. 43 Cal. 707 = 43 I.A. 73 = 20 C.W.N. 802 = 14 A.L.J. 621 = (1916) 1 M.W.N. 406 = 31 M.L.J. 1 = 18 Bom. L.R. 490 = 3 L.W. 556 = 24 C.L.J. 116 = 20 M.L.T. 267 = 23 Ind. Cas. 583 (P.C.).

**—Appellate Court—Appreciation of evidence—Trial Judge—Opinion of—Will.**

On a question as to the truth of a verbal authority to adopt given by the deceased the view of the judge who tried the case and saw the witnesses is entitled to great weight. (1916) 1 M.W.N. 377 = 4 L.W. 587 = 20 C.W.N. 650 = 33 Ind. Cas. 852 (P.C.).

**—Appellate Court—Findings of fact—Reversal of—Reasons should be shown.**

Judges on appeal although they might have come to a different conclusion had they been judges in the first instance should be shown strong reason to reverse findings of a judge of first instance who has seen and heard the witnesses examined before him. 20 C.W.N. 760 = 1 Pat. L.J. 48 = 3 Pat. L.W. 405 = 33 Ind. Cas. 711.

**—Appellate Court—Oral evidence—Weight due to opinion of trial Judge.**

It is no doubt true that on appeal the whole case including the facts are within the jurisdiction of the Appeal Court. But where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the finding of fact of the trying judge who has seen and heard the witnesses and has had an opportunity of noting their demeanour,

should not be lightly disregarded. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Appellate Court. 39 Bom. 386 = 42 I.A. 110 = 19 C.W.N. 617 = 17 M.L.T. 408 = 28 M.L.J. 593 = 21 C.L.J. 528 = 17 Bom. L.R. 455 = 2 L.V. 521 = (1915) M.W.N. 788 = 29 Ind. Cas. 229 (P.C.).

**—Appellate Court—Findings of fact—Interference.**

Where the case is one not so much of estimate of credibility of witnesses who have been believed by the trial Court as of the effect of their statements, on the assumption that they have spoken the truth the appellate Court will refuse to adopt the conclusion of the trial Court if good grounds are shown. 20 C.L.J. 501 = 19 C.W.N. 826 = 27 Ind. Cas. 276.

**—Appellate Court—Appreciation of evidence—Evidence conflicting.**

In the case of conflicting evidence the Appellate Court in order to arrive at a proper appreciation of the same, must attach a great regard for the opinion formed by of the trial Judge in whose presence the evidence was given. 22 Ind. Cas. 512 (Cal.).

**—Appellate Court—Finding of fact.**

The appellate Court should be very careful in disturbing the finding of the lower Court based on facts when the Court, who heard and was them disbelieves them. 10 M.L.T. 304 = (1911) 2 M.W.N. 330 = 12 Ind. Cas. 393.

**—Evidence—Appreciation of—Appeal.**

Where the questions at issue entirely depend on a proper appreciation of the evidence of the witnesses in the case, the appellate tribunal is not to disturb the conclusion of the first court unless the Judge of the Court has, in dealing with the evidence of witnesses before him, adopted an erroneous procedure and has decided against the clear weight of evidence. 11 M.L.T. 38 = (1911) 2 M.W.N. 495 = 12 Ind. Cas. 751.

**—Appellate Court—Function and duty of.**

Per Abdur Rahim, J.—The appellate tribunal ought not to refuse to apply in judging of the truth of the evidence given by hill people, the general tests of probability which are based on universal experience of human conduct. The application of such tests may have to be modified to some extent but we cannot altogether exclude those tests in dealing with the evidence of his tribes. Per Ayling, J.—In the case of witnesses of a primitive type, the advantage of hearing them depose is unusually great and the remarks of the first Court as to the impression left on its mind by their demeanour seem to deserve considerable weight. Per Coutts Trotter, J.—The knowledge of locality and people of the trial Judge is relevant on the point as to what weight should be attached to his opinion. 7 Cr.L.R. 147 (Mad.).

**—Appellate Court—Finding of trial Judge.**

Where there is a finding of the trial judge as to due and proper execution of will, based on evidence the Appellate Court should not upset it without cogent reasons. 32 Mad. 400 = 10 C.L.J. 276 = 11 Bom. L.R. 1206 = 6 M.I.T. 304 = 19 M.L.J. 640 = 36 I.A. 185 = 3 Ind. Cas. 799 (P.C.).



— If a particular finding of the trial Court is accepted by the appellant in his grounds of appeal, the Appellate Court cannot go behind such a finding and the fact that appellant's pleader acted carelessly in drafting the grounds is not material. 59 Ind. Cas. 689 = 44 P.L.R. 1921 = A.I.R. 1921 Lah. 182.

#### 8 (d). Onus.

— Appellate Court—Onus—Unsuccessful party seeking to reverse decision has heavy burden to discharge.

The trial Court on giving a considered judgment ten days after the last hearing in Court found that the story of the adoption was untrue, that the alleged will was fictitious and dismissed the suit. He founded his decision partly on the demeanour of the plaintiff's witnesses, partly on inconsistencies in their testimony and partly on the improbabilities of their story as tested by subsequent conduct. He believed the witnesses for the defendants. The Appellate Court reversed the finding of fact but its judgment did not show that the then appellant-plaintiff had discharged the heavy burden of showing that the decision was wrong. In these circumstances Privy Council restored the trial Court's finding. 123 Ind. Cas. 557 = 34 C.W.N. 593 = A.I.R. 1930 P.C. 170 = 58 M.L.J. 629 (P.C.).

— Appeal—Onus—Appellant must show good reasons to disturb trial Court's judgment.

When the plaintiff's witnesses and the defendant's witnesses have sworn to diametrically opposite stories and in which the probabilities are evenly balanced, the appellants must show to the Appellate Court good reasons for disturbing a careful and considered finding of an intelligent Judge. 105 Ind. Cas. 479 = 1 L.C. 508 = A.I.R. 1927 Oudh 485.

— Duty of appellant.

It is the duty of the appellant to satisfy the Court of appeal that the decision of the trial Court is erroneous. 84 Ind. Cas. 732 = 40 C.L.J. 303 = A.I.R. 1925 Cal. 224.

— Appellant will fail if he can show only that nicely balanced calculations make the possibility of judgment of the lower Court being either right or wrong. 83 Ind. Cas. 563 = 11 O.L.J. 87 = A.I.R. 1924 Oudh 326.

— Onus is on appellants to show that lower Court's judgment is wrong. 63 Ind. Cas. 898 = 25 C.W.N. 866 = 17 N.L.R. 72 = A.I.R. 1921 P.C. 55 (P.C.).

— Appellate Court—Questions of fact—Procedure.

On appeal the appellate Court is not bound to accept the decision on facts of the Lower Court. The appellant should however satisfy the Appellate Court that the judgment of the lower Court is erroneous. 20 C.W.N. 66 = 32 Ind. Cas. 53.

— Appellate Court—Question of fact—Will—Genuineness.

On questions of fact the onus is on the appellant who invites the appellate judges, who have not heard or seen witnesses, to overrule the decision of judges

who, after a prolonged and elaborate enquiry have arrived at the conclusion that they could not believe the evidence called in support of a Will. 13 C.W.N. 782 = 5 M.L.T. 384 = 3 Ind. Cas. 997 (P.C.).

#### 8 (e). Powers of.

See C.P.C., SS.107 AND 108, O. 41, R. 33.

— Appellate Court—Powers of.

Appellate Court can go into matter clearly in issue but for which no distinct issue is framed. A.I.R. 1930 All. 525.

— Part of case not set out in plaint but coming within issue framed, from documents and materials on record—Court of first appeal can allow it to be agitated before it. 11 Pat. L.T. 637 = 124 Ind. Cas. 385 = A.I.R. 1930 Pat. 7.

— Ground not taken in memo. should not be gone into.

Where an objection is not taken in the written statement and the matter is not discussed in trial Court and is not mentioned in grounds of appeal the Appellate Court should not go into the question at all. 120 Ind. Cas. 455 = 49 C.L.J. 555 = 33 C.W.N. 559 = 57 Cal. 10 = A.I.R. 1929 Cal. 651.

— Issue not properly decided by the trial Court—Appellate Court may reverse the judgment but cannot send the issue for retrial. 114 Ind. Cas. 409 = 32 C.W.N. 867 = 49 C.L.J. 1 = 56 Cal. 6 = A.I.R. 1928 Cal. 546.

— Appellate Court—Powers of.

Appeal against order rejecting application for setting aside *ex parte* decree—Appellate Court can decide the case finally treating it as appeal against *ex-parte* decree itself. 97 Ind. Cas. 313 = 45 C.L.J. 117 = A.I.R. 1926 Cal. 1232.

#### 8 (f). Remand.

— Appellate Court—Remand.

It is not desirable to direct a remand in a case which has been tried on various issues not preliminary ones and has already involved parties on great labour, time and expense with regard to adducing evidence. If in such a case the Appellate Court finds that the suit is bad for multifariousness the Judge should put the plaintiffs upon their election or strike out a particular party from the array of defendants and proceed with the trial of the appeal upon all questions of law and fact which are raised before him. 123 Ind. Cas. 324 = 1930 A.L.J. 99 = A.I.R. 1930 All. 180.

— In the above absence of proof of some fact within Evidence Act, S. 32, what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so, grant a remand. 104 Ind. Cas. 733 = 46 C.L.J. 253 = A.I.R. 1927 Cal. 855.

— Finding not based on pleadings and inconsistent with them—Retrial.

Where the lower Court up held the plea of estopped on grounds which were not only not pleaded in the written statement, but which were inconsistent with



what was stated therein and with regard to which no issue had been framed :

**Held**, that there was no proper trial of the suit in the lower Court and it should be remanded for retrial. 106 Ind. Cas. 474 = 28 P.L.R. 303 = A.I.R. 1927 Lah. 802.

#### —Appeal—Remand.

Burden of proof shifted in appeal—Remand should be ordered. 99 Ind. Cas. 4 = A.I.R. 1927 Lah. 148.

—Findings—Finding of lower Court—Unsatisfactory—Proper way is to send the case back—Judgment in favour of opposite party should not be passed. 96 Ind. Cas. 551 (Pat.).

### 8 (g). Miscellaneous.

#### —Appellate Court—Finally of order.

When the appellate Court makes an order, the subordinate Court is bound to carry it out whether it is right or wrong, and it has no jurisdiction to question the propriety of such an order which can only be corrected by way of appeal from order of the appellate Court or by review, if that is allowed by law. 110 Ind. Cas. 529.

#### —Appellate Court—Contempt.

Contempt of Court case which should have been tried by a Magistrate though tried by the Court itself is not in valid. 94 I.L.J. Cas. 532 = 53 Cal. 401 = 43 C.L.J. 41 = A.I.R. 1926 Cal. 701.

#### —Appellate Court—Expunging remarks—Only way of interference.

Where the judgment of the lower Court contained a passage which on appeal was found to be unnecessary for the purpose of the case.

**Held**, that the only way in which High Court could interfere with it would be to order that particular sentence to be expunged from the judgment. 78 Ind. Cas. 844 = A.I.R. 1924 All. 724.

### 9. Arguments.

#### —Argument.

Court has no power to cut short counsel's argument unless they are irrelevant and involve repetition—Legal practitioner. 107 Ind. Cas. 763 = 29 Cr. L.J. 279 = A.I.R. 1928 Lah. 319.

—Practice of allowing counsel or vakil to file memorandum of arguments in writing was condemned. 111 Ind. Cas. 849 = 28 M.L.W. 511 = 1928 M.W.N. 788 = 1 M. Cr.C. 293 = 29 Cr.L.J. 929 = A.I.R. 1928 Mad. 1130 = 55 M.L.J. 712.

—Pleader—Notes of arguments by pleaders should not be submitted to Court—If submitted must first be submitted to the other party's pleader and then to Court. 73 Ind. Cas. 706 = 37 C.L.J. 42 = A.I.R. 1921 Cal. 425.

### 10. Burden of proof.

#### See also—

- (1) C.P.C., O. 21 Rs. 58 AND 63.
- (2) CRIMINAL TRIAL—BURDEN OF PROOF
- (3) EVIDENCE—BURDEN OF PROOF.
- (4) EVIDENCE ACT, SS. 101 TO 114.

#### —Burden of Proof.

A party can sustain the **onus** cast on him by eliciting the necessary facts by cross-examination of the opposite party's witnesses and not necessarily by adducing evidence on his own side. 122 Ind. Cas. 378 (Nag.).

#### —Burden of proof—Evidence.

If a burden of proving some issues is laid on the plaintiff and of others on the defendant, the plaintiff, can reserve his case and produce rebutting evidence after defendants evidence only on those issues the burden of proving which is laid on the defendant. 66 P.R. 1911 = 104 P.L.R. 1912 = 190 P.W.R. 1911 = 12 Ind. Cas. 862.

—Where the evidence on both sides has been weighed, the question of burden of proof possesses little real importance in appeal. 122 Ind. Cas. 378 (Nag.).

#### —Burden of proof—Immaterial after evidence.

Whether a piece of evidence is enough for discharging the burden of proof depends upon the weight to be attached to that evidence and is not a question of law. So where each party had adduced evidence to prove or disprove an issue, the importance of the burden of proof disappears almost entirely. 13 M. 394, 34 A. 511 : 24 M.L.J. 517, Foll. 28 M.L.J. 92 = 26 Ind. Cas. 899.

#### —Burden of proof—Immaterial after evidence tendered.

A Court should weigh the evidence tendered as a whole without paying much heed to the arguments as to the allocation of burden of proof, treat the pleadings of parties as admissions and endeavour to arrive at a clear finding upon the facts involved. 1 O.L.J. 591 = 26 Ind. Cas. 547.

#### —Burden of proof—Question—Immaterial—After evidence.

There can be no question of burden of proof when the Court has only to determine the case on evidence fully recorded on both sides. 37 Ind. Cas. 353 (Pat.).

—Plaintiff has to prove his own title—Showing that defendants' title is weak is not enough. A.I.R. 1929 Lah. 868.

—A plaintiff must always succeed on the strength of his own title and on the weakness of the defendant's title. 119 Ind. Cas. 337 = 6 O.W.N. 549 = A.I.R. 1929 Oudh 494.

—A claimant cannot succeed without giving **prima facie** proof in support of his case whether he be a plaintiff or a defendant. 97 Ind. Cas. 1023 = A.I.R. 1927 Nag. 32.



—Burden of proof—Plaintiff must succeed or fail on his own allegations.

The Plaintiff vendor, sued for a part of the consideration alleging that the defendants had orally agreed to pay the amount in cash, though fictitiously entered in the sale deed, as due to certain creditors of his and to be paid by the vendee to prove 'necessity'. In his oral statement the plaintiff said that the amount was entered fictitiously to defeat pre-emptors. The claim though allowed by the original Court was rightly rejected on appeal. 40 P.L.R. 1910 = 8 Ind. Cas. 230.

—Party voluntarily assuming burden cannot afterwards change position.

When a party by its pleadings and conduct volunteers to bear the burden of proving a particular thing, it cannot afterwards turn round and say that the burden was on the other party, especially when its action in promising to produce certain documents must have had the effect of preventing the party on whom the burden would really have been placed to produce from producing these documents. 95 Ind. Cas. 743 = 24 A.L.J. 593 = A.I.R. 1926 All. 497.

—Burden accepted once and attempted to be discharged—Party cannot complain subsequently. 4 L.L.J. 426 = A.I.R. 1921 Lah. 284.

—Burden of proof—Change of, on appeal—Remand.

Where an appellate Court changes the allocation of the burden of proof, it should remand the case to the first court to enable the party, on whom it has been placed, to adduce evidence in support of the issue. 98 P.R. 1910 = 36 P.L.R. 1911 = 8 Ind. Cas. 1153.

—Burden of proof of minority.

The burden of proof as to his minority lies on the minor. Where there is no *prima facie* evidence of minority, it does not matter in the least whether the evidence adduced by the opposite party on the point is sufficient to show that the minor was a major at the time in question. A.I.R. 1940 Rang. 191 = 1940 Rang. L.R. 481 = 191 Ind. Cas. 21.

—Plea of Act of State.

Where there existed a right either admitted or that could be established by decree of Court, and that right, it was alleged, was taken by an Act of State.

Held, it would be necessary so specifically to plead but the moment that Cession is admitted the subjects necessary become petitioners and have the *onus* cast on them of showing the acts of acknowledgment, which give them the right they wish to be declared. 82 Ind. Cas. 779 = 21 M.L.W. 28 = 1924 M.W.N. 694 = 48 Bom. 613 = 51 I.A. 357 = 22 A.L.J. 951 = 5 L.R.P.C. 199 = 26 Bom. L.R. 1143 = 40 C.L.J. 473 = 29 C.W.N. 317 = A.I.R. 1924 P.C. 216 = 47 M.L.J. 574 (P.C.).

—Burden of proof—Bona fide purchase.

The proposition that the defence of a bona fide purchaser for value without notice is a single defence and cannot be split up refers more to the form of pleading and cannot be treated as decisive of the question of *onus* in all cases. 4 L.W. 200 = 35 Ind. Cas. 893.

11. Cause of action.

See also (1) CAUSE OF ACTION

(2) C.P.C., SS. 11, 20: O. 2, RR. 1 AND 2.

—Practice—Declaration—Suit for—Cause of action—Law enacted but neither brought into force nor action taken thereunder—Suit to declare law unconstitutional—If lies. See SPECIFIC RELIEF ACT, S. 42. ILLS. (g). A.I.R. 1951 Pat. 246.

—Cause of action—Suit to determine boundaries—Maintainability.

Confusion of boundaries between estate of two independent proprietors is *per se* no ground to support a bill for fixing the boundaries, unless some equity is superinduced by act of the parties, *i.e.*, unless some confusion has arisen from some misconduct on the part of the defendant or those under whom he claims. (1904) 6 Bom. L.R. 782 = 29 Bom. 73.

—Non-accrual of cause of action set out in plaint.

Where cause of action set forth in the plaint is found never to have accrued, the suit fails and should be dismissed. (1904) A.W.N. 207 = 1 A.L.J. 628 = 27 A. 174.

—Joinder of causes of action—Suit for recovery of secured debt as well as unsecured debt of different period—Misjoinder—Suit on two mortgages in respect of some property.

A claim for recovery of unsecured debt of a different period cannot be joined in the same suit with a claim for recovery of a secured debt, as the causes of action for the two are quite separate and of different character: in the absence of an express contract to the effect that the unsecured debts can be added on to the secured debts for the purpose of recovery, they cannot be combined in one suit though the parties are the same. But the claims arising under two similar contracts referring to the same property can be added and there will be no misjoinder, *e.g.*, mortgage of a part of the property and a second mortgage of the other part of the same property. A.I.R. 1950 Kut. 21.

—Mis-joinder of causes of action—Dismissal of whole suit—Propriety—Dismissal of one claim improperly joined—Effect on rest of the claims in suit.

Merely because there has been a misjoinder of causes of action, the entire suit cannot be dismissed. When the claim in respect of one cause of action which was irregularly or improperly joined is dismissed, the irregularity stands cured with such dismissal and the rest of the claim can be gone into and decreed. A.I.R. 1950 Kut. 21.

—Mis-joinder—Causes of action—Form of suit on an award—If an alternative prayer to decide suit on merits can be asked for.

There is no objection to a suit on an award being coupled in the alternative with a suit on the merits of the dispute between the parties. Such a combina-



tion is convenient and does not prejudice any party. 12 P.R. 1917 = 39 Ind. Cas. 349.

—**Mis-joinder—Plea of when not to be taken.**

A plea of mis-joinder of causes of action cannot be taken for the first time in the High Court. 26 Ind. Cas. 781 (Cal.).

—**Mis-joinder—Cause of action—Amendment.**

A claim to future relief in respect of 'harra' on the basis of a lease from the mortgagee cannot be joined with a claim for redemption. A suit bad for multifariousness is not to be dismissed without giving plaintiff opportunity to amend the plaint and restrict his claims. 7 N.L.R. 43 = 10 Ind. Cas. 737.

## 12. Chief Court.

—**Chief Court—Death sentences—Fine.**

The practice of the Chief Court is not to impose fines where death sentences have been given. 18 P.R. 1913, Cr. = 14 Cr.L.J. 522 = 41 P.W.R. 1913 Cr. = 326 P.L.R. 1913 = 20 Ind. Cas. 1002.

—**Chief Court—Punjab—Conviction by Superintendent, Hill States under special powers given by the Local Govt.—Local Govt. statement**

The Chief Court, cannot entertain and hear an appeal from the order of Supt. Hill State specially appointed by the Local Govt. to try criminal cases in a Native State outside Br. India, though the officer happens to be a Dt. Magistrate in British India nor can the Chief Court question the validity of such an appointment. It is bound to accept as conclusive the statement of the Local Govt. with regard to the capacity in which that officer has acted. 20 P.W.R. 1910, Cr. = 14 P.R. 1910 Cr. = 11 Cr.L.J. 390 = 45 P.L.R. 1910 = 6 Ind. Cas. 640.

—**Chief Court—Division Bench.**

Where a question of law based on facts decided by a single Judge is referred to a Division Bench the latter can go into the whole case and decide the same. So also when a similar question is referred to a Full Bench, the latter can correct the erroneous finding of fact and decline to answer the reference if it does not arise upon the facts. 12 P.W.R. 1910 = 59 P.L.R. 1910 = 5 Ind. Cas. 835.

—**Chief Court—Division Bench—Decision of single Judge.**

The Division Bench is not competent to re-open questions as to irregularities decided by a Judge sitting as a single Bench. 150 P.W.R. 1909 = 151 P.L.R. 1909 = 4 Ind. Cas. 1006.

## 13. Civil Dispute.

—**Civil dispute—Criminal dispute—Police being allowed to assist parties in enforcing rights of a civil nature.**

Police officers should not be employed to assist parties to enforce what they claim to be their right in a matter of civil dispute, until the matter had been decided by the Civil Courts. 1 Pat. L.W. 580 = 18 Cr.L.J. 640 = 39 Ind. Cas. 1008.

—**Civil dispute—Criminal Courts.**

Disputes between landlords and tenants should be left to Revenue Court and not taken up by Criminal Courts. 17 Cr.L.J. 406 = 35 Ind. Cas. 966 (Mad.).

—**Civil dispute—Criminal case—Jurisdiction.**

Parties should not resort to the Cr. Courts where the point at issue between them can more appropriately be decided by a Civil Court. 33 P.R. (Cr.) 1910, Foll. 4 P.W.R. Cr. 1916 = 17 Cr.L.J. 7 = 32 Ind. Cas. 135.

—**Civil-dispute—Criminal trial.**

The habit of rushing to the criminal court where a civil dispute arises should be discouraged. 33 P.L.R. 1913 = 10 P.W.R. 1913, Cr. = 14 Cr.L.J. 128 = 18 Ind. Cas. 688.

—**Civil dispute—Abuse of Criminal Process.**

It is undesirable that Criminal process should be abused, with the object of furthering a civil claim and it is intolerable if a person can evade the law by reason of his position. 10 Cr.L.J. 160 = 2 Ind. Cas. 825.

—**Civil dispute—Criminal case.**

A court is bound to see that the machinery of criminal law is not utilised for the gratification of petty spite. 5 P.W.R. 1909, Cr. = 9 Cr.L.J. 158 = 1 Ind. Cas. 101.

## 14. Commission.

See C.P. CODE, O. 26.

—**Commissioners—Scope of investigation—Messengers deputed by Court to make spot inspection and to report—Messengers examining witnesses during investigation—If acting beyond province—Judgment based on report—If vitiated.**

Where messengers are appointed by the Court and deputed to view the land in dispute and to report, they are not bound to confine themselves to a scrutiny of the locus and to a report of the results of their own observation. It is open to them to examine witnesses on the spot and when they do so in the presence of the parties in the course of their investigation, and the parties co-operate with the messengers in activities, without raising any objection or complaint to such procedure, it cannot be said that the messengers have gone beyond their province and that the judgment of the Court based in part on their report is vitiated. The messengers must be held to have discharged their task in a reasonable manner. A.I.R. 1949 P.C. 291.

—**Commissioner.**

The Commissioner is a delegate of the Court acting under the Court's authority and the procedure adopted by him should naturally be the procedure of the Court from which he derived his authority. 42 Mad. 661, Diss.; 45 Cal. 825, Appr. 74 Ind. Cas. 445 = 9 O.L.J. 593 = 24 Cr.L.J. 781 = A.I.R. 1923 Oudh 119.

—**Commissioner—Partition suit.**

In a partition suit a relation of one of the parties or their pleader is not to be appointed as a commis-



sioner except with the consent of the other party. 39 Ind. Cas. 951 (All.).

—Commissioner—Damages—Assessment—Reference to officer of Court.

Cases are not to be referred to other persons for assessing charges etc., except when the enquiry involves questions of detail, resulting in waste of time. (1890) 6 T.L.R. 356 Foll. The market rate of coal in a suit for breach of contract to supply coal can be ascertained by the Judge without referring it to assessors. 42 Cal. 819 = 19 C.W.N. 609 = 30. Ind. Cas. 990.

—Evidence—Commission—Ruler of native state—Cross-examination of.

Ruler of a Native State who is exempt from attendance in British Courts cannot be cross-examined except by issuing a commission to be executed in his State. 4 S.L.R. 88 = 8. Ind. Cas. 897.

### 15. Consolidation.

See C.P.C. O. 45, R. 4 AND O. 41, R. 1.

—Consolidation—Civil Revision Petitions.

Court has no inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of by a single judgment of the lower Court so as to enable the party to file one vakalat in the petitions and pay one process fee for the common respondents. 123 Ind. Cas. 606 = 53 Mad. 262 = 31 M.L.W. 294 = A.I.R. 1930 Mad. 381 = 58 M.L.J. 521 (F.B.).

—Consolidation of appeals—Power of High Court.

The power of the High Court to consolidate appeals is one which is inherent in it and consolidation can be allowed in proper cases. 109 Ind. Cas. 651 = 27 M.L.W. 366 = 1928 M.W.N. 271 = A.I.R. 1928 Mad. 463 = 54 M.L.J. 595.

—Consolidation of appeals.

Order declaring appeals are analogous, does not result in their consolidation. 93 Ind. Cas. 129 = 4 Pat. 448 = 7 P.L.T. 431 = 1925 P.H.C.C. 345 = A.I.R. 1925 Pat. 765.

—Where parties agreed to make decision in one suit dependent on another they cannot resile from it after the decision in the suit. 83 Ind. Cas. 970 = 39 C.L.J. 537 = A.I.R. 1924 Cal. 940.

—Consolidation of suits—Suit by agent and against—Trial of both if could be together.

A suit for accounts by a principal and a counter suit by the agent for monies due to him under the agency may, for the sake of convenience be tried together but that does not mean that they should not be tried separately. 15 C.W.N. 930 = 11 Ind. Cas. 161.

### 16. Contempt.

See CONTEMPT.

—Calcutta High Court—Contempt proceeding—Representation of Party.

Held that in contempt proceedings before the High Court it cannot be said that in every case the party if

represented must appear through an advocate instructed by an attorney. Nature of High Court's jurisdiction in matters of contempt indicated. 34 C.W.N. 928 = 129 Ind. Cas. 366 = A.I.R. 1930 Cal. 759.

—Breaking undertaking given to Court justifies refusal to hear.

A breach of an undertaking given to a Court by a litigant pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction, is misconduct amounting to contempt. When a person is guilty of such contempt he places himself in a perilous situation so as not to be heard by the Court till he has purged his contempt. A person in contempt may be denied certain favours of the court and privileges until he has purged himself of contempt. The rule denying privileges is limited to proceedings in which the contempt occurs. A litigant in contempt has no standing in Court. 82 Ind. Cas. 292 = 39 C.L.J. 217 = A.I.R. 1924 Cal. 953.

### 17. Costs.

See C.P.C., S. 35.

—Costs—Appeal based on a decision which is overruled—Liability of appellant for costs.

Where an appeal filed on the strength of a ruling which is overruled by the Full Bench, is argued fully before and during the reference to the Full Bench the appellant cannot claim that it is a fit case for dismissing the appeal without costs. (The appeal however was dismissed with half the costs of the respondent). (1919) 37 M.L.J. 271 : I.L.R. 43 Mad. 61, dis. I.L.R. (1951) Mad. 305 = 1950 M.W.N. 851 = 63 L.W. 1130 = (1950) 2 M.L.J. 674 = A.I.R. 1951 Mad. 48 (F.B.).

—Delay in litigation—Effect of.

Their Lordships think it is of the utmost importance that the people in India should realize that the statements their Lordships have made, as to the essential duty on the part of litigants to use all reasonable speed to bring their cases to trial, are not mere empty phrases: and their Lordships mean to enforce and make them effectual by the only instrument in their hands, by dealing with the question of the costs on the appeal where the delay arises. 122 Ind. Cas. 305 = 31 M.L.W. 326 = 34 C.W.N. 512 = 32 Bom. L.R. 492 = A.I.R. 1930 P.C. 42 = 58 M.L.J. 285 (P.C.).

—Costs.

Where the form of action lent support to the judgment that was delivered by the High Court but the High Court refused to exercise a power, that they possessed, to modify the relief that the plaintiff asked but the Privy Council did modify the relief, the costs in the High Court were refused. 122 Ind. Cas. 305 = 31 M.L.W. 326 = 34 C.W.N. 512 = 32 B.L.R. 492 = A.I.R. 1930 P.C. 42 = 58 M.L.J. 285 (P.C.).

—Interlocutory orders for costs made by the Court of appeal during the progress of the suit may be taxed forthwith and execution levied therefor. 57 Cal. 469 = A.I.R. 1930 Cal. 465.

—Documents—Failure to produce—Effect.

Apart from the question of the onus of proof, it lies upon a party, whether he be plaintiff or defendant, to produce all such material documents relating to the suit as may be in his possession, even though no



application has been made for their production by the other party. High Court would deprive party of costs for failure to do so. 112 Ind. Cas. 791 = 1929 A.L.J. 262 = A.I.R. 1929 All. 134.

—Where a trial Court leaves the parties to bear their own costs, and one of them appealed from such order while the other does not, the appellate Court cannot make the former pay the costs of the latter in the trial Court. 118 Ind. Cas. 464 = 30 P.L.R. 600 = A.I.R. 1929 Lah. 177.

#### —Omission to point out correct law.

It is clearly the party's business to direct the mind of the Court to the authorities which show him the right practice, and if a party has failed to do this he should not be allowed costs although case is decided in his favour. 94 Ind. Cas. 306 = 1926 M.W.N. 465 = A.I.R. 1926 Mad. 642 = 50 M.L.J. 428.

#### —Payment of costs to several respondents individually must be specifically decreed.

Where more than one party appears as defendant or respondent, an order or decree directing payment of the defendants' or respondents' costs does not necessarily mean that each defendant or respondent appearing is entitled to his costs from the losing party. When such parties appear separately they should apply for separate sets of costs at the time when the judgment is delivered. 79 Ind. Cas. 704 = 48 Bom. 348 = 26 Bom. L.R. 209 = A.I.R. 1924 Bom. 317.

#### —Costs—Expert witness—Special fees.

An expert witness who has conducted elaborate and technical experiments ought to be allowed special expert fees as part of the costs in the case. 10 L.B.R. 203 = 13 Bur. L.T. 62 = 59 Ind. Cas. 823.

#### —Costs—Taxation—Review—Sind Judicial Commissioner's Court Rules, R. 23, 24 and 27.

Under R. 27 of Rules of the Court of the Judicial Commissioner in Sind, no application for review of taxation of costs is allowable, unless made before decree is signed. Where the final incidence of the burden of costs is left for the decision of the lower court, as in the case of remand, a party desiring his pleaders fees, to be included in the costs must file the usual certificate of fees in the Appellate Court before the decree of that Court is signed. 5 S.L.R. 254 = 15 Ind. Cas. 828.

#### —Costs—Abandonment of appeal with a claim for costs cannot be allowed.

An appellant must abandon an appeal unconditionally and he cannot abandon an appeal and at the same time claim costs of the suit and the appeal. 5 N.L.R. 121 = 3 Ind. Cas. 572.

#### —Costs—Income-tax reference—Assessee successful—Right to recover deposit.

All fiscal enactments must be construed in favour of the subject and it cannot be said that if an assessee has not been properly taxed and if he succeeds on a reference in the High Court, yet he must lose a sum of Rs. 100 simply because the Income-tax Officer has chosen to make an assessment. 1930 A.L.J. 1548 = A.I.R. 1931 All. 123.

#### —Administration actions.

The usual practice in summons for construction and in administration actions where the executor has not been guilty of misconduct, is that the costs of all parties as between attorney and client should come out of the estate. 70 Ind. Cas. 178 = 24 Bom. L.R. 1124 = A.I.R. 1923 Bom. 96.

#### —Divorce Suit—Liability of husband.

Where a petition for the dissolution of marriage on the ground of adultery is filed by the husband and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from counsel as is reasonable under the circumstances. 77 Ind. Cas. 133 = 44 All. 745 = A.I.R. 1922 All. 504 (F.B.).

#### —Costs—Partition suit.

Where a suit has to be brought for effecting a partition between the members of a family and neither party has been guilty of unfair contention, the costs till the preliminary decree should come out of the estate. 34 Cal. 878 and 42 Cal. 451, not Foll. 11. L.W. 5 = 54 Ind. Cas. 382.

#### —Costs—Redemption suits.

In redemption suits, a mortgagor is ordinarily entitled to costs unless he forfeits his right to it by laches. In Malabar, though question of compensation complicates redemption suits, yet where the mortgagor fails to deposit even the mortgage amount in full, the mortgagee must be given the costs of the suit. (1917) M.W.N. 275 = 38 Ind. Cas. 655.

#### —Costs—Solicitor—Expert knowledge as to hand-writing—Extra charges for the work—Taxing Master's decision—Review by Chamber Judge.

In a suit to obtain probate of a will, the defence was that the will was a forgery. The defendant's solicitor failing to obtain an expert in hand-writing, made a special study of the subject occupying 128 hours, and arrived at the conclusion that the will was not genuine. He then notwithstanding counsel's opinion to the contrary, got the suit decided in his client's favour. In his bill of costs the defendant's solicitor claimed his extra fees for the special work, but the Taxing Master disallowed the claim.

Held, in review of taxation, that the solicitor was entitled to a special remuneration for his work in qualifying himself as an expert in hand-writing. (1907) 9 Bom. L.R. 819 = 31 Bom. 430.

#### —Costs—Taxation—Certifying counsel—Originating summons.

In a originating summons, parties are entitled to instruct counsel; and without any certificate the costs of one counsel must be allowed on taxation. (1907) 9 Bom. L.R. 1071.

#### —Stay of costs.

Where a party has been successful in a Court of Appeal and has been awarded his costs it is not the practice of the High Court to stay execution for costs except in cases where it is abundantly clear that



there will be no chance of recovering the costs if they are allowed to go unprotected to the person entitled to them. 90 Ind. Cas. 703 = A.I.R. 1926 Pat. 54.

### 18. Court-fee.

See also (1) COURT-FEE.

(2) COURT-FEES ACT.

—Filing of appeal with patently deficit court-fee—Appellant unable to secure funds for payment of full court-fee—Not a ground for excusing delay—Grant of time by Judge in the Admission Court to pay the deficit—Right of other side to question.

Assuming that an appellant as a matter of fact was unable to raise sufficient moneys till date of application to excuse delay, that by itself cannot be a sufficient ground to have the delay excused. An appellant who did not have the means to pay the court-fee on an appeal should, if so advised, file the appeal *in forma pauperis*. The practice of filing an appeal with a patently deficit court-fee simply because before the last date of filing the appeal, the appellant is unable to secure enough money for payment of the full court-fee, and then taking time to raise the deficit amount and getting the delay excused as a matter of course, cannot be tolerated.

Where the delay is excused by a judge sitting in the Admission Court without notice to the other side, it is assumed that the other side would be always at liberty at a subsequent stage or even at the hearing of the appeal to contend that the delay should not have been excused. It is desirable that notice should be given in such cases to the other side to obviate inconvenience and expense which might be avoided if the Court were to eventually refuse to excuse the delay. (1914) 1 L.W. 440, approved. I.L.R. (1950) Mad. 775 = A.I.R. 1950 Mad. 769 = 63 L.W. 70 = 1950 M.W.N. 67 = (1950) 1 M.L.J. 79.

### —Court-fee.

Insufficient court-fee—Point not free from difficulty—Pleader should be allowed to make up deficiency. A.I.R. 1930 Lah. 101 = 124 Ind. Cas. 318.

—Failure to pay promised court-fee justifies refusal to entertain appeal.

A suit for possession and mesne profits was undervalued but the Court tried the suit on merits on the plaintiff's undertaking that he would pay up before the decree is drawn up. The suit was dismissed and the plaintiff did not pay the deficit court-fee. He however appealed against the decree so far as the costs were concerned.

Held that the plaintiff being in contempt could not appeal. 82 Ind. Cas. 292 = 39 C.L.J. 217 = A.I.R. 1924 Cal. 953.

### —Deficit in Lower Court.

In all cases where the question of recovering the deficit in the lower Court arises on appeal the appeal should first be admitted before the point is decided. 62 Ind. Cas. 43 = 2 P.L.T. 383 = 6 P.L.J. 293 = 1921 P.H.C.C. 161 = A.I.R. 1921 Pat. 88 (F.B.).

### —Use of stamps.

The words "for use in the High Court only" impressed on the back of Court-fee stamps do not limit

their use to High Court only. The words may have some significance for administrative purposes, but they are not capable of invalidating the stamps themselves if filed in lower Courts. 97 Ind. Cas. 822 = 8 P.L.T. 33 = A.I.R. 1926 Pat. 408.

### 19. Criminal Trial.

See also CRIMINAL TRIAL.

### —Prosecution under S. 211, I.P.C.

The practice that a complainant or first informant should not be prosecuted under S. 211, until his complaint or police case has been disposed of, is not based on any statute and is merely a precautionary rule of safety in respect of a special class of criminal case. While a prosecution under S. 211 might in certain circumstances be delayed or even set aside in accordance with this practice, the practice could *per se* be no ground for setting aside a conviction, for there is no illegality in the trial. 125 Ind. Cas. 770 = 9 Pat. 126 = 31 Cr.L.J. 934 = 11 Pat. L.T. 224.

### —Criminal—Evidence—Quantum or value of evidence.

The fouler the crime, the clearer and plainer the proof ought to be, though it cannot be laid down as a proposition of law that the quantum or value of evidence must be proportionate to the enormity of the crime or the consequences which may follow from convictions. 1 Pat. L.T. 684 = 59 Ind. Cas. 858.

### —Criminal trial—Guilt—Evidence.

The practice of engineering offences in order to find out whether a person will commit an offence when tempted, is strongly to be deprecated. 17 Cr.L.J. 139 = 33 Ind. Cas. 315 (All.).

### —Criminal trial—Filing of written statement by accused.

The practice of filing written statements on behalf of the accused persons is nowhere provided for, and should not be allowed. 20 C.W.N. 128 = 17 Cr.L.J. 9 = 32 Ind. Cas. 137.

### —Criminal trial—Defence—Accused denying fact against him.

An accused is not bound by any statement denying any fact against him if he desires subsequently to take a defence inconsistent with the denial. 16 Cr.L.J. 76 = 26 Ind. Cas. 668 (Cal.).

### —Criminal trial—Record of case—Contravention of Government order—Proof of.

A copy of the Government order or an extract therefrom or a reference thereto should be placed on the record if a person is convicted for contravening that order. 18 C.W.N. 1272 = 15 Cr.L.J. 703 = 26 Ind. Cas. 151.

### —Criminal trial—District Magistrate—Interference by—In the course of trial by Subordinate Magistrate.

The District Magistrate cannot order that certain witnesses in a case before a Subordinate Magistrate should be made co-accused with the accused. A Magistrate should not ordinarily be interfered with in the course of the trial and if it transpires that certain witnesses in the case should be criminally proceeded against, the proceedings ought ordinarily await the conclusion of the case and should be insti-



tuted ordinarily by the order of or on the application to the Magistrate who has tried the case. 16 Bom. L.R. 259 = 15 Cr.L.J. 428 = 24 Ind. Cas. 164.

—**Criminal trial—Conviction—Complainant's Case.**

A conviction must be based on facts found amidst conflicting evidence and not on the exact proof of the complainant's statement. 14 Bom. L.R. 135 = 13 Cr.L.J. 300 = 14 Ind. Cas. 764.

—**Criminal trial—Magistrate bound to proceed with case—Witness in attendance—Magistrate unable to record evidence—Witness must be informed to appear at the adjourned hearing.**

When a Magistrate has entertained a complaint, he is bound to proceed according to law. Where the witnesses are in attendance but the Magistrate is not able to record evidence the witnesses must be asked to appear at the adjourned hearing and cannot be left to be summoned by the issue of process. 3 P.W.R. 1912 Cr. = 13 Cr.L.J. 176 = 60 P.L.R. 1912 = 13 Ind. Cas. 928.

—**Criminal trial—Prosecution—Witnesses.**

It is the duty of the prosecution to put in the box all persons having special knowledge of relevant facts. 8 P.W.R. 1909 Cr. = 10 Cr.L.J. 321 = 3 Ind. Cas. 622.

—**Criminal trial—Intention—Presumption.**

Neither the judge nor the jury are justified in assuming guilty knowledge on the part of an accused. 32 P.L.R. 1911 = 12 Cr.L.J. 125 = 9 Ind. Cas. 731.

—**Criminal trial—Charges against Government servants.**

Summary procedure should not be employed in cases in which Government servants, whatever their rank may be, are concerned. The power of a court to punish a public servant for an offence is not taken away simply because he has been punished by his departmental superiors. 15 P.W.R. 1911 Cr. = 184 P.L.R. 1911 = 12 Cr. L.J. 143 = 9 Ind. Cas. 831.

—**Criminal trial—Argument of counsel.**

Arguments of counsel should bear some relation to the charge brought and the facts on record. It is not proper to charge a man with one thing and argue that he has been guilty of something quite different. 4 P.W.R. 1910 Cr. = 11 Cr.L.J. 205 = 5 Ind. Cas. 714.

—**Criminal trial—Charges—English rules of indictment.**

In respect of charges the Courts are guided by Cr.P.C. and not by English rules as to indictment. 32 Mad 384 = 5 M.L.T. 393 = 9 Cr.L.J. 456 = 2 Ind. Cas. 33.

—**Criminal trial—Sessions Judge—Duty of.**

It is the duty of the Sessions Judge to sift the facts if pleaders appearing for the prosecution or the defence have not sufficiently done it. 10 Cr.L.J. 567 = 4 Ind. Cas. 391 (Mad.).

—**Criminal trial—Conviction—Illegality.**

Where the Magistrate convicted the accused against his own conscience the conviction was set aside as illegal. 10 Cr.L.J. 583 = 4 Ind. Cas. 428 (All.).

—**Criminal trial—Offence—Penal Code, Ss. 299 and 300.**

The Sessions Judge cannot convict an accused for culpable homicide not amounting to murder, when he had recorded his plea of guilty to a charge of murder. 3 S.L.R. 58 = 10 Cr.L.J. 5 = 2 Ind. Cas. 372.

—**Criminal trial—Notice—Police Inspector.**

Notice to the police Inspector in charge of case is necessary before the Magistrate disposes of it. (1915) M.W.N. 554 = 16 Cr.L.J. 736 = 31 Ind. Cas. 176.

—**Criminal trial—Prosecuting inspector.**

The proper place for a prosecuting Inspector in a Magistrate's Court is along with the pleader for the defence and in equality with him below the dais. His sitting on the dais near the Magistrate should be avoided as it is likely to raise a doubt as to the impartiality of the judge in trying cases. 8 A.L.J. 1235 = 12 Cr.L.J. 579 = 12 Ind. Cas. 843.

—**Criminal trial—Magistrate—Knowledge of the people.**

It is the duty of the Magistrates to make themselves acquainted with the character of the population within their jurisdiction. 11 Bom. L.R. 849 = 10 Cr.L.J. 427 = 3 Ind. Cas. 958.

—**Criminal trial—Plea of not guilty.**

Where the plea of guilty is not accepted by the Sessions Judge and the case is proceeded with, the accused must be directed, following the practice in England, to enter a plea of 'not guilty.' 9 C.L.J. 55 = 10 Cr.L.J. 325 = 3 Ind. Cas. 625.

—**Criminal trial—Judgment—Review.**

Under the provisions of the Criminal Procedure Code, the High Court has no power to review its own judgment. 23 B. 50, 19 B 732 : 10 B. 176 : 7 A. 672 : 14 C. 42, Foll. 19 Bom. L.R. 695 = 18 Cr.L.J. 889 = 41 Ind. Cas. 1001.

—**Review—Criminal case—Judgment.**

Generally, a Criminal Court cannot review its own decision. 4 Bur. L.T. 211 = 12 Cr.L.J. 473 = 12 Ind. Cas. 31.

—**Criminal trial—Magistrate discharging accused—If can revive the case on application.**

A Magistrate who discharges the accused can legally revive the case on an application being made therefor. 29 C. 726, Foll. 38 Cal. 828 = 13 Cr.L.J. 120 = 13 Ind. Cas. 776.

—**Criminal trial—Appeal—Dismissal for default.**

A criminal appeal should not be dismissed for default but must be considered on its merits, though it can be summarily dismissed if no sufficient ground for interfering is seen. 12 Cr.L.J. 481 = 12 Ind. Cas. 89 (A.M.).

—**Criminal trial—Photograph of under-trial prisoner.**

There is no warrant or justification for the practice of taking photographs of under-trial prisoners. 38 Cal. 559 = 15 C.W.N. 593 = 12 Cr.L.J. 286 = 10 Ind. Cas. 582.

—**Criminal trial—Civil law—Principles.**

Principles of Civil law may be applied in the criminal law, if they are not directly opposed to any principle



of the criminal law. 26 P.W.R. 1910 Cr. = 11 Cr.L.J. 428 = 12 P.R. 1913 Cr. = 269 P.L.R. 1914 = 6 Ind. Cas. 964.

**—Criminal trial—Sentence—Deterrent sentences—Prosecuting authorities, duties of—Jurisdiction of lower Court.**

It is not desirable to trust exclusively to the High court's power of correcting sentences of lower courts, where they ought to be deterrent and prosecuting authorities in such cases ought to put before the trying Court circumstances justifying the imposition of deterrent sentences. 16 Bom. L.R. 203 = 15 Cr.L.J. 367 = 23 Ind. Cas. 735.

**—Criminal trial—Sentence—Deterrent Sentence—Authority desiring—Duty of.**

Where the authorities desire that a specially deterrent sentence should be imposed, they should bring it to the notice of the trying court and inform it of the reasons therefor. 16 Bom. L.R. 200 = 15 Cr.L.J. 362 = 23 Ind. Cas. 730.

**—Sentence—Adjournment.**

No court has an inherent power to adjourn the passing of a sentence for an indefinite time. An order convicting the accused and directing him to furnish security and to come up for sentence after a long time is really an adjournment of sentence and is therefore bad. 14 Bom. L.R. 144 = 13 Cr.L.J. 288 = 14 Ind. Cas. 672.

**—Sentence—Offence technical.**

In case of technical offence a nominal sentence is always sufficient to meet the ends of justice. 34 C.749 : 7 Bom. L.R. 474, Foll. 16 P.R. 1910 Cr. = 11 Cr.L.J. 421 = 91 P.L.R. 1910 = 23 P.W.R. 1910 Cr. = 6 Ind. Cas. 952.

**—Criminal trial—Magistrate complainant ought not to try.**

A magistrate is incompetent to make any order in any case in which he is even the nominal complainant. 16 Cr.L.J. 801 = 31 Ind. Cas. 817 (All.).

**—Stay of trial—Criminal proceedings—Issues substantially the same as the civil suit.**

The executant of a deed denied the execution before the Sub-Registrar. But the District Registrar registered the deed and ordered prosecution under S. 82 (a) of the Registration Act. The executant sued in a Civil Court for a declaration that the deed was a forgery and moved the High Court for stay of the criminal proceedings.

**Held,** that as the issue in both the proceedings civil and criminal was the same and as there was no likelihood of the evidence becoming stale or unobtainable, the High Court would be justified in ordering the stay of the criminal proceedings and in such a case the High Court can direct the lower Court to expedite the disposal of the civil suit. 62 Ind. Cas. 185 = 22 Cr. L.J. 489 = 1 Pat. L.T. 697.

**—Stay of trial—Criminal proceeding—Pendency of civil suit between the parties on substantially same issues.**

Where the parties to, and the issues in, two proceedings, civil and criminal are substantially the same and the prosecution, before the Magistrate is but a private prosecution, it is not ordinarily desirable that both the cases should go on at the same time and the

prosecution should be stayed. 7 Bur. L.T. 73 = 15 Cr.L.J. 488 = 24 Ind. Cas. 576.

**—Stay of trial—Criminal proceedings—Civil Suit.**

If a civil suit follows criminal proceedings, on the same facts, the latter should not be stayed. 11 Cr.L.J. 291 = 6 Ind. Cas. 181 (Cal.).

**20. Decree.**

See C.P. CODE, SS. 2 (2) AND 33.

**—Maintenance decree—Provision for liberty to apply for varying it—If can be inserted.**

No provision can be inserted in the maintenance decree for liberty to apply to vary the rate according to the exigencies of circumstances of either spouse. The remedy of either party for varying the rate on change of circumstances by way of a suit will always be available. 1948 M.W.N. 133 = A.I.R. 1949 Mad. 100 = 61 L.W. 181 = (1947) 2 M.L.J. 544.

**—Preliminary decree wrongly granting widow a share in agricultural lands—No appeal—Whether can be rectified by refusing in final decree—Direct and collateral attacks in validity of decree—Distinction pointed out.**

Where a Court wrongly allows an untenable claim, the error may be corrected by resort to one or other of the modes known to law, viz., by review, appeal, revision or by suit, according to circumstances. Such attempt to vacate, modify or correct a decree of a competent court by proceeding in one of the modes permitted by law or what may be termed 'direct attack' which will succeed if the error of fact or the deviation from law which is said to vitiate the decree or order is established. But a collateral attack is an attempt to avoid, defeat or evade the decree or order or to deny its effectiveness by or in a proceeding, other than a direct attack, with object of rendering it a dead letter, a nullity to be ignored. A collateral attack can only succeed if an absolute lack of jurisdiction over the subject-matter is established and the application by the Court of an Act which is inapplicable is not such a lack of jurisdiction. A.I.R. 1944 Mad. 513 = I.L.R. (1945) Mad. 216 = (1944) 2 M.L.J. 67 = 1944 M.W.N. 480 = 218 Ind. Cas. 58.

**—Decree—Only one decree should be drawn up.**

Per Findlay, J.C.—Apart from the question of preliminary and final decrees in suits the intention of the Civil Procedure Code is that there should be only one decree in any given suit and, therefore, when an appellate Court has to deal with two appeals arising out of the same suit it is desirable that it should draw up as a single decree, a comprehensive document which would give its adjudication in the whole matter of the litigation involved. 12 N.L.J. 101 = 25 N.L.R. 183 = A.I.R. 1929 Nag. 229 (F.B.).

—A Court should not pass a decree which cannot be given effect to. 79 Ind. Cas. 365 = A.I.R. 1925 Cal. 411.

—Record—Loss of—Lost decree can be reconstructed from evidence of person who read it. 77 Ind. Cas. 258 = 4 U.B.R. 135 = A.I.R. 1923 Rang. 113.

**—Decree for amount more than the subject matter of the plaint.**

Where a widow sues for the recovery of her husband's property both for herself and a co-widow impleaded as



defendant, the Court can pass a decree for the whole property if the co-widow agrees to such a course. 60 Ind. Cas. 246 = 12 M.L.W. 544 = (1920) M.W.N. 721.

—**Decree—Setting aside—Effect of—Suit to set aside fraudulent decree.**

**Semble.**—The remedy of the plaintiff if he succeeds in getting the declaration that a decree was fraudulently obtained, is to apply to the Court to proceed with the suit.

Per **Srinivasa Iyengar J.**—The more appropriate mode of setting aside a consent decree for fraud is by a separate suit instituted for that purpose rather than by a motion in the cause in the nature of a review. A decree obtained by fraud is not a nullity and is not wholly void. 41 Mad. 213 = 6 L.W. 368 = 33 M.L.J. 499 = 41 Ind. Cas. 937.

—**Decree—Setting aside—Effect of—Whether plaintiff can bring a fresh suit.**

A decree which was declared null and void against the defendant on account of fraud, does not revive the plaintiff's original suit: the plaintiff may bring a fresh suit. 32 P.W.R. 1916 = 33 Ind. Cas. 890.

—**Decree—Construction—Reference to pleadings.**

A court can refer to the pleadings and judgment for ascertaining the real meaning of a decree. 13 Ind. Cas. 82 (Cal.).

—**Decree—Motion—Case not on the list—Practice of Bombay High Court.**

There is no fixed practice in Bombay preventing the passing of a decree on motion without the suit appearing on the list of hearing. (1901) 3 Bom. L.R. 431 = 26 B. 76.

## 21. Discretion.

(a) Exercise of.

(b) Interference with.

(a). Exercise of.

—**Discretion—Relief for declaration.**

A relief of declaration is discretionary with the Court which should be granted with due regard to all circumstances of a case and a High Court will not be justified in interfering with the discretion in second appeal. 129 Ind. Cas. 446 = A.I.R. 1930 All. 620.

—**Specific relief in second appeal.**

Discretion to grant or refuse specific performance can be exercised in second appeal. 122 Ind. Cas. 740 = A.I.R. 1930 All. 166.

—**Motive of a party—Relevancy of.**

In judicial proceedings the question of motive is not altogether irrelevant. If there is a discretion in the Courts to allow a party to enforce one remedy in preference to another, where more remedies than one are open, or if an enforcement of a remedy will amount to an abuse of the processes of the Court, motive may in some cases have to be considered: but there again it is not so much to find out what the real motive of the party is, but rather to determine what resultant injury would accrue to his antagonist. 102 Ind. Cas. 513 = 31 C.W.N. 653 = A.I.R. 1927 Cal. 581.

—**Discretion to appoint Receiver.**

Appellate Court should not interfere with the discretion exercised by the lower Court in appointing a Receiver without sufficient reasons. 94 Ind. Cas. 39 = 27 P.L.R. 138 = A.I.R. 1927 Lah. 65.

—**Exercise of—In case of fraud.**

Where a party gives absolute discretion to the other to do a certain thing its exercise in the absence of fraud is not open to review.

A discretion, although absolute, is nonetheless a discretion to be exercised with reference to the true position and with perhaps even a greater sense of responsibility in that it is within limits final. 88 Ind. Cas. 54 = 28 Bom. L.R. 1488 = 28 P.L.R. 29 = 1925. M.W.N. 459 = A.I.R. 1925 P.C. 150 (P.C.).

—**Exercise.**

The discretion of the Court must be exercised on recognised principles and should not be arbitrary. Where the circumstances of a case demand it the High Court will interfere with the orders of the lower Courts if they were inconsistent with sound principles. 85 Ind. Cas. 796 = 29 C.W.N. 643 = A.I.R. 1925 Cal. 1027.

—**Canada—Vancouver Island Settlers Rights Act, (1904), S. 3—Lieutenant-Governor in Council should act judicially in deciding a question under S. 3—But he is not bound by technical rules of evidence or procedure. A.I.R. 1921 P.C. 234 (P.C.).**

—**Discretion—Question of law.**

A Judge should decide questions of law for himself and should not accept a view suggested by counsel unless he is satisfied as to its soundness. 9 Bur. L.T. 53 = 31 Ind. Cas. 875.

(b) Interference with.

—**Interference.**

Where the lower Court has reasonably exercised its discretion, that discretion should not be lightly interfered with by the Appellate Court. 114 Ind. Cas. 360 = 28 M.L.W. 687 = 1929 M.W.N. 196 = 2 M. Cr.C. 19 = 30 Cr.L.J. 322 = A.I.R. 1929 Mad. 21 = 56 M.L.J. 208.

—**Interference—Delay condoned without sufficient cause.**

In matters of discretion a Court of second appeal ought not and ordinarily does not interfere with the exercise of discretion on the part of the subordinate Courts, but that non-interference must necessarily be limited to cases where there is sufficient material on record to justify the exercise of discretion in any particular way. Where, however, it appears that the lower Appellate Court has exercised its discretion in a judicially unsound manner without proper legal materials to support its decision, the High Court will surely interfere.

A memo. of appeal was accepted by the Appellate Court after the period of limitation had expired, without enquiring into sufficient cause for condoning the delay in the presentation of the memo. The appeal was accepted on merits setting aside the decree of the lower Court.

**Held**, that the Appellate Court acted wrongly in entertaining appeal as it had no jurisdiction to touch the decree, and decide the case on merits on the basis



of time-barred memo. 25 Mad. 166, Foll. 114 Ind. Cas. 612 = 11 N.L.J. 186 = A.I.R. 1929 Nag. 8.

#### —Interference.

Although there is jurisdiction in the Appellate Court to correct a wrong exercise of discretion by the trial Court the former should be slow to interfere with the exercise of discretion by the trial Court, unless it is satisfied that the discretion has been unreasonably exercised. 119 Ind. Cas. 817 = 8 Pat. 153 = 10 P.L.T. 259 = A.I.R. 1929 Pat. 164.

#### —It is mistake for superior tribunal to lay rules as to exercise of such discretion.

When a tribunal is invested by statute with a discretion without any indication of the grounds upon which the discretion is to be exercised, it is a mistake for a superior tribunal to lay down any rules with a view to indicating the particular grooves in which the discretion should run. 113 Ind. Cas. 329 = 9 P.L.T. 672 = 8 Pat. 235 = 30 Cr.L.J. 137 = 12 A.I.Cr.R. 41 = A.I.R. 1928 Pat. 630.

#### —Interference—Refusal to recast charges.

An Appellate Court should be very slow to interfere with the discretion of a trial Court if not exercised in a perverse or arbitrary manner.

Where the trial Court feared that the recasting of the charges would embarrass the Jury and possibly prejudice the accused in his trial.

Held, that it cannot be said that such a reason was capricious or involved any disregard of any legal principle and certainly does not call for interference by High Court in appeal. 97 Ind. Cas. 1041 = 21 S.L.R. 55 = 27 Cr.L.J. 1217 = A.I.R. 1927 Sind 28.

#### —Interference.

An Appellate Court has power to interfere with the discretion of first Court as to a presumption of genuineness of a suspicious document. 95 Ind. Cas. 261 = A.I.R. 1926 All. 537.

#### —Interference.

If a lower Court does not exercise a discretion which it might have exercised, it is open to the appellate Court to exercise that discretion. 92 Ind. Cas. 966 = 27 P.L.R. 18 = A.I.R. 1926 Lah. 223.

—Appellate Court won't interfere with discretion judicially exercised though it differs in conclusion. 76 Ind. Cas. 285 = A.I.R. 1924 Lah. 629.

#### —Discretion as to admissibility should not be disturbed.

The question of the admissibility of secondary evidence is a point properly to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion therefore should not be overruled except in a clear case of misapprehension. 19 Cal. 438 (P.C.), Foll. 71 Ind. Cas. 568 = A.I.R. 1924 Lah. 303.

#### —Arbitration.

Whether an award should be set aside or remitted can be determined by the Court of first instance and an Appellate Court will not set aside its decision unless discretion is misused. 76 Ind. Cas. 275 = A.I.R. 1924 Sind 132.

#### —Interference.

Where the exercise of discretion has not been made on sound legal principles appellate Court can interfere

with the order of the lower Court. 72 Ind. Cas. 569 = A.I.R. 1923 Lah. 48.

#### —Discretion—Appellate Court—Interference when proper.

It is opposed to sound practice for an appellate court to substitute its own discretion for that of the court from which an appeal has been preferred, unless the court below has acted capriciously or in disregard of any legal principles in the exercise of its discretion. 42 Bom. 380 = 22 C.W.N. 601 = 16 A.L.J. 513 = 27 C.L.J. 623 = 5 Pat. L.W. 25 = 23 M.L.T. 400 = 8 L.W. 53 = 20 Bom. L.R. 714 = 35 M.L.J. 262 = 12 Bur. L.T. 91 = 45 I.A. 61 = 45 Ind. Cas. 568 (P.C.).

#### —Discretion—Appellate Court—Interference when to be made.

Where in the exercise of a judicial discretion a judge fails to apply a rule laid down for its exercise, the appellate court should either remit the case or itself exercise the discretion. 45 Cal. 17 = 22 M.L.T. 403 = 22 C.W.N. 74 = 26 C.L.J. 557 = 16 A.L.J. 1 = 34 M.L.J. 1 = 20 Bom. L.R. 38 = (1918) M.W.N. 16 = 7 L.W. 94 = 4 Pat. L.W. 1 = 44 I.A. 229 = 42 Ind. Cas. 849 (P.C.).

#### —Discretion—Appellate Court.

Where a Judge assumes that there is no general rule for exercising discretion when in fact there is one, he misdirects himself and the superior court must either remit the case or exercise the discretion itself. 45 Cal. 94 = 33 M.L.J. 486 = 22 M.L.T. 362 = 6 L.W. 592 = 126 P.W.R. 1917 = 15 A.L.J. 777 = 19 Bom. L.R. 866 = 3 Pat. L.W. 313 = 26 C.L.J. 572 = 104 P.R. 1917 = (1917) M.W.N. 811 = 22 C.W.N. 169 = 127 P.L.R. 1917 = 44 I.A. 218 = 42 Ind. Cas. 43 (P.C.).

#### —Discretion—Appellate Court.

The Court of appeal ought to be slow to interfere with an exercise of a discretion by the Lower Court. 22 C.L.J. 293 = 31 Ind. Cas. 315.

#### —Discretion—Appellate Court—Interference.

In the matter of appointment of a guardian for a minor the appellate court will not interfere, with the discretion of the lower Court unless weighty reasons have been made out for setting it aside. 26 Ind. Cas. 300 (Cal.).

#### —Discretion—Appellate Court—Interference with discretion of lower Court.

A Court of Appeal will be reluctant to interfere with the Lower Court's discretion. 18 C.W.N. 1193 = 25 Ind. Cas. 112.

#### —Discretion—Appellate Court.

A Lower Court cannot use judicial discretion when the Appellate Court gives specific directions. 10 M.L.T. 284 = (1911) 2 M.W.N. 240 = 21 M.L.J. 1018 = 12 Ind. Cas. 139.

#### —Discretion—Co-owners—Interference.

Courts should be very cautious of interfering with the enjoyment of joint estates between the co-owners though they will do so for proper cases. 7 N.L.R. 82 = 11 Ind. Cas. 687.

#### —Discretion—Appellate Court—Interference.

The court of appeal should not interfere without good and sufficient reasons, with the orders of the lower Court which are within the lower court's jurisdiction. 14 C.W.N. 532 = 5 Ind. Cas. 127.



**22. Practice—Duty of Court.**

See (1) C.P.C. SS. 33 AND 45 AND O. 20, R. 4  
(2) NOTE 36.

- (a) (General).
- (b) Appealable cases.
- (c) Conduct of suit.
- (d) Duty to see that no injustice is done by its acts.
- (e) Formal defects.
- (f) Framing of issues.
- (g) Grant of relief.
- (h) Precedents.
- (i) Question of law.
- (a) General.

**—Duty of Court—Court of equity—Shortening of litigation.**

The Court of equity delights in shortening litigation and not in lengthening it or in multiplying litigation proceedings. 28 Pat. 102=A.I.R. 1949 Pat. 293=30 P.L.T. 201.

**—Duty of Court—Successive applications by party after adverse order—Maintainability—Res judicata—Application of.**

Although the principles of *res judicata* as such might not apply to a particular case, the Court would certainly be guided by principles analogous to *res judicata*. The Court should not countenance any harassment of the parties at the instance of litigants who would flood the tribunal with applications one after another, even though the tribunal had pronounced adversely to them. I.L.R. 1949 Bom. 766 = 49 Bom. L.R. 454=A.I.R. 1947 Bom. 413.

**—Duty of Court—Charge against public officer of partiality and neglect of duty—Pleading and proof of—Duty of Court to insist on and to protect public officer against attacks without basis.**

When a Court or a Judge comes across any case where it finds that a public officer has departed or deviated from the path of rectitude, the Court or Judge realising how necessary purity of administration is in the state, should in no uncertain terms condemn such action on the part of the public officer. But it is equally important and essential that when a particular officer is conscientiously doing his duty, the Court should not permit any suggestions to be made with regard to his impartiality and uncertainty. Before making a serious charge against a public officer namely that he showed deliberate partiality to a certain party and did not fully have regard to the interests of his institution, it is necessary that there should be proper pleadings in which the charge is formulated and proved. It is easy for a party to fling mud at persons who very often find it very difficult to defend their conduct, and it is the duty of the Courts to protect public officers from such mud-slinging. I.L.R. 1950 Bom. 233=51 Bom. L.R. 190=A.I.R. 1949 Bom. 229.

**—Duty of Court—Suit against judicial officer—Act done in discharge of judicial duties—Ex parte preliminary investigation by Court.**

It should be the duty of Court in which any suit is filed, which on the face of the plaint shows a case made against a judicial officer in respect of an act done

in the discharge of his judicial duties, to make a preliminary investigation *ex parte* of its own motion, before any summons in the suit is even served. In such a case the plaintiff should be called upon, before an issue by the Court of any summons, to show cause, by way of establishing a *prima facie* case against the judicial officer why a summons should be served on the defendant. 2 D.R. 71.

**—Disputed signature—Undesirability of Appellate Court constituting itself an expert—Proper course to take.**

It is not proper for an Appellate Court to constitute itself an expert where there is a dispute as to the genuineness of the signatures in documents. Where a Judge finds that the decision of the matter is not free from difficulty, the proper course for him is to requisition the services of an expert, especially when he is differing from the opinion of the trial Judge on a matter which the latter was by reason of his familiarity with the language and script more competent to speak. 1947 A.L.J. 110=1947 A.W.R. (H.C.) 125=1947 A. L. W. 264=A.I.R. 1947 A. 411.

**—Duty of Court—Duty of Judges to maintain temper.**

It is a matter of public policy that justice should not merely be done but should appear to be done. Though judges are human, it is always to be regretted if their patience even appears to give way. 1945 A.L.J. 34=A.I.R. 1945 P.C. 38=221 Ind. Cas. 603=1946 A.W.R. (P.C.) 15=1946 O.A. 15 (P.C.).

**—Duty of Court—Separate suit pending between parties in another Court—Observations in appeal on merits of pending suit—Propriety of.**

Where another suit between the parties to an appeal is still pending, the Court should generally avoid making any observation in the appeal which might prejudice the parties in that litigation or which might embarrass the Court in the trial of that other suit. The issue which has to be decided in that pending suit should not be decided in the appeal before the Court though between the same parties. 30 P.L.T. 359.

**—Duty of Court—Comment.**

Court ought not to comment adversely on witnesses' conduct relying on matters which are not 'evidence'. 85 Ind. Cas. 143=5 Lah. 476=26 Cr.L.J. 463=A.I.R. 1925 Lah. 187.

**—Remarks prejudicial to the character of stranger are undesirable.**

It is very undesirable that a Judge or a Magistrate should make remarks which are prejudicial to the character of a person who is neither a party nor a witness in the proceeding before him, and who has therefore no opportunity of giving an explanation or defending himself against the remarks made by the Court. 61 Ind. Cas. 63=45 Bom. 1127=23 Bom. L. R. 357=22 Cr. L.J. 335=A.I.R. 1921 Bom. 394.

**—Duty of Court—Wart of jurisdiction.**

Where the Court is of opinion that the suit is not cognizable by the Civil Court, the proper order to make is to return the plaint to the plaintiff for presentation to the proper Court and to dismiss his suit. 1930 A.L.J. 1251=14 R.D. 656=130 Ind. Cas. 292=A.I.R. 1931 A. 33.



### —Avoidance of multiplicity of suits.

Rights of various parties should be decided in one suit rather than in a number of suits, as it is obviously undesirable that the matter in controversy, which may be settled without disadvantage to any of the parties in a single litigation should be repeatedly agitated in a succession of suits. 17 C. W. N. 1161, Approved. 114 Ind. Cas. 369=30 Bom. L. R. 1604=A. I. R. 1629 Bom. 60.

### —Duty of Court—Recording reasons.

Where any enactment requires the recording of reasons by the Court for an order which it is empowered to pass it should not overlook that requisite. 119 Ind. Cas. 43=30 M. L. W. 230=1929 M. W. N. 74=A. I. R. 1929 Mad. 718.

### —Duty of Court—Standing over.

Appeal called on—Appellant going to call his pleader who was arguing case in another Court—Case should be allowed to stand over for a few minutes in order that parties may have their case decided on merits. 119 Ind. Cas. 435=51 All. 758=1929 A. L. J. 559=A. I. R. 1929 All. 399.

### —Duty of Court—Injury to parties—It is not the duty of a Civil Court to punish offences.

Where a Civil Court held that the defendant ought to be made to suffer for entering into an illegal agreement and breaking the law.

Held, it was not the duty of a Civil Court to punish offences. 110 Ind. Cas. 351=A. I. R. 1928 Nag. 232.

### —Duty of Court.

It is never the duty of the Court to initiate any proceedings on behalf of the parties. 89 Ind. Cas. 992=7 P. L. T. 39=A. I. R. 1926 Pat. 62.

Even if parties have not taken every step open to them or have not shown a prompt sense of their obligation or a right appreciation of the appropriate procedure it is nonetheless the object of Courts to decide the rights of parties and not to punish them for mistake they make in the conduct of their case by deciding otherwise than in accordance with their rights. 82 Ind. Cas. 184=22 A. L. J. 791=5 L. R. A. (Civ.) 545=46 All. 864=A. I. R. 1924 All. 818.

### —Duty of Court—Protection of subjects—Inroad upon the liberty of subject will not be tolerated by Courts.

Where there are breaches of law and order it is the duty of the High Court to relentlessly apply the law and to look neither to the possession nor the motive of the person committing or encouraging breaches of law and order. But while this is so it is equally the duty of the Court to assert from time to time and as often as it may be necessary that the subject has his rights as well as his duties and to assert further that the High Court as the guardian of the rights and the liberties of the subject will sternly repress, any attempt on the part of the executive government to tamper with such rights and liberties; and that an order in the garb of an order for the maintenance of law and order will not be allowed to stand, if its object is not to maintain law and order but to make a very serious inroad upon the liberty of the subject. 63 Ind. Cas. 945=3 P. L. T. 585=1922 P. H. C. C. 274=2 Pat. 134=23 Cr. L. J. 625=1 Pat. L. R. (Cr.) 199=A. I. R. 1923 Pat. 1 (S. B.).

### —Complaint—To be made in open court.

Complaints such as those by a judgment-debtor that bidders had not come or that the process-server had wrongly proclaimed that the sale would be held at some place other than the place at which it was to be held in fact, should be considered by the Court only when they are made to it in open Court in the usual way and not through a subordinate officer. 59 Ind. Cas. 167=44 Mad. 35=A. I. R. 1921 Mad. 583=12 M. L. W. 182=39 M. L. J. 188.

### —Judge—Duty to protect witnesses harassed.

It is for the Judge when he sees that a counsel is harrasing or brow-beating a witness unduly or trying to suppress his answers, to intervene and protect the witnesses in the interests of justice. Duties of the Bench and the Bar to each other discussed. (1917) P. H. C. C. 230=2 Pat. L. W. 83=18 Cr. L. J. 670=40 Ind. Cas. 318.

### —Judge—Interested in case—Duty of.

A judge should not try any case in which it is presumed he has the smallest personal interest or bias. 15 C. L. J. 162=14 Ind. Cas. 458.

### —Court's Duty—See Minor 9 Bom. L. R. 1114.

### —Issues—Appealable case—Duty of Judge to give findings.

In all cases from which an appeal lies the trying Judge should determine and give findings on all issues, so that the appellate Court might have the benefit of the view of the evidence taken by the trying Judge. A. I. R. 1949 H. P. 7.

### —Duty of Court—Appealable case—Duty to decide and give findings on all issues.

It is the duty of lower Courts, which are Courts of fact, to pronounce their opinion on all the important points in appealable cases, as failure to do so usually necessitates a remand. The practice of Courts of fact forbearing from deciding all the issues in the case ought to be severely disapproved. (1946) P. W. N. 321=13 B. R. 382=230 Ind. Cas. 88=A. I. R. 1947 Pat. 185. (S. B.).

#### (b). Appealable cases.

### —Duty of Court—Disposal of suit on preliminary issues without recording findings on all issues—Propriety of—Necessity to avoid—Duty of Court.

The practice of disposing of suits on findings arrived at on some issues only without recording findings on all the issues in the case must be avoided as, in the event of the appellate Court disagreeing with the findings of the trial Court there has to be a remand of the suit, and consequent prolongation of the proceedings with needless expense to the parties. 53 Mys. H. C. R. 322.

### —Duty of Court—Finding on all points to be recorded—Disposal of case summarily on one or two issues only—Propriety of.

The practice of Subordinate Courts disposing of cases summarily without recording evidence on all the issues and disposing of the cases on one or two issues which they consider sufficient to decide the case is extremely unsatisfactory and must be deprecated. In all appealable cases Courts should record their findings and pronounce their



opinion on all the important points in the case, in order to avoid a remand on appeal resulting in additional heavy cost. 53 Mys. H.C.R. 73=28 Mys. L.J. 117.

—**Duty of Court—Findings on all points to be recorded in appealable cases.**

It is the duty of lower Courts to pronounce their opinion on all the important points in appealable cases as a failure to do so often necessitates a remand with the consequence of heavy additional costs. 52 Mys. H.C.R. 426=28 Mys. L.J. 14.

—**Duty of court—Complete consideration of all issues.**

It is better for trial Court to decide all the issues in order to save time and prevent remands in case the Appellate Court disagrees with it on questions of law or on questions of fact. 119 Ind. Cas. 330=30 P.L.R. 645=A.I.R. 1930 Lah. 221.

—**Judgment—Completeness—Walsh, J.**

Even if a suit is dismissed upon a preliminary point it is of the greatest advantage to the parties and to the appellate Court that all the issues should be determined because preliminary points are sometimes unsound and if they are overruled in the appellate Court, the appellate Court is then seized of all the material which enables it to dispose of the suit if it happens to disagree with the first Court. 103 Ind. Cas. 428=25 A.L.J. 857=A.I.R. 1927 All. 669.

—**Court must decide every issue allowing both parties, opportunity to be heard, though question raised in the issue was one which might have been disposed of on the allegations in the plaint itself.** 90 Ind. Cas. 749=48 All. 44=23 A.L.J. 901=6 L.R.A. (Civ.) 488=A.I.R. 1926 All. 36.

—**In appealable cases an opinion should be expressed on all the important points, to avoid the necessity of a remand by the appellate Court.** 76 Ind. Cas. 772=A.I.R. 1923 Nag. 322.

—**In appealable cases the Courts below should as far as may be practicable, pronounce their opinion on all the important points so as to avoid remand expense and delay.** 74 Ind. Cas. 906=32 M.L.T. 115=50 Cal. 243=27 C.W.N. 749=37 C.L.J. 561=50 I.A. 247=A.I.R. 1922 P.C. 405=44 M.L.J. 388 (P.C.).

—**Judgment—General issues—Judgment to be full.**

Where petitions raising important questions of law or fact are made to a court, it should proceed to deal with them fully as the failure in many cases involves remand which is undesirable. 1 Pat. L.T. 582=(1920) P.H.C.C. 261=58 Ind. Cas. 489.

—**Judgment—Decision—Duty of Court if issue framed and evidence taken thereon.**

Where an express issue is raised and evidence is given thereon by both parties, it is incumbent on the court to come to a conclusion thereon. 57 Ind. Cas. 524 (Pat.).

—**Judgment—Trial Court—Decision—Issues.**

A trial Court should not after recording all the evidence confine its decision to the trial of one issue 5 L.W. 228=38 Ind. Cas. 188.

—**Judgment—Contents of—Appealable cases—Duty of Lower Court.**

In appealable cases, the Lower Court should as far as possible pronounce its opinion on all the issues raised. 5 W.R.P.C. 53 Foll. 1 L.W. 416=94 Ind. Cas. 87.

(c). **Conduct of suit.**

—**Duty of Court—Reliance on and decision on basis of suspicions and conjectures—Duty to give effect to documents proved in the case.**

The rights of parties to a litigation cannot be decided on mere suspicions or conjectures; the law presumes in favour of honest dealing. Where the documents proved in the case evidence a definite arrangement or fact, they cannot be explained away on hypothetical grounds. 1949 F.C.R. 441=A.I.R. 1950 F.C. 21=51 Bom. L.R. 906=1949 F.L.J. 374.

—**Documents forming basis of claim—Consideration of.**

When the rights of the parties are governed by a written document, it is essential to study and to follow the terms of such document, just as it is necessary, when a Court is administering the sections of a Code that it should study the exact language of the section, before troubling itself about decided cases on general considerations. 26 A.L.J. 446=A.I.R. 1923 All. 230.

—**Plaintiff alleging defendant is a co debtor and that defendant asserting that he is a surety—Case to be disposed of only after taking evidence.**

Where the plaintiff alleges that a particular defendant is co-debtor while that defendant asserts that he is only a surety, the Court should dispose of the case only after taking down the evidence of the parties in the matter. A.I.R. 1950 Ajmer 9 (I).

—**Fraud on Court—Party obtaining adjournment on strength of telegram of witness.**

Where a party obtains an adjournment on the strength of a telegram from one of his witnesses that he had missed a train, even if the statement of the witness was false, the party to the suit cannot be made to suffer because there was no fraud on his part. 1949 A.M.L.J. 28.

—**Duty of Court—Case between aborigines and sophisticated persons—Duty of Court to be on guard and to take commonsense view.**

When dealing with simple aborigines liable to exploitation at the hands of more sophisticated people, the Courts are in duty bound to be perpetually on their guard to take a commonsense view and to endeavour to penetrate through the statements made before them to the actual realities behind. 228 Ind. Cas. 192=13 B.R. 150=29 P.L.T. 93=A.I.R. 1948 Pat. 10.

—**Duty of Court—Evidence tendered at late stage—Conflict between procedure and substantial rights of parties.**

As a general rule, evidence should never be shut out. Opportunity should always be given to the parties to give evidence, if the justice of the case requires it. It does not matter if the original omission to give evidence arose from negligence or carelessness. However negligent or careless may have been the first omission and however late the proposed evidence, it should be allowed if that can be done without injustice to the other side. There is no injustice if the other side can be compensated by costs. But if the other side by the



production of such evidence is seriously prejudiced, which cannot be remedied, the Court shall not exercise the discretion.

The procedure of the Court is to aid the administration of justice and not to hamper it. Where in the peculiar circumstances of a case, there is a conflict between the law of procedure and the substantial rights of the parties, it is the duty of the Judge or the Court to ignore the procedure. 53 C.W.N. 770=84 C.L.J. 313.

**—Duty of Court—Trial of suit—Defendant not appearing—Evidence required of plaintiff.**

Where the defendant does not appear and the Court requires the plaintiff to adduce *prima facie* evidence, it should take just enough evidence to satisfy itself that a *prima facie* case has been established. In any event it should at least tell the plaintiff how much evidence it requires. Otherwise the plaintiff will be bound to adduce all his evidence in every undefended case and proceed as fully as he would have done in a defended action. I.L.R. (1947) Nag. 982=A.I.R. 1948 Nag. 168=1948 N.L.J. 72.

—Undefended suit—Mere absence or defence is not enough for plaintiff's success which should be founded on the strength of the plaintiff's claim by itself. 84 Ind. Cas. 65=39 C.L.J. 569=A.I.R. 1925 Cal. 75.

**—Duty of Court—Evidence—Lower Court should carefully consider entire material on record for giving finding of fact.**

The High Court is bound to accept as final the findings of fact arrived at by the lower Appellate Courts. It is therefore all the more necessary for these Courts to give such finding after a careful consideration of the entire important material on the record which may have a bearing on the questions at issue. 123 Ind. Cas. 573=A.I.R. 1930 Lah. 12.

**—Question of fact—Court should examine parties and sift the evidence.**

A suit was instituted for the recovery of money due on a promissory note alleged to have been executed in favour of plaintiff by the defendant who was illiterate. The promote bore a blurred thumb mark. The defendant denied the execution of the promote and pleaded enmity. The trial Court did not examine the plaintiff and defendant. While the scribe, one of the two witnesses examined, said that no money was paid in his presence and that the defendant refused to affix his thumb mark, the other stated quite the opposite. The Trial Court believing the latter witness decreed the claim.

Held, where the decision on a question of fact is final the duty of examining the parties and thoroughly sifting the evidence ought to be better realised by the Trial Courts. 25 O.C. 69=A.I.R. 1922 Oudh 122.

**—Duty of Court—Impartiality—Correspondence with any one in the matter pending judicially before it.**

It is objectionable for a Court to enter into correspondence with regard to a matter pending judicially before it, and it is illegal to take notice of the statements made in such correspondence by a person who has not chosen to substantiate them either by himself going into the witness-box or by leading other evidence. 107 Ind. Cas. 397=A.I.R. 1928 Lah. 456.

**—Court should not act on information received in absence of parties.**

The Court is not entitled to act on information received in the absence of the parties nor can it base its judgment on its own knowledge of the facts. To say that the Court could have come to the same conclusion on the other material before it is no answer. If the case is brought within the general principle that the Judge's mind may, by a possibility, have been biased, there is sufficient objection. 92 Ind. Cas. 792=47 Mad. 800=A.I.R. 1925 Mad. 145=48 M.L.J. 89.

—Court's mind should not be influenced by irrelevant and inadmissible evidence. 95 Ind. Cas. 137 (Lah.).

**—Duty of Court—Hearing—Allahabad High Court Rules—Time fixed for the sitting of Subordinate Judges—Taking up of a fresh case by the Subordinate Judge after the expiry of the time fixed—Propriety.**

Though a Subordinate Judge might be justified in sitting beyond the period of time fixed by the Allahabad High Court for the sitting of Subordinate Judges in that Province for the purpose of continuing the hearing of a case the hearing of which has already started, or taking up a fresh case, with the consent of parties, it would be too much to expect that the litigants should wait for indefinite hours, without being told when their cases are likely to be taken up. 121 Ind. Cas. 551=1930 A.L.J. 670.

—A case fixed on a particular date cannot be taken up prior to that date unless the parties consent to it. 105 Ind. Cas. 271=6 Pat. 108=A.I.R. 1927 Pat. 354.

**—Duty of Court—Moral rules.**

Moral rules which may be very satisfactory as moral rules should not be introduced into the administration of justice. 97 Ind. Cas. 604=24 M.L.W. 318=1926 M.W.N. 661=A.I.R. 1926 Mad. 1017=31 M.L.J. 387.

**—Duty of Court—Point not raised by parties.**

Court ought not to decide a case on a point not raised by parties. 92 Ind. Cas. 241=7 L.L.J. 542=26 P.L.R. 840=A.I.R. 1927 Lah. 96.

**—Duty of Court—Pleadings.**

Subordinate Courts should confine themselves to the pleadings of the parties and not usurp the functions of the *Kaji* of old who sat under a tree and dispensed natural justice without being hampered by any pleadings or evidence. 81 Ind. Cas. 573=A.I.R. 1925 Oudh 142.

**—Court should dismiss suit if it disbelieves plaintiff or should allow amendment—Passing decree in plaintiff's favour after such disbelief is wrong.**

78 Ind. Cas. 162=A.I.R. 1925 Cal. 521.

**—Court is nobody's agent.**

The Court is nobody's agent. It is a tribunal to decide disputes between two parties and must, with a view to perform its functions justly and properly, act independently of any of the two parties engaged in a litigation before it. 75 Ind. Cas. 267=A.I.R. 1925 Oudh 264.

**—Failure of the suit on the main cause of action—Trial of suit on other unnecessary issues—Parties.**

Plaintiff sued for possession of their mother's property on the ground that she was dead.

Held, that the cause of action in the case was the death of the mother, and if that was found against, it was not competent to the Court to deal with the ques-



tions of the paternity of the plaintiff and the validity of the gift by the mother. Where these questions were not presented by the plaintiffs as separate and substantive questions affecting rights other than that of possession.

**Held, also,** that the validity of the gift by the mother, the mother being alive, could only be determined with her as a party to the suit. The circumstance that some of the *media concludendi* might be the same in another action does not vest the Court with any right or duty to pronounce upon them in a suit, which has gone before the Board because of the failure of the ground of the action. (1907) 7 C.L.J. 44=17 M.L.J. 626=12 C.W.N. 227=35 C. 189=10 Bom. L.R. 9=2 M.L.T. 509=14 Bur. L.R. 101=35 I.A. 38 (P.C.).

**—Hearing—Deciding case without hearing party—Proper procedure.**

It is an elementary principle which is binding on all persons who exercise judicial or quasi-judicial powers, that an order should not be made against a man's interest without there being given him an opportunity of being heard. The proper remedy of the party against whom the order has been made without hearing him is to apply to the same authority for a re-hearing. (1906) 4 C.L.J. 177=3 A.L.J. 698=8 Bom. L.R. 719=16 M.L.J. 365=1 M.L.T. 308=10 C.W.N. 969=33 C. 1178=33 I.A. 134 (P.C.).

**(d) Duty to see that no injustice is done by its acts. See C.P. Code, S. 151.**

Mistake of Court—Relief to parties against injustice caused by its own mistake or oversight. See C.P. CODE, S. 151. A.I.R. 1950 Pat. 350.

**—Mistake of party leading to mistake on part of Court's officers—Right of party to take advantage of own mistake and plead mistake of Court as excuse.**

A party cannot be allowed to take advantage of his own wrong; where the decree-holder-purchaser's wrong calculation and mistake lead to a mistake and wrong calculation on the part of the officers of Court and the deposit made by the decree-holder falling short, application is made by judgment-debtor for setting aside the sale, the decree-holder cannot be heard to say that the sale should not be set aside on the ground of the inadequacy of the deposit and plead the mistake of the Court's officers in defence. A.I.R. 1951 Cal. 319.

**—Duty of Court—No injustice.**

Where the facts of the case show that the claim of the plaintiff is utterly inequitable and unjust, his case is clean out of the principle: "One of the first and highest duties of all Courts is to take care that the act of the Court does no injustice to any of the suitors." 1930 M.W.N. 524=32 M.L.W. 357=53 Mad. 943=128 Ind. Cas. 509=59 M.L.J. 893=A.I.R. 1930 Mad. 921.

—A general duty is obligatory on Courts and a corresponding power is inherent in them to see that no party suffers from their own acts. 83 Ind. Cas. 138=A.I.R. 1925 Mad. 365.

**—Courts having jurisdiction are bound to see that no injury is done by their acts.**

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court or of any intermediate Court of

12 F. Y. D—47.

Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It would be inequitable and contrary to justice that the judgment-debtor should be restored to his property without making good to the auction-purchaser the moneys which have been applied for his benefit. 69 Ind. Cas. 278=27 C.W.N. 582=37 C.L.J. 351=21 A.L.J. 490=25 Bom. L.R. 643=1923 M.W.N. 368=4 L.R.P.C. 117=18. P.L.W. 802=49 I.A. 351=2 Pat. 10=32 P.L.T. 10=4 P.L.T. 61=A.I.R. 1922 P.C. 269=44 M.L.J. 735 (P.C.).

**(e). Formal Defects.**

**—Duty of Courts is not to allow mere technicalities.**

It is the duty of the Courts to administer justice taking a broad view and not to allow litigants to take advantage of legal technicalities and commit what is practically robbery by process of law. 74 Ind. Cas. 47=1 Bur. L.J. 111=A.I.R. 1923 Rang. 57.

**—Formal defect—Court whether bound by technicalities.**

A court should not be bound by any technicalities which regard to the form of the statement of claim in a plaint. 26 C.L.J. 105=41 Ind. Cas. 842.

**—Formal defect—Not to defeat justice.**

The object of rules of procedure is to provide for the best and most convenient mode of adjudication and they should not be converted into mere mechanical tests by which courts may save themselves the trouble of deciding the real issues between the parties. 24 Ind. Cas. 822 (Mad.).

**—Formal defect—Application—Erroneous provision cited.**

A court should not refuse an application simply because it asks the Court to exercise its admitted powers under a wrong section. 16 Ind. Cas. 614 (Cal.).

**—Formal defect—Court's duty.**

Mere grounds of equity do not justify a court in construing an application as something essentially different from what it is. 5 S. L.R. 68=11 Ind. Cas. 77.

**—Formal defect—Not to be penalised.**

Courts must look to the essential justice of the case and the substance and merits and not matters of form. 10 C.L.J. 517=3 Ind. Cas. 34.

**—Formal defect—Application under wrong section.**

A Court will not refuse an application, proper on the merits, and within the power of the Court to grant, merely because it was asked for, under a wrong section. 10 C.L.J. 91=1 Ind. Cas. 677.

**(f). Framing of Issues.**

**—Practice—Duty of Court—Illegality appearing on facts and not raised by opponent—Duty to frame issue.**

Both in India and in England Courts are bound to take notice of any ground of illegality appearing



on facts stated in a party's pleading or disclosed otherwise though his opponent does not raise it in his pleading. A Court could frame an issue if it finds that it arises out of pleadings or is involved thereon. I. L. R. (1950) Nag. 105=A.I.R. 1950 Nag. 71=1950 N.L.J. 297.

—**Duty of Court—Issues—Framing of—Duty to read pleadings carefully and frame issues and note points really in dispute—Adoption of draft issues—Propriety—Admission of evidence.**

It is always safe for the Judges of lower Courts to read the pleadings carefully, frame issues (without adopting the draft issues framed by the advocates of parties blindly) and be familiar with the points really in dispute so as to enable them not merely to check unnecessary evidence but also unnecessary arguments on points which do not really arise. Copies of numerous documents should not be lugged in at a late stage or relied upon without any evidence of the same. A.I.R. 1950 Mys. 33 (F. B.).

—**Court need not raise issue not put forward by parties—Where parties have not been misled, defect in form of issues is immaterial.** 83 Ind. Cas. 360=16 S.L.R. 207=A.I.R. 1922 Sind 159 (F.B.).

—**Issues—Duty of Court to raise.**

An issue should be raised and a finding given by the Court on every question necessary for the right decision of a suit. But where the pleadings raise an issue with sufficient clearness it is immaterial that the plea was not put forward in a particular form. (1914) M.W.N. 595=25 Ind Cas. 123.

(g). **Grant of relief.**

—**Duty of Court—Right to relief—Basis of.**

It is the duty of a Court to apply the principles of law to the particular case before it, and determine not merely the right but the extent to which the parties are entitled to remedy. A party seeking a relief has to prove his right to it and the Court cannot give him relief on inferences. A.I.R. 1950 M. B. 41.

—**Duty of Court—Incorrect provision of law quoted—If conclusive as to relief to be granted—Substance of prayer to be considered.**

The duty of Court is to look at the substance of the application presented to it in order to grant relief, and the fact that the applicant quotes an incorrect provision of law should not be taken into account. 3 A.I. Cr. D. 242.

(h). **Precedents.**

—**Duty of Court—Precedents.**

The Court should be reluctant to dissent from the view expressed in long established decided cases and thereby not only to unsettle the law but also to endanger the security of property and title, dangers which are not associated with changes brought about by legislative intervention. 68 Ind. Cas. 219=35 C.L.J. 36=26 G.W.N. 703=A.I.R. 1922 Cal. 331.

—**Consideration of cases cited.**

Where the lower Appellate Court refused to consider cases cited by the appellant and reserved the decision of the trial Court on flimsy grounds.

**Held,** that it was the duty of the lower Appellate Court to consider the cases cited and that his refusal to do so was improper. 63 Ind. Cas. 290=3 Pat. L.T. 143=1 Pat. 44 1921 P.H.C.G. 349=A.I.R. 1922 Pat. 56.

—**Precedents—Unanimity among judicial decisions in India.**

Per **Jenkins J.**—It is desirable, and is in the interests of justice, that so far as possible there should be unanimity among several courts on those matters where local conditions do not call for different results. (1902) 4 Bom. L.R. 688=27 B. 1 (F.B.).

(i) **Question of law.**

—**Duty of Court—Practice—Point not raised in first Court—Consideration of.**

Per **Halifax, A J.C.**—There is no justification for a refusal to consider a plea of law that the parties being Gonds are not governed by the Hindu Law, in appeal on the fact that it is not raised in the first Court. It is the business of the Court to discover the law applicable to the facts laid before it even without the aid of suggestions made to it by the parties in the form of pleas. 118 Ind. Cas. 871=A.I.R. 1930 Nag. 35.

—**The Court is in duty bound to consider the legal aspect of the case as they appear on the record whether specifically pleaded or not.** 127 Ind. Cas. 173=A.I.R. 1930 Rang. 264.

—**Courts have no right to legislate however desirable that legislation may be on principle.** 119 Ind. Cas. 376=49 C.L.J. 422=30 Cr.L.J. 1030=A.I.R. 1929 Cal. 508.

—**Cannot alter law but can only administer it.**

It is not the province of the Judge to alter the law however opposed it may be to the consciousness of the people. It is his duty to administer it as he finds it. Where the law has been uniform for the last 60 years it will not be proper for Courts to alter it merely because it is opposed to the present consciousness of people, when the legislation could have altered it. 32 Mad. 351, Considered. 74 Ind. Cas. 27=16 M.L.W. 768=31 M.L.T. 389=A.I.R. 1923 Mad. 153.

—**Judge—Duties of.**

The Judge's duty is to decide what according to the best of his judgment the law is and not to declare what the law ought to be. 4 S.L.R. 209=12 Cr.L.J. 119=9 Ind. Cas. 718.

—**Court—Functions of—Duty to declare the law.**

The court has to ascertain and declare what the law is and not what it ought to be. 34 Bom. 72=11 Bom. L.R. 255=2 Ind. Cas. 173.

—**The proper method of trying a case is by arriving at findings of fact first and applying the law to them afterwards.** 116 Ind. Cas. 285=51 All. 519=1929 A.L.J. 115=A.I.R. 1929 All. 170.

—**A Court should first decide the points or law involved in issues and then, if necessary, refer any matters to a commissioner.** 113 Ind. Cas. 646=A.I.R. 1929 Mad. 121.

—**Court must itself find and examine all pleas of law that apply to facts of the case.**

Court must find and examine all pleas of law that may possibly apply to the facts for itself. It must not wait for the parties even to suggest them, still less for the parties to plead them, which they are expressly forbidden to do by the Civil Procedure Code. Refusal by a Judge to examine a question of law applicable to the facts because it was not "pleaded" earlier is his own condemnation; he ought to see it for himself earlier.



but anyhow he should hasten to repair the results of his own inadvertence when a party reminds him of it. 107 Ind. Cas. 513=A.I.R. 1928 Nag. 206.

**—Court itself should find out law applicable to the case.**

By R. 2 of O. 6 parties are forbidden to state more than facts in their pleadings, and though counsel can and do help in finding out the law applicable to those facts and presenting it to the Court, it still remains the duty of the Court alone to discover and apply the law applicable to the facts found proved. 93 Ind. Cas. 103=A.I.R. 1926 Nag. 313.

**—Court must find and apply law though not pleaded.**

The common idea that a Court is not bound to consider, or rather is bound not to consider, any view of the law in respect of the facts before it except such as is laid before it formally by the parties or their pleaders, if they happen to have any, and further is required to answer nothing but 'yes' or 'no' to any plea of law that may be taken is wrong. It is the duty of the Court whether with or without help of the parties or their pleaders to discover for itself and to apply the law applicable to the facts pleaded and proved. 92 Ind. Cas. 926=A.I.R. 1926 Nag. 265.

**23. Practice—Ejectment.**

See also EJECTMENT.

**—Ejectment suit—Burden of proof—Duty of plaintiff.**

A plaintiff in a suit for ejectment has to prove not only his possession within 12 years but also his title to the property in suit. If he fails to prove his title, his suit has to be dismissed. Where the plaintiff sues for possession of lands on the basis of a permanent heritable grant of the lands in favour of his ancestor burdened with the performance of a duty, he can only succeed if he proves his title, namely, he must prove by evidence when, why and to whom the grant was made and who was in possession of the lands before his ancestor. On failure of proof, no grant in favour of his ancestor or family can be inferred. A.I.R. 1950 Pat. 302.

**—Ejectment—Redemption—Separate suit necessary.**

In a suit for possession by vendee the defendant can redeem the mortgage if the plaintiff is found entitled to possession as mortgagee. A separate suit for redemption is not necessary. 7 O.L.J. 342=2 U.P.L.R. (J. C.) 123=57 Ind. Cas. 541.

**—Ejectment—Redemption.**

The practice of the Bombay High Court to pass a decree for redemption in a suit in ejectment is purely discretionary. 35 Bom. 507=13 Bom. L.R. 895=12 Ind. Cas. 387.

**—Ejectment—Suit on title—Decree on the strength of prescriptive acquisition.**

The question whether a plaintiff can succeed on a title by adverse possession not set up in the plaint depends mainly on the facts of each particular case and more particularly on whether the defendant has or has not been taken by surprise and whether he has had an opportunity of meeting the case so set up. 53 Ind. Cas. 639 (Cal.).

**—Ejectment—Suit on title—Plea of adverse possession—Burden of proof.**

The onus is on the defendant to plead and prove the adverse possession for the statutory period in a suit for declaration of title based on the defendant's alleged repudiation of it. 39 M. 617, Foll. 37 Ind. Cas. 794 (All.).

**—Ejectment—Title—Pleadings.**

A sued B for possession of certain property. A claimed under a registered deed of gift made by the daughter of the last owner of the property. B claimed as the adopted son of the last owner. The question to be decided was whether B, failing in his defence as to adoption could set up that A's deed of gift was invalid.

**Held,** that B could not set up that plea. He could not rely on the ground of attack open to the donor if the latter sued the donee, within limitation, to set aside the deed. The title of the donee could not be challenged by a third party without a title so long as the registered deed is there. 36 Bom. 37=13 Bom. L.R. 947=12 Ind. Cas. 532.

**—Ejectment—Partition suit by Hindu sons for possession of property improperly alienated by their father—Suit allowed—Decree, form of.**

In a suit by Hindu sons for possession of property improperly alienated by their father the decree which allows the sons' claim should direct recovery of the whole property declaring at the same time that the purchaser had acquired the share and interest of the alienor and is entitled to take proceedings to have it ascertained by partition. But if there is an alternative prayer for partition, the Court should at once decree partition as the theoretical objection to it disappears. 41 Bom. 347=19 Bom. L.R. 69=39 Ind. Cas. 23.

**—Ejectment—Decree for redemption—Costs—Conditional decree.**

To avoid further litigation over matters substantially ripe for settlement, the Privy Council acceded to the plaintiff's prayer that his suit in ejectment should be converted into one for redemption of certain mortgages to which the property was held to be subject, on terms as to costs viz., that plaintiff should pay the defendant's costs in the Courts in India and each party to bear his costs of the Privy Council appeal. 35 All. 211=25 M.L.J. 111=(1913) M.W.N. 500=13 M.L.T. 488=11 A.L.J. 494=17 C.L.J. 555=15 Bom. L.R. 502=17 C.W.N. 853=40 I.A. 105=19 Ind. Cas. 267 (P.C.).

**—Ejectment—Decree for partition.**

A suit in ejectment cannot be converted into one for partition. 37 Mad. 529=23 M.L.J. 189=(1912) M.W.N. 1127=15 Ind. Cas. 299.

**—Ejectment—Decree for joint possession.**

It is open to the Court to pass a decree for joint possession in a suit for exclusive possession, the plaintiff having been found so entitled, but the plaintiff cannot claim such a decree as of right. (1912) M.W.N. 1116=15 Ind. Cas. 665.

**—Ejectment—Decree for joint possession..**

Plaintiff sued for exclusive possession of certain lands and it was found that the lands belonged to him jointly with the defendant.



**Held**, the plaintiff could be given a decree for joint possession along with the defendant to the extent of his interest. 26 B 141, Foll. (1910) M.W.N. 261=8 M.L.T. 97=6 Ind. Cas. 502.

#### —Ejectment—Joint possession.

A plaintiff who has brought a suit in ejectment, finding that it is barred by limitation, cannot claim relief on the basis of a tenancy in common and ask joint possession. 33 Mad. 356=7 M.L.T. 95=5 Ind. Cas. 764.

#### —Ejectment—Decree for joint possession.

If the evidence establishes plaintiff's title to joint possession, decree should be passed to that effect though he claims exclusive possession. 19 C.L.J. 213=2 Ind. Cas. 492.

### 24. Practice—Election of remedies.

#### —Election of remedies.

Where there is nothing in the Code to limit a party to one particular mode of procedure, the fact that he gets a longer period of limitation by adopting a particular course is no ground for refusing relief. 9 L.W. 311=(1919) M.W.N. 246=37 M.L.J. 59=50 Ind. Cas. 327.

#### —Election of remedies—Inconsistent reliefs.

On election of one of two alternative remedies, a party on failure cannot seek the other remedy. 15 A.L.J. 661=33 Ind. Cas. 798.

#### —Election of remedies—Two remedies given by law—Right of party.

Where two remedies are given by law to a party he is entitled to avail himself of either of them unless they are inconsistent. 37 Mad. 29=10 M.L.T. 437=21 M.L.J. 1063=12 Ind. Cas. 664.

### 25. Practice—English Law.

See (1) PRECEDENTS AND  
(2) NOTE 40

#### —English law—Principles of—Applicability.

It is unsafe to adduce principles of English law without trying to discover whether there corresponds to those principles anything in our own law which may be said to constitute a recognition of those principles in all details. Pak. L.R. (1950) Lah. 1=A.I.R. 1950 Lah. 106.

#### —English law—Applicability.

English law may no doubt be useful in some cases but it can properly be invoked only when it is found applicable to the circumstances of this country. 11 Lah. 564=129 Ind. Cas. 21=31 P.L.R. 934=A.I.R. 1930 Lah. 920.

#### —English law—Applicability to cases under Hindu law.

One must, in applying the principles of the English common law and not rules of the nature of procedure to a state of things which is created not entirely by the acts of the parties but by the necessary consequence of the relation in which they stand to one another by virtue of the provisions of Hindu law, remember that he is applying them to a totally different subject-matter. In view of that the provisions of

law in such matters should be applied with greater flexibility than they would be applied in England. 101 Ind. Cas. 386=A.I.R. 1928 Mad. 23.

—English Rules under O. 27 of the Rules of the Supreme Court—Summary remedies of plaintiff on default of pleading by defendants—Do not apply in India. 76 Ind. Cas. 940=1923 P.H.C.C. 153=5 P.L.T. 330=A.I.R. 1923 Pat. 386.

### 26. Practice—Evidence.

See also (1) C.P.C., O. 18.

(2) EVIDENCE.

(3) EVIDENCE ACT.

(4) NOTE 74.

(a) Admission of

(b) Appellate court.

(c) Appreciation.

(d) Court's duty.

(e) Quantum of.

(f) What is.

(g) Miscellaneous.

(a). Admission of.

—Evidence—Examination of witnesses—Prospective witness present in Court during examination of another witness—Bar, if, any to his examination as a witness.

The fact that one of the plaintiffs was present in Court when his co-plaintiff was giving evidence is no ground, for objecting to the recording of the former's evidence. But it will be for the trial Judge to decide how much weight is to be attached to that evidence. There is nothing in the C.P. Code, prohibiting the recording of evidence in such circumstances. 1946 A.M. L. J. 43.

—Examination of witnesses *de bene esse*—Irregular deposition—Objections should be taken at the earliest opportunity and not at hearing of action. 64 Ind. Cas. 785=33 C.L.J. 577=A.I.R. 1921 Cal. 852.

—Evidence—Marking document by consent—Effect—If proof of allegations in the document.

Permitting a document to be marked by consent only means that the party consenting is willing to waive his right to have the document in question proved. Agreeing to the document being marked by consent certainly does not mean that the consenting party accepts the correctness of every statement made in that document. 1947 M.W.N. 753=A.I.R. 1948 Mad. 298=60 L.W. 803=(1947) 2 M.L.J. 535.

—Evidence—Document (Judgment) produced at late stage—Objection to admission on ground of production at late stage—If to be allowed.

A technical objection to the admission of a document, e.g., a judgment of a Court of law, on the question of the existence of ancient custom, based on the ground that it is produced at a late stage, should not be allowed to prevail, when the evidence is important and relevant to the case. A.I.R. 1950 Sind 26.

—Evidence—Admissibility.

—Objection to admission of document not taken in trial cannot be allowed to be taken in appeal. But the position is not the same where the document is inadmissible and unless it is admitted there is no alternative



method of proving it. 57 Cal. 775=126 Ind. Cas. 550=A. I. R. 1930 Cal. 94.

—Objection as to improper admission of evidence, which is not inherently inadmissible, should be taken at the earliest opportunity and cannot be raised for the first time in appeal if the evidence has been allowed to be let in at the trial. 1 Pat. 606, Foll. 112 Ind. Cas. 385=A. I. R. 1929 Lah. 145.

#### —Evidence—Objections to.

—When a document has been accepted in evidence without an objection in the trial Court, the Appellate Court cannot allow the objection for the first time in appeal. 112 Ind. Cas. 461 (Lah.).

—Objections as to the admissibility of evidence will not as a general rule, be entertained for the first time in second appeal. 104 Ind. Cas. 518=39 M.L.T. 198=A. I. R. 1927 Mad. 1107.

—When application is made at a late stage in the case to put in evidence *res noviter ad notitiam pervena*, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter was not discovered before. 100 Ind. Cas. 77=31 C.W.N. 245=25 M.L.W. 400=1927 M.W.N. 190=38 M.L.T. 57=45 C.L.J. 308=29 Bom. L.R. 786=A. I. R. 1927 P.C. 27=52 M.L.J. 492 (P.C.).

—Where a party accepts the certificate of a thumb-impression expert without formal proof in the trial Court, he cannot be allowed in appeal to say that his evidence should be excluded for want of proof. 100 Ind. Cas. 922=A. I. R. 1927 Lah. 396.

#### —Evidence—Proof of.

The question of proof is a question of procedure and if it can be shown that the documents went in without any objection, it cannot be urged in the appellate Court that they were not properly proved in the Court below. 98 Ind. Cas. 968=8 P.L.T. 255=A. I. R. 1927 Pat. 117.

#### —Evidence—Formal defect.

High Court ought not in second appeal to reject a document admitted by lower Court in consequence of an error in form rather than in substance. 97 Ind. Cas. 200=43 C.L.J. 479=A. I. R. 1926 Cal. 988.

—Where a copy of the original document is allowed to be filed by the Court without objection, the question involved is not one of relevancy but is one of admissibility, and the objection as regards admissibility not having been raised in the Trial Court is not open in appeal. 84 Ind. Cas. 921=20 M.L.W. 719=35 M.L.T. 129=1924 M.W.N. 923=A. I. R. 1925 Mad. 257.

—Where the objection as to inadmissibility of the deed was taken in the first Court in the written statement but was afterwards dropped and was not put in issue and it was not taken in the grounds of appeal to the lower Appellate Court.

**Held**, no reason for remanding the case for an inquiry into the actual value of the property covered by the deed was clearly made out. 79 Ind. Cas. 440=A. I. R. 1923 Lah. 21.

—Where a document has not been tendered as a piece of evidence in the lower Court, but has been merely produced in compliance with an order of discovery, the argument of party being estopped by reason of his not having objected in the lower Court, from questioning

the admissibility of the document in the Appellate Court, does not arise. 4 L.L.J. 385=A. I. R. 1921 Lah. 328.

#### —Evidence—Admissibility—Omission to object—Irrelevant document.

It is the duty of the Court to exclude an irrelevant document from evidence even if no objection is taken to its admissibility by the parties. Omission to object would not render it admissible. 5 Pat. L.J. 410=57 Ind. Cas. 561.

#### —Evidence—Admissibility—Objections on appeal.

The plea of the inadmissibility of a document for want of registration must be raised in the first Court and not in appeal. 57 Ind. Cas. 58. (Lah.).

#### —Evidence—Admissibility—Objection to second appeal.

No objection to the admissibility of a document can be taken for the first time in second appeal when an answer to the objection involves an enquiry into facts. 56 Ind. Cas. 816 (Cal.).

#### —Evidence—Admissibility—Objection to.

The objection to the admissibility of a document in evidence should be raised when the document is tendered. To raise objections to the admissibility of evidence, documentary or otherwise, for the first time in appeal is improper. 38 All. 366=14 A.L.J. 449=35 Ind. Cas. 701 (F.B.).

#### —Evidence—Admissibility of document—Objection in appellate Court.

Where no objection is taken to the admissibility of a document in the Lower Court, no such objection can be taken in the Appellate Court and the latter also cannot raise such an objection *suo motu*. 216 P.W.R. 1912=14 Ind. Cas. 539.

#### —Evidence—Admissibility—Award—Unstamped—Objection on appeal.

Objection that an award is ineffective as it is not stamped, cannot be taken for the first time in second appeal. 37 Cal. 63=10 C.L.J. 41=14 C.W.N. 75=2 Ind. Cas. 414.

—Non-objection to admissibility—Inadmissible document is not made admissible. 121 Ind. Cas. 334=8 Pat. 783=A. I. R. 1929 Pat. 739.

—Where no objection is raised to the admissibility of a document and both parties rely on it the document can be the basis of decision. A. I. R. 1924 Lah. 265, Foll. 9 L.L.J. 32=A. I. R. 1927 Lah. 888.

—The evidence of a witness cannot be admitted until the opposite party had an opportunity of cross-examining him. 117 Ind. Cas. 824=A. I. R. 1929 All. 236.

—Where there is any objection to the admissibility of an evidence, a final decision on the objection must be recorded before the Court proceeds to judgment. 93 Ind. Cas. 101=43 C.L.J. 237=30 C.W.N. 259=A. I. R. 1926 Cal. 752.

#### —Evidence—Admission of document—Subject to objections.

A Court acts improperly in admitting a document "subject to objection" and not deciding the objection. 1 Pat. L.T. 491=58 Ind. Cas. 247.



**—Evidence—Procedure.**

To admit everything first and afterwards determine the question of admissibility is entirely erroneous procedure. 84 Ind. Cas. 987=3 Bur. L.J. 231=2 Rang. 441=A.I.R. 1925 Rang. 61.

**(b). Appellate Court.****—Evidence—Appellate Court.**

Where in a protracted proceeding in lower Courts a party is offered plenty of opportunity to prove his case by adducing evidence, and the party does not produce the evidence then available, it is not permissible to that party to have the same evidence admitted in second appeal. 122 Ind. Cas. 342=A.I.R. 1930 Mad. 361.

—To put a translated copy of the vidence is not a satisfactory method of placing evidence before the High Court. 98 Ind. Cas. 1008=A.I.R. 1927 Cal. 232.

**—Second appeal—Lower Appellate Court improperly admitting additional evidence—Procedure.**

Where the lower Appellate Court has admitted additional evidence improperly, the High Court can itself dispose of the case only in such cases where independently of the evidence improperly admitted the lower Court has apparently arrived at its conclusion upon other grounds. 98 Ind. Cas. 129=A.I.R. 1927 Cal. 140.

—Appellate Court will interfere with decision as to admissibility of evidence to prevent a clear miscarriage of justice. 97 Ind. Cas. 785=24 M.L.W. 227=A. I. R. 1926 Mad. 1003.

**—Public document rejected and produced with a new entry at later stage requires special application.**

Where after the return of a public document by the trial Court and before its production again in the Appellate Court an entry is made therein, and the party producing it wishes the Appellate Court to treat the new entry as part of the record, a special application should be made to that effect. 75 Ind. Cas. 465=18 M.L.W. 324=1923 M.W.N. 732=A. I. R. 1924 Mad. 117.

—There is no precedent for allowing an appellant to lead evidence, which could have been led in the Court below, in appeal. 77 Ind. Cas. 515=A.I.R. 1922 Bom. 147.

**—Evidence—Shutting out of—Appellate Court—Duty of.**

The failure of a Court to examine witnesses is a good ground for interference under S. 100, C.P.C. The Lower Appellate Court should not disregard the plea even if its raised at the hearing of the appeal without having been raised in the memorandum of appeal as it is a matter which could not take the other side by surprise and which clearly affects the decision on the merits. 3 Bur. L.T. 146=8 Ind. Cas. 990.

**(c). Appreciation.**

See also C. P. CODE, O. 20, R. 14.

**—Maxims—Falsa demonstratio non nocet—Deed with map annexed to it—Map inaccurate—Map can be disregarded.**

No doubt a map annexed to a deed is a part of the contract and as a rule must be used as evidence of the parcels, but an inaccurate map does not affect or vitiate a clear description of the parcel, although under certain circumstances a map or survey may override a description of parcel. If further the parcel of land be loosely described in deed and map inaccurate, but the boundaries demarcated on the land by cairns of stones which have been in perfect accordance with the agreement map if inaccurate is a *falsa demonstratio* and boundary marked on land is conclusive. 31 Bom. L.R. 1433, =A.I.R. 1930 Bom. 125=124 Ind. Cas. 113.

—Where both the parties have tendered evidence the question of weight is not a question of law. 120 Ind. Cas. 193=31 Cr.L.J. 1=1930 Cr.C. 39=1930 A. L. J. 254=A.I.R. 1930 All. 23.

—It is not open to a Court in second appeal to appraise the value of evidence on the value of which both the lower Courts had agreed. 111 Ind. Cas. 843=A. I. R. 1929 Oudh 41.

—The fact that an attesting witness does not remember at a distance of time where ants the execution signed the mortgage bond and which of the attesting witnesses signed first is no reason for disbelieving his evidence which is formally sufficient to prove execution and attestation, nor is the fact that his signature finds a place on the deed below that of another attesting witness who stated that he signed the deed as a marginal witness, although the executants did not sign it in his presence, sufficient to show that his evidence of attestation is untrue. 119 Ind. Cas. 405=8 Pat. 450=10 P.L.T. 379=A.I.R. 1929 Pat. 422.

**—Cumulative effect of all documents should be taken into account.**

It is an erroneous method of dealing with the evidence to consider whether each document produced in a case is by itself sufficient to rebut the *prima facie* presumption that the family is joint, but what ought to be done should be that cumulative effect of all the documents should be taken into account. 31 All. 412; 4 O.L.J. 124, and A.I.R. 1926 Oudh 511, Foll. 112 Ind. Cas. 387=5 O.W.N. 992=4 Luck. 138=A. I. R. 1928 Oudh 509.

**—Conspiracy case.**

In cases of conspiracies it is difficult for the prosecution to secure outside and independent evidence. The prosecution has to depend upon evidence of people who are engaged in detecting crimes of this sort. In a case like this therefore the evidence of such persons should be scrutinized and received with a great deal of caution. 100 Ind. Cas. 113=31 C.W.N. 239=28 Cr.L.J. 241=A.I.R. 1927 Cal. 265.

**—Absence of entry—Value of.**

The absence of entry in a document may be evidence though its effect is to be determined in the light of the general evidence and if it is admissible in evidence it is for the Court dealing with the facts to attach such weight to it as it thinks proper. A.I.R. 1925 Cal. 64.

**—Entry in a Register.**

Where the question was as to the date of death of one L and the plaintiff appellants produced in support of their assertion that L died on a certain day, an alleged private register in which the crucial entry was apparently interpolated among faded brown entries and was seen in bright blue ink.



**Held**, that the register was not of such a character as to enable their Lordships to pronounce affirmatively that the entry in question was made at the date alleged. 26 Bom. L.R. 563=20 M.L.W. 1=A.I.R. 1924 P. C. 136=46 M.L.J. 541 (P.C.).

—Discrepancies in small details.

Discrepancies in small details, such as whether the deceased was standing or sitting, facing north or facing south when he was struck, who it was that pulled out the spear and so forth are of no help to discredit the evidence. 71 Ind. Cas. 657=37 C.L.J. 173=24 Cr.L.J. 193=A.I.R. 1923 Cal. 463.

—Interested witnesses—Corroborated by other evidence—Testimony can be believed. 75 Ind. Cas. 359=6 L.L.J. 62=24 Cr. L.J. 935=A.I.R. 1923 Lah. 598.

—A few (say two) casual and somewhat ambiguous phrases in a deposition cannot destroy the very clear effect of the whole deposition. 79 Ind. Cas. 422=7 N.L.J. 217=A.I.R. 1923 Nag. 265.

—Evidence—Appreciation—Corroboration,

Part of a statement of an unreliable witness may be admitted if corroborated by other reliable witnesses. 47 Cal. 254=31 C.L.J. 209=24 C.W.N. 425=21 Cr. L. J. 522=56 Ind. Cas. 778.

—Evidence—Appreciation of—Attention paid to witnesses speaking to good character of accused.

A Court in taking proceedings under S. 110, Cr. P. Code ought to pay particular attention to the evidence of witnesses produced by accused about his good character, and though not bound to believe, should have good reasons to disbelieve such evidence before making an order. If it fails to do so, the order can be revised. 13 A.L.J. 1055=16 Cr.L.J. 810=31 Ind. Cas. 826.

—Evidence—Appreciation of—Witness improving on his former statement.

It is unsafe to rely upon a witness who materially improves upon his former statement. The presence of blood-stains on articles of clothing or on the accused's person is not conclusive evidence of guilt in a murder case and may be explained in various ways. 43 P.W.R. 1914 Cr.=16 Cr.L.J. 75=212 P.L.R. 1915=26 Ind. Cas. 667.

—Evidence—Appreciation of—Evidence distrusted in part, if should be rejected altogether.

When the evidence produced in a particular case is distrusted in certain particulars by the Court, it is not necessary that it should distrust the whole. 89 P.L.R. 1914=15 Cr. L.J. 148=30 P.W.R. 1914 Cr.=22 Ind. Cas. 724.

—Evidence—Appreciation of—Conflicting evidence—Mass of oral and documentary evidence.

Where there is a mass of oral and documentary evidence of a directly conflicting nature let in on behalf of the two parties on a vital question in a case, the decision should be based on the documentary evidence, which should afford a basis for decision as to the credibility of witnesses. The safe principle is to consider which story fits in with the admitted circumstances. 14 Ind. Cas. 99 (Oudh.)

—Evidence—Appreciation of—Divergent allegation of parties—Conflict of oral testimony—Safe course.

Where there are divergent allegations of the parties and there is also a conflict of oral testimony, the safe course to adopt is to test the evidence in the light of facts, admitted or proved beyond doubt. 15 C.L.J. 621=13 Ind. Cas. 678.

—Evidence—Appreciation of—Variation in evidence—Finding of Court—Discretion.

For a Court to come to the conclusion that evidence as given by either party does not represent the true state of affairs, is not uncommon. (1911) 2 M.W.N. 197=12 Ind. Cas. 208.

—Evidence—Cross-examination—Court, if can fix time limit for.

A court cannot fix a time limit within which the cross-examination of a witness is to be finished. 8 Ind. Cas. 418 (Oudh).

—Evidence—Pleadings.

A plaintiff must succeed upon the strength of his own title rather than upon the defendant's weakness. 6 Ind. Cas. 709 (All.).

—Evidence—Appreciation of.

Where witnesses of the same status, on the two sides contradict each other and their evidence is not easily reconcilable, the only safe course will be to rely upon the action and conduct of the principal parties and the contents of documents produced. 31 All. 116=36 I.A. 9=5 M.L.T. 58=9 C.L.J. 172=13 C.W.N. 370=11 Bom. L.R. 196=19 M.L.J. 186=1 Ind. Cas. 128 (P.C.)

(d). Court's duty.

—Evidence—Court's duty.

Court must record all evidence whether satisfactory or otherwise—It cannot discard witnesses merely because party himself says that they are not likely to improve on witnesses gone before. 119 Ind. Cas. 330=30 P.L.R. 645=A.I.R. 1930 Lah. 221.

—Evidence—Record of, how made.

A Magistrate should record the evidence for the defence with the same care and precision as that for the prosecution; otherwise his opinion that the evidence is false cannot be easily found out. 2 U.P.L.R. (All.) 113=21 Cr. L.J. 55=56 Ind. Cas. 856.

—Party privileged under law—Court must look for evidence to hold that he had contracted out of privilege. 110 Ind. Cas. 750=10 L.R.A. (Rev.) 73=A.I.R. 1928 All. 693.

—Cross-examination, stopping of.

The Courts have full power to prevent any abuse of the rights of cross-examination in any manner appropriate to the circumstances of the case; but before passing an order stopping further cross-examination, it must satisfy itself that questions were being asked which could not affect the result of the suit, in short, that the right of cross-examination was being abused. A.I.R. 1922 Oudh 124.

—Suspicious circumstances—Decision must be based on legal testimony and not suspicion. 11 M.I.A. 28, Foll. 62 Ind. Cas. 455=2 P.L.T. 658=6 P.L.J. 218=A.I.R. 1921 Pat. 125.



**—Evidence—Examination of witness after close of case.**

It is bad procedure to examine a party, after the arguments in the case are over, regarding a clear statement made by him on a previous occasion. 48 P.W.R. 1909=2 P.L.R. 1909=4 Ind. Cas. 632.

**Quantum of.**

**—Principles applicable to civil cases as distinguished from those applicable to criminal cases explained.**

So far as civil cases are concerned, there are certain well-recognized principles which could be invoked for guidance. If the matter arose in a criminal case, then the standard of proof that would be required before the accused could be convicted would be quite different from the standard of proof required in disposing of civil disputes. In civil proceedings a mere preponderance of probability is sufficient, whereas in criminal proceedings there must be such a moral certainty as convinces the minds of the tribunal as reasonable men beyond all reasonable doubt. Again if the Court should find in any particular case that the evidence is so equally balanced, that it is not able to prefer the evidence on the one side to the evidence on the other, then naturally it has to ask itself the question: On whom does the burden of proof in this particular case lie? If the person on whom such *onus* of proof lies does not discharge it to the satisfaction of the Court then the case of that person must fail. 110 Ind. Cas. 21=1928 M.W.N. 98=A.I.R. 1928 Mad. 489.

**—Proof in civil and criminal cases.**

What circumstances will constitute proof can never be the subject of a general definition. But one thing is clear that in civil cases what is required or considered sufficient is preponderance of probability, while in criminal cases owing to the serious consequences of an erroneous condemnation both to the accused and society, the persuasion of guilt must amount to such a moral certainty as convinces the minds of the tribunals as reasonable men, beyond all reasonable doubt. 79 Ind. Cas. 609=A.I.R. 1924 Nag. 385.

**(f). What is.**

**—Evidence—What is.**

The mere sending for a record does not make the record evidence in the case. 98 Ind. Cas. 881=A.I.R. 1927 Lah. 69.

—A party cannot be allowed to refer to a document not on the record and deliberately withheld by him both from inspection and from the proof. 99 Ind. Cas. 507=1926 P.H.C.G. 344=8 P.L.J. 431=A.I.R. 1927 Pat. 93.

—Conviction for criminal trespass is no evidence as to title 84. Ind. Cas. 983=40 C.L.J. 246=A.I.R. 1925 Cal. 207.

—Penal Code, S. 297—Local inspection—Magistrate's own opinion is not evidence. 81 Ind. Cas. 602=1 Pat. L.R. Cr. 256=25 Cr. L.J. 954=A.I.R. 1923 Pat. 573.

**—Evidence—Historical works—Not referred in the first Court—Admissibility.**

Reference to works of history not given in evidence or referred to in the Court of First Instance at the appellate stage is irregular and should be avoided. 1 Pat. L.J. 225=20 C.W.N. 1082=36 Ind. Cas. 206.

**(g). Miscellaneous.**

**—Evidence—Who must lead—Evidence need not be always led by party under burden of proof.**

It is not always necessary that the party who has the burden must himself lead evidence. It is open to him to sustain the *onus* cast upon him by the facts which he may elicit by cross-examination of the other party's witnesses. 78 Ind. Cas. 330=A.I.R. 1924 Nag. 367.

—Document produced alleged to be forgery—Party alleging must prove it before asking Court to reject it. 72 Ind. Cas. 971=24 Cr. L.J. 507=A.I.R. 1923 Pat. 31.

**—Evidence—Relevancy.**

Plaintiff's *kabuliat* to superior landlord is not relevant on question of defendant's status before *kabuliat*. A.I.R. 1923 Cal. 375.

**—Evidence—Application for filing documentary evidence.**

An application made on the first hearing for permission to file documentary evidence at a later stage should be decided at once. *Obiter*: An appeal cannot be preferred under O. 43, C. P.C. against an order of refusal or acceptance of documentary evidence. 3. O.L.J. 538=19 O.C. 314=37. Ind. Cas. 34.

**—Evidence—Oath—Defendant's agreement to abide by plaintiff's oath—Resiling from—Effect.**

A plaintiff cannot get a decree merely because the defendant having agreed to abide by plaintiff's oath afterwards refused to abide by it. 19 O.C. 161=37 Ind. Cas. 75.

**—Evidence—Objection to—Party not pleading a point, if can object to rebutting evidence by opposite party.**

A party trying to prove a point not raised in his pleadings cannot object to the opposite party tendering rebutting evidence as to that point. 1. O.L.J. 591=26 Ind. Cas. 547.

**—Evidence—Opinion of Judge and Jury—How much weight to be given.**

In India the opinion of a judge is to be weighed by the High Court in exactly the same balance as the opinion of a Jury. 41 Cal. 752=18 C.W.N. 580=15 Cr. L.J. 402=23. Ind. Cas. 1002.

**—Evidence—Custom—Validity of, to be determined when custom established.**

The question of the validity of a custom should not be considered till the custom itself has been established with precision. 20 C.L.J. 426=26 Ind. Cas. 954.

**—Evidence—Agreement to dispense with.**

Where in the trial of a suit the parties agreed not to let in oral evidence but to abide by the result of local inspection by the Judge, his successor cannot act on the result of inspection made by his predecessor, and no question of estoppel can arise if the case is not tried by him in the regular course. 12 A.L.J. 48=22 Ind. Cas. 51.

**—Evidence—Admissions—Statement of accused.**

If the conviction is to be based solely on the statement of the accused, it is fair that the statement should, unless there is good reason to the contrary, be taken as a whole. (1911) 1 M.W.N. 199=9 M.L.T. 316=12 Cr. L.J. 142=9 Ind. Cas. 790.



**—Evidence—Indian woman.**

An Indian woman is at a great disadvantage in conducting her case in Court and not infrequently makes errors of omission and commission. 75 P.L.R. 1910=54 P.W.R. 1910=6 Ind. Cas. 661.

**—Evidence—Court applying for information other than in the manner provided by law.**

It is improper for a court to receive any information of any kind in reference to a case, whether it be relevant or not, other than such as comes before it in the way which the law recognizes to be the form of legal evidence. (1904) 6 Bom. L.R. 789.

**27. Practice—Execution.**

See also (1) C. P. CODE, S.4 7 and O. 21.

**(2) EXECUTION****(3) EXECUTION SALE.****—Execution—Appellate decree alone is capable of execution.**

Where once an appellate decree is passed, whether it confirms, varies, or reverses the decree of the original Court, it is the only decree capable of execution for it has been substituted for that of the original Court and technically a fresh application for execution is necessary. 127 Ind. Cas. 199=32 Bom. L.R. 300=A.I.R. 1930 Bom. 225.

—Executing Court can interpret a decree by referring to judgments as well as pleadings in the case. 1 Pat. L.T. 471, Foll. A.I.R. 1929 Pat. 746.

—Suggestion by Court to withdraw execution application and file another because first one was long pending—Court's action is improper. 87 Ind. Cas. 635=1925 M.W.N. 406=A.I.R. 1925 Mad. 1113=48 M.L.J. 616.

—Decree against assets—Possession of assets may be decided in suit or in execution proceedings. 8 Bom. 309; 25 Bom. 494, Foll. 85 Ind. Cas. 768=A.I.R. 1925 Nag. 380.

**—Duty of Court.**

It is the duty of the Court executing a decree to see that parties to the proceedings are properly before it. 80 Ind. Cas. 716=3 Pat. L.R. (Civ.) 242=6 P.L.T. 164=A.I.R. 1925 Pat. 160.

**—Execution—Copy of decree and vakalatnama if necessary.**

A copy of decree as also a fresh vakalatnama are not necessary in execution proceedings. 15 C.L.J. 89=16 C.W.N. 736=13 Ind. Cas. 365.

**28. Practice—Ex-parte hearing.****—Ex-parte hearing—Slip in the order.**

If there is a slip in the order in an appeal heard *ex-parte*, the error is attributable to the appellant. 16 C.W.N. 793=12 M.L.T. 482=10 A.L.J. 379=(1912) M.W.N. 1150=23 M.L.J. 738=14 Bom. L.R. 1223=17 C.L.J. 14=16 Ind. Cas. 830 (P.C.).

**—Ex-parte hearing—Duty of Counsel.**

When an appeal is heard *ex-parte*, Counsel must bring to the notice of the Board adverse as well as favourable authorities. 44 Cal. 573=15 A.L.J. 154 32 M.L.J. 206=21 C.W.N. 473=1 Pat. L.W. 294=(1917) M.W.N. 254=25 C.L.J. 259=21 M.L.T. 240=5 L.W. 526=19 Bom. L.R. 410=44 A. 30=39 Ind. Cas. 346 (P.C.).

**—Ex-parte decree—Remedies open to defendant.**

A defendant against whom an *ex parte* decree is passed has three remedies open: (1) to file an application to set aside the decree; (2) to file an appeal against the decree; and (3) to file an ap-

plication for review of judgment. These are concurrent remedies. But in most cases the only effective remedy is an application to set aside the *ex parte* decree. I.L.R. (1946) Nag. 586=224 Ind. Cas. 526=1946 N.L.J. 349=A.I.R. 1946 Nag. 393.

**29. Practice—Federal and Supreme Court.****—Concurrent findings—Rule against interference with—Scope of—Adherence to the rule by the F. C.**

The rule as to concurrent findings is not a rule based on any statutory provision. It is a rule of conduct which the Privy Council had laid down for itself. Following this rule the Judicial Committee usually declined to review the evidence a third time unless there were special circumstances which would justify a departure from this practice. The practice is not a cast iron one and the grounds given in the decisions justifying departure from the above rule are merely illustrative. In an appropriate case and on a suitable occasion the matter may have to be fully considered and elucidated in all its aspects. In the absence of circumstances justifying departure from this rule, the Federal Court would adhere to the practice developed by the judicial Committee during the course of a century. 1949 F.L.J. 90=A.I.R. 1949 F.C. 88=62 L.W. 403=(1949) 1 M.L.J. 568 (F.C.).

**—Leave to appeal to Supreme Court—Separate application—Necessity—Question whether the Provincial Insolvency (Amendment) Act (XXV of 1948) is ultra vires the Dominion Legislature—Leave to appeal to the Supreme Court—If can be granted.**

It was agreed that there need be no separate petition for leave to appeal to the Supreme Court.

The question whether the Provincial Insolvency (Amendment) Act (XXV of 1948) is *ultra vires* the Dominion Legislature involves a substantial question of law as to the interpretation of the Constitution and leave to appeal to the Supreme Court can be granted. A.I.R. 1950 Mad. 691=(1950) 2 M.L.J. 817.

**30. Practice—Forum.**

See (1) C. P. CODE, Ss. 17, 20, 22, 24, and 35.

**(2) NOTE 7 (f).****—Forum—Choice of plaintiff.**

The plaintiff has the right to choose his own forum, in fact any forum the law allows him. 130 Ind. Cas. 523=A.I.R. 1950 Lah. 944.

—Right of plaintiff to choose forum should not be interfered with except on very strong grounds—Balance of convenience—Plaintiff has to be primarily considered. 100 Ind. Cas. 67=A.I.R. 1927 Lah. 183.

**31. Practice—High Court.**

- (a) Calcutta High Court.
- (b) Dacca High Court.
- (c) Patna High Court.
- (d) Division Bench.
- (e) Full Bench.
- (f) Original side.
- (g) Rule Nisi.
- (h) Miscellaneous.

**(a) Calcutta High Court.****—Calcutta High Court (Original Side)—Original of granting probate.**

The question whether a certain document should be admitted to probate cannot be decided upon an originating summons. It is not until the probate Court has decided the matter finally that it is given to anyone



to know what the dispositions made by the testator are. 130 Ind. Cas. 217=A.I.R. 1931 Cal. 138=52 C.L.J. 475.

—**High Court—Calcutta—Amendment of decree.**

According to the practice of the Calcutta High Court the decree should be presented for amendment to the Division Bench in charge of the group to which the case belongs irrespective of whether the Judges are the same or not. 11 C.L.J. 155=5 Ind. Cas. 723.

—**High Court, (Calcutta)—Vakils—Right to appear—Rule for application to transfer.**

Vakils are not allowed to appear on rule for application to transfer. 37 Cal. 853=8 Ind. Cas. 724.

(b) **Dacca High Court.**

—**High Court—Affidavit sworn before commissioner of High Court at Calcutta—Admissibility in Dacca High Court—Diplomatic and Consular Officers (Oaths and Fees) Act XXI of 1948—Calcutta High Court (O. S.) Rules and Orders, Chap. XV, Rr. 5 and 12.**

There is no provision actually prohibiting the use of an affidavit in the Dacca High Court which has been sworn before a Commissioner of another country in another Dominion. It is within the discretion of the Dacca High Court to accept an affidavit even though not sworn before a person appointed a Commissioner in India of the Court of Pakistan if it is in a form in which the Court considers it to have been duly sworn before a Commissioner of the Calcutta High Court.

After the enactment of the Diplomatic and Consular Officers (Oaths and Fees) Act XXI of 1948, persons living in Calcutta and concerned with litigation in the Dacca High Court can swear an affidavit in Calcutta before the Deputy High Commissioner of Pakistan, which will automatically without further question be admissible for proceedings in the Dacca High Court 1 D.R. 71.

(c). **Patna High Court.**

—**Practice—Patna High Court.**

Per **Mullick, J.**—Where there is a long *cursus curiae* established in the High Court of Calcutta, Patna High Court will not depart from that course unless strong reasons exist to the contrary. 110 Ind. Cas. 469=7 Pat. 690=9 P.L.T. 357=A.I.R. 1928 Pat. 410.

—**High Court—Patna—Calcutta decisions.**

The Patna High Court will not lightly depart from a general practice sanctioned by the decisions of the Calcutta High Court. 5 Pat. L.J. 23=54 Ind. Cas. 673.

—**High Court—Patna—Calcutta decisions.**

In matters of settled practice the Patna High Court follows the Calcutta High Court. 5 Pat. L.W. 327= (1918) P.H.C.C. 246=3 Pat. L.T. 377=46 Ind. Cas. 137.

—**High Court—Patna—Precedents of the Calcutta High Court to be followed.**

Precedents of the Calcutta High Court in matters of procedure should be accepted by the Patna High Court as the pleaders have been all along following the Calcutta rulings. (1918) P.H.C.C. 130=3 Pat. L.J. 285=4 Pat. L.W. 324=45 Ind. Cas. 203.

—**High Court—Patna—Calcutta decisions—Conformity to.**

The decisions of the Calcutta High Court which until recently exercised jurisdiction in Bihar and Orissa although they do not prevent the High Court from exercising an independent judgement, are entitled to the greatest respect and should not be departed from without cogent reasons. 4 Pat. L.J. 38=44 Ind. Cas. 146.

—**High Court—Patna—Decisions of Calcutta High Court.**

When a general practice is sanctified by concurrent decisions of the Calcutta High Court the Patna High Court should not depart from it. 1 Pat. L.W. 759= (1917) P.H.C.C. 191=40. Ind. Cas. 517.

(d). **Division Bench.**

High Court—Division Bench—Power to express opinion on abstract question of law. See **High Court.** 48 P.L.R. 205=A.I.R. 1946 Lah. 419.

—Even where one Division Bench of the High Court has issued Rule, the propriety of the order can be questioned by the Bench hearing the Rule on the ground that the application was made too late. 103 Ind. Cas. 63=54 Cal. 394=28 Cr. L.J. 639=8 A.I. Cr. R. 257=A.I.R. 1927 Cal. 574.

—**Case heard by a Bench, but not finally disposed of.**

Even if a case has been heard by one Bench, but is not finally disposed of, it is open to the Chief Justice to ask another Bench to proceed with the trial of the case. Further it is questionable whether, under S. 439, the High Court cannot *suo motu* interfere in cases of this sort where the final orders have not already been passed by it. 106 Ind. Cas. 686=32 M.L.T. 548=1927 M.W.N. 835=28 Cr. L.J. 974=27 M.L.W. 239=9 A.I. Cr. R. 127= A.I.R. 1927 Mad. 961=53 M.L.J. 633 (F.B.).

—**Division Bench—Order of, cannot be objected to before another Division Bench.**

—An appellant obtaining an adjournment from a Division Bench of the High Court to enable him to apply for an order to set aside the abatement of his appeal cannot question the correctness of that order when his application is laid before another Division Bench. 90 Ind. Cas. 41=26 P.L.R. 832=7 L.L.J. 544=A.I.R. 1926 Lah. 37.

—If a question is in fact decided by the Division Bench by its decision once, it is not open to another Division Bench at another stage of the same case to allow the question to be re-agitated before it. 78 Ind. Cas. 200=3 Pat. 371=5 P.L.T. 145=1924 P.H.C.C. 33=A.I.R. 1925 Pat. 1 (F.B.).

—**High Court—Appeal heard ex parte—No jurisdiction to another Bench to order rehearing of appeal.**

An appeal was heard and decreed *ex parte* by Division Bench of the High Court. Another Division Bench set aside the judgment and directed the rehearing of the appeal by the former Bench. Held that the order directing the rehearing of the appeal was without jurisdiction. If there were any grounds for setting aside the judgment of the former Bench the application ought to have been made to that Bench and none other. 30 Ind. Cas. 27 (Cal.).

—**Chief Justice cannot direct the conduct of suit.**

It is open to the Chief Justice to appoint a special bench of two Judges to try a suit but having done so it is not open to him in any way to fetter the discretion of the bench as to how the suit shall be tried. It is for the bench and the bench alone to decide how the suit is to be tried, that is to say, whether issues of fact and law are to be tried, or whether the issues of law shall be tried first. 80 Ind. Cas. 637=27 C.W.N. 955=A.I.R. 1924 Cal. 186.

—**High Court—Judgment delivered by one Judge on behalf of absent colleague.**

The Judgment of one of two judges composing a Bench read by the other in Court when the former is on



leave is a valid judgment. 22 C.W.N. 263=27 C.L.J. 257=43 Ind. Cas. 781.

#### —High Court—Division Bench—Powers.

It is not necessary that a division Bench of the Calcutta High Court must refer any particular case to a Full Bench, but it can follow a decision of the Court which it does not wholly approve of. 38 Ind. Cas. 643 (Cal.).

#### —High Court—Madras—Criminal appeals—Power to admit.

A Division Bench hearing criminal appeals has power to admit criminal appeals presented through the Bench Clerk although a single judge is sitting at the time as an admission Court. 39 Mad. 527=29 M.L.J. 101=18 M.L.T. 95=(1915) M.W.N. 504=16 Cr.L.J. 593=30 Ind. Cas. 145 (F.B.).

#### —High Court—Single Judge—Division Bench—Judgment.

A single Judge of the High Court doubting the correctness of the decision of a Division Bench cannot do any thing else than refer it to the larger Bench. 1 Pat. L.T. 349=58 Ind. Cas. 459.

#### (e). Full Bench.

#### —Practice Full Bench—Powers of Power to interfere with findings of Division Bench on questions not referred.

The Full Bench has power to interfere with the findings of the Division Bench on questions not referred to it, in cases where the whole appeal or revision case is referred. I.L.R. (1946) 2 Cal. 214=225 Ind. Cas. 280=81 C.L.J. 16=50 C.W.N. 578=A.I.R. 1946 Cal. 348 (F.B.).

#### —Full Bench—Full Bench cannot proceed to decide an issue no longer arising.

The function of High Court Judges, whether sitting singly or sitting as a Bench, whether a Division or a Full Bench, is limited to deciding some issue in being between two parties.

Where an appeal fails on merit, not as a result of any argument on behalf of the respondent or of any evidence read on his behalf but on the simple statement of the case for the appellant, there is no justification even for a Full Bench to proceed to decide an issue which no longer arises. 111 Ind. Cas. 670=26 A.L.J. 1201=10 I.L.Cr.R. 390=29 Cr.L.J. 910=9 L.R.A. (Cr.) 130=A.I.R. 1928 All. 680 (F.B.).

—High Court—Reference to Full Bench, in second appeal—Full Bench holding that point referred does not arise—Case should be sent to referring Bench for decision. 53 Ind. Cas. 955=100 Ind. Cas. 289=A.I.R. 1927 Cal. 256 (F.B.).

—A difference of opinion prevailing upon the Bench, in accordance with the usual custom, the Judges holding the view of the minority will deliver judgment first. 96 Ind. Cas. 1039=24 A.L.J. 825=A.I.R. 1926 All. 369 (F.B.).

#### —Judgment—Validity.

A Full Bench judgment is not rendered invalid by being pronounced at a time when one of the Judges constituting the Full Bench was absent on other duty. 83 Ind. Cas. 91=1924 M.W.N. 692=21 M.L.W. 12=A.I.R. 1925 Mad. 58=47 M.L.J. 397.

—There is power under R. 64 or otherwise for the the Chief Justice to direct that a point of law be dealt with by a Full Bench, although the suit has only come before a single Judge. 103 Ind. Cas. 906=51 Bom. 371=29 Bom. L.R. 1124=A.I.R. 1927 Bom. 487 (F.B.).

#### —Reference to Full Bench for opinion on question of law.

When a question of law is referred to a full Bench **Per Tek Chand J.** for opinion, the Full Bench does not constitute a Court of appeal so as to examine whether the question has been correctly framed. 104 Ind. Cas. 849=8 Lah. 384=A.I.R. 1927 Lah. 289 (F.B.).

#### —Full Bench's judgment—Nature of.

Where the Full Bench is asked for a ruling on an abstract question of law to guide the Division Bench charged with the duty of deciding an appeal and the parties to the appeal, being interested in the same abstract question, are allowed to appeal and argue the question, there is no reason to hold from that fact that, contrary to the ordinary practice of the Court, the appeal was before the full Bench for the determination of any issue or ground of appeal peculiar to it. The judgment of the Full Bench is in the nature of an opinion intended for the guidance of the smaller Benches and one which would be binding on them if not subsequently reviewed and altered by a higher authority. 93 Ind. Cas. 612=7 Lah. 376=28 P.L.R. 245=A.I.R. 1926 Lah. 264.

#### —High Court—Full Bench—Function of.

**Obiter**—The province of a Full Bench ordinarily is to decide merely difficult questions of law or custom upon which divergent opinions or decisions have been expressed. 28 P.R. 1913=10 P.L.R. 1913=275 P.W.R. 1912=16 Ind. Cas. 967.

#### —High Court—Full Bench—Reference to Full Bench on point of law—Powers of Full Bench to deal with whole case.

A Full Bench has power, where a reference is made to it on a point of law, to look into the circumstances of the whole case and deal finally with the appeal out of which the reference has arisen. 10 P.R. 1911 Cr.=24 P.W.R. 1911 Cr.=19 Cr.L.J. 364=205 P.L.R. 1911=11 Ind. Cas. 132.

—A case already decided cannot be referred to a Full Bench. Where a reference to a Full Bench was asked for in an application for a review of a judgment.

**Held**, that there could be no such reference. 87 Ind. Cas. 1029=A.I.R. 1925 Nag. 384.

#### —Hypothetical question should not be referred to Full Bench.

The practice of submitting a hypothetical question of law to a Full Bench before the Divisional Bench has satisfied itself that the facts really exist which would necessarily raise that question was depreciated. 76 Ind. Cas. 886=46 Mad. 919=18 M.L.W. 953=33 M.L.T. 53=1924 M.W.N. 14=A.I.R. 1924 Mad. 271=45 M.L.J. 528 (F.B.).

#### —Reference to Full Bench.

Where a case was referred to a Full Bench on the ground that "it is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representatives should be clearly defined."

**Held**, that the reference was one which ought not to have been made. 80 Ind. Cas. 163=47 Mad. 411=34 M.L.T. 17=1924 M.W.N. 346=A.I.R. 1924 Mad. 530=46 M.L.J. 261 (F.B.).

#### —High Court—Full Bench—Reference to, on difference of opinion.

In the ordinary course, on a difference of opinion arising between two Division Benches of the same High Court, the case should be referred to a Full Bench. 38 All. 581=14 A.L.J. 1055=21 C.W.N. 1=18 Bom.



L.P. 999=31 M.L.J. 799=20 M.L.T. 505=4 L.W. 602  
 =(1916) 2 M.W.N. 551=1 Pat. L.W. 57=25 C.L.J.  
 517=43 I.A. 294=36 Ind. Cas. 87 (P.C.).

**—High Court—Full Bench—Conflict of decisions—Private consultation bad.**

It is usual and expedient whenever a difference of opinion arises in the same High Court, to refer the point to the Full Bench. It is undesirable to introduce the opinions of another judge (not a party to the judgment) obtained on a private consultation, for the purpose of enforcing the conclusion arrived at. 37 All. 604=42 I.A. 208=13 A.L.J. 1007=18 M. L. T. 409=29 M.L.J. 434=17 Bom. L.R. 1022=20 C. W. N. 1=22 C.L.J. 481=2 L.W. 897=(1915) N.W.N. 772=30 Ind. Cas. 529 (P.C.).

**—Full Bench decision doubted by Division Bench.**

In a case in which a Division Court doubts the correctness of a Full Bench decision, by which the Division Court is bound, and the Division Court considers that the matter should be considered by a Bench, specially constituted, it has been the practice for the Division Court to bring the matter to the notice of the Chief Justice and to consult him as to the propriety of a Bench being specially constituted to consider the matter. 98 Ind. Cas. 220=54 Cal. 266=44 C. L. J. 194=31 C.W.N. 14=A.I.R. 1926 Cal. 1153 (S.B.).

**—Nagpur Judicial Commissioner's Court—Reference to Full Bench by Judicial Commissioner while case is pending before an Additional Judicial Commissioner—Judicial Commissioner should use his powers in exceptional cases.** 94 Ind. Cas. 81=A.I.R. 1926 Nag. 353.

**(f). Original side.**

**—Original Side—Innovation by Judge of great importance inconsistent with past practice—Reasons should be given.** 108 Ind. Cas. 794=52 Bom. 459=30 Bom. Bom. L.R. 402=A.I.R. 1928 Bom. 123.

**—High Court—Original Side—Decision of single Judge.**

A Judge on the original side is ordinarily bound to consider the decision of another judge on the original side but he need not follow it, if he considers it to be erroneous. 24 C.W.N. 1032=60 Ind. Cas. 406.

**—High Court—Original Side—Single Judge on Original Side when bound by rules of law laid down by other Judge.**

A Judge sitting on the original side is not bound to follow the judgment of another judge on a question of law when it is contrary to reason or law or a manifestly absurd decision based on finding of facts which lead him to different conclusion. 33 Bom. 122=10 Bom. L.R. 417=1 Ind. Cas. 834.

**—High Court—Original Side—Order—Modification.**

Judge sitting on the original Side of the High Court has jurisdiction to modify the minutes of his order before the formal order is drawn up. 42 Mad. 269=24 M.L.T. 500=36 M.L.J. 28=(1918) M.W.N. 928=9 L.W. 217=49 Ind. Cas. 373.

**—Original Side—After passing preliminary decree in partnership suit and appointment of receiver therein, it is competent to High Court on Original side to make charging order at the instance of creditors of partnership firm—Effect of such charging order is to constitute judgment creditor secured creditor having priority over unsecured creditors.** 16 Bom. 577; 20 Bom. 176 and 34 Bom. 384, Dis. from. A.I.R. 1927 Bom 394 and 407, Overruled. 54 Bom. 667=32 Bom. L. R. 850=127 Ind. Cas. 481=A.I.R. 1930 Bom. 451.

**—Receiver—Lease—Condition of forfeiture on insolvency of lessee or his successor—Lessee mortgaging—Mortgage suit—Property put in hands of Receiver—Lessee declared insolvent—Lessor applying for possession—Declaration sought for cannot be made on summons in Chambers.** 88 Ind. Cas. 808=41 C.L.J. 371=A.I.R. 1925 Cal. 750.

**—High Court—Original Side—Decree—Appeal—Date of payment.**

Where by a decree on the original side, payment was to be made by a certain day, and proceedings were stayed on appeal, which was however later dismissed and the date fixed elapsed in the meanwhile.

**Held,** that application on the original side for fixing a fresh date was rightly made as it was a proceeding in execution 22 Ind. Cas. 368 (Cal.).

**—High Court—Original Side—Consent decree, if can be set aside or varied by notice of motion.**

A consent decree cannot be set aside, varied or altered by a judge on an application based merely on notice of motion. 13 Bom. L.R. 332=11 Ind. Cas. 356.

**—High Court—Original Side—Death of plaintiff after date of order for payment—Fresh order for payment necessary.**

If the plaintiff dies after the date of the order for payment in a mortgage suit, and his heir is substituted, a fresh order must be taken before the sale of the mortgaged property takes place. 12 C.L.J. 596=8 Ind. Cas. 806.

**—High Court—Original Side—Third party directions.**

Third party directions are generally given by Courts on the following principles:—

1. In clear cases of contribution or indemnity from the third party.

2. Where all disputes arising out of a transaction as between plaintiffs and defendants and between defendants, and a third party can be tried and settled in one action.

3. In case of current and sub-contract, where the contract between plaintiff and defendants, has been imported into the contract between the defendants, and third parties.

Where the ascertainment of the terms of contract and between defendant, and third parties requires a preliminary issue to be tried, the court should refuse to issue third party directions. It cannot issue such directions under rules at present in force even if there is no question identical as between plaintiff and defendant as between defendants and third parties. 34 Bom. 423=11 Bom. L.R. 1056=4 Ind. Cas. 131.

**—High Court—Original Side—Taxation of costs.**

According to the practice of the original side of the Court taxation of the bills of attorneys is optional and bills of costs are frequently adjusted without taxation. 36 Cal. 493=2 Ind. Cas. 553.

**(g) Rule nisi.**

**—High Court—Rule nisi—Perversion of facts—Rule, if can be made absolute.**

A rule applied for in astute and intelligent perversion of facts cannot be made absolute unless there are strong grounds for doing so. 15 C. L. J. 162=14 Ind. Cas. 458.



—**High Court—Rule granted on one of several grounds—Fresh rule on other ground, wheather may be issued.**

The High Court has no jurisdiction to grant a fresh rule when on the same facts a rule was granted on one only of several grounds. 38 Cal. 933=15 Cal. C.L.J. 325=12 Cr.L.J. 407=11 Ind. Cas. 591.

—**High Court—Rule nisi—Jurisdiction to decide question of right.**

In a proceeding initiated by a rule nisi, the High Court (Bombay) has no jurisdiction to vary a decree when it involves the decision of a question of right. 33 Bom 216=Bom. L.R. 488=2 Ind. Cas. 294.

—**High Court—Rule nisi—Decision in.**

The Court need not decide a point, which is not specifically raised in a rule nisi. 13 C. W. N. 305=1 Ind. Cas. 152.

#### (h). Miscellaneous.

—**High Court—Duty to interpret, not to make law.**

The function of the Judges of High Court is to interpret the law and not to make it, *jusdicera* and not *jusdare*. 31 Punj. L.R. 842=A.I.R. 1930 Lah. 1034.

—**Reference.**

It is not the practice of the Allahabad High Court or any other Court to give a decree or pass an order to express an opinion on a reference when such decree, order or opinion must of necessity be infructuous. 128 Ind. Cas. 1=1930 A.L.J. 763=A.I.R. 1931 All. 26.

—**Question of attendance of witness—Master's powers.**

Question how far the attendance of a witness is necessary and material is one for master to decide and that discretion must be exercised in a fair and reasonable way according to the usual and established practice and allowance in respect of such matters, otherwise the Court or Judge will interfere and review the discretion of the master who has not so exercised it. 122 Ind. Cas. 121=54 Bom. 62=31 Bom. L.R. 1020=A.I.R. 1930 Bom. 24.

—**Issue not framed on particular point but point obvious on face of record—High Court can consider such point in second appeal.** 119 Ind. Cas. 765=11 L.L.J. 149=A.I.R. 1929 Lah. 553.

—**If debarred from looking at unprinted documents.**

It is open to the High Court to refuse to look at documents that have not been printed, but that Court is not debarred from looking at such documents. 108 Ind. Cas. 374=A.I.R. 1928 Lah. 704.

—**Madras High Court—Parties relying upon affidavits must take express reference to them in grounds of appeal or sufficiently otherwise.** 108 Ind. Cas. 401=1927 M.W.N. 743=A.I.R. 1928 Mad. 246.

—**Second Appeal—Appeal partly heard by another Judge—Judge subsequently hearing the appeal is bound by previous findings.** 104 Ind. Cas. 892=A.I.R. 1928 Mad. 58.

—**Decisions of revenue side.**

The High Court ought to follow, especially in matters of procedure, as far as it can do so, the policy or line of decisions adopted by the revenue side in cases which strictly belong to the revenue jurisdiction. 92 Ind. Cas. 1046=A.I.R. 1926 All. 282.

—**Administration suit in Rangoon High Court—Form of preliminary decree.**

It is advisable that the form of preliminary decree in administration suits in the Rangoon High Court should be revised by the High Court, so that there can in future be no question as to a conflict of authority between the High Court administration suit and a District

Court which had an administrator of the same estate. 91 Ind. Cas. 432=23 M.L.W. 399=30 C.W.N. 769=6 L.R. P.C. 185=1925 M.W.N. 847=A.I.R. 1925 P.C. 261=50 M.L.J. 644 (P.C.).

—**Administration suit in Rangoon High Court—Preliminary decree passed—Administrator appointed by another Court can be permitted by it to sell property.** 91 Ind. Cas. 432=23 M.L.W. 399=30 C.W.N. 769=6 L.R.P.C. 185=1925 M.W.N. 847=A.I.R. 1925 P.C. 261=50 M.L.J. 644 (P.C.).

—**Injunction—Batwara proceedings—High Court can restrain parties from proceeding with batwara proceedings till determination of civil suit.** 34 Cal. 101, Foll. 85 Ind. Cas. 551=6 P.L.T. 524=A.I.R. 1925 Pat. 710.

—**Insolvency matters.**

The High Court as an Appellate Court in Insolvency does not as a rule hear matters except by way of appeal from the Original Side sitting in Insolvency. 79 Ind. Cas. 910=A.I.R. 1925 Mad. 141.

—**Stay of execution.**

It is not the practice of the Lahore High Court in all cases to order stay of execution of a decree for possession of immoveable property, pending appeal. 61 Ind. Cas. 827. (Lah.).

—**High Court—Judgment—Amendment—Application for review.**

The judgment of a High Court is not complete until it is sealed and it can alter it without any application for review. 10 B. 176, Not followed. 38 Cal. 828=13 Cr. L.J. 120=13. Ind. Cas. 776.

#### 32. Practice—Inconsistent Pleas.

See also (1) C. P. CODE, O. 6 and O. 7.

(2) EVIDENCE ACT, S. 115.

(3) PLEADINGS.

(a) Duty and Power of Court.

(b) New case.

(c) Right of parties.

(d) When allowed

(e) When not allowed.

#### 32. (a) Duty and Power of Court.

—**Inconsistent pleas.**

The Court while preserving sacred the rights of parties to frame their own pleadings, must see that they do not offend against rules of pleadings or tend to embarrass, delay or prejudice the trial of the suit. 4. O.L.J. 230=40. Ind. Cas. 488.

—**Inconsistent pleas.**

A defendant may raise by his written statement as many distinct and separate, i.e., inconsistent defences as he may think proper; if the defence is embarrassing, the Court may under O. 6, R. 16 direct one of two inconsistent defences to be struck out and the pleading amended. The defendant pleaded that the bond in suit was a forgery and denied execution and in the alternative that if it was executed it was done under circumstances which did not make it binding upon her. When the evidence came to be adduced the defendant was allowed to go into both these matters.

**Held**, that the plaintiff cannot in appeal raise any objection on the ground that the defences put forward were inconsistent. 12 C.L.J. 357=7 Ind. Cas. 166.

—**Inconsistent pleas,—Effect of document—Duty of Court.**

Where a party takes up inconsistent positions regarding the effect of the instrument in controversy, it is the duty of the Court to give effect to the real intention of the parties, subject to an order as to costs. 33 All.



344=14. O.C. 133=38 I.A. 104=15 C.W.N. 497=8 A.L.J. 465=13 C.L.J. 519=9 M.L.T. 507=13 Bom. L.R. 404=21 M.L.J. 637=(1911) 2 M.W.N. 242=10 Ind. Cas. 285 (P.C.).

—**Inconsistent pleas—Plaint—If can be set up.**

A Court has power to allow the plaintiff to amend the plaint and put forward two inconsistent cases, viz., first that the defendant never rendered accounts and should be called upon to render one; secondly, that if the defendant has rendered accounts they ought to be reopened on the ground of fraud or the plaintiff should be given liberty to surcharge and falsify them because vitiated by overcharges and material errors. 13 C.L.J. 165=7 Ind. Cas. 270.

**32. (b) Practice—Inconsistent Pleas—New Case.**

—A co-sharer can maintain a suit of ejectment against a trespasser on behalf of the proprietary body. But where a co-sharer comes forward clearly as the exclusive owner of the property to be recovered from the trespasser, and fails to prove his exclusive title, a new case cannot be made in appeal that his suit was of a representative character. 112 Ind. Cas. 402=10 L.L.J. 360.

—**New plea—Inconsistent plea.**

Plea not only not raised in lower Court but inconsistent to those raised—Appellate Court should not allow. 112 Ind. Cas. 462=30 Bom. L.R. 889=A.I.R. 1929 Bom. 114.

—Where the defence in the lower Court was fraudulent misrepresentation as to the area concerned and in second appeal S. 20, Contract Act, was pleaded for the first time, the defence was held to be unsustainable as the plea was inconsistent. 119 Ind. Cas. 205=33 C.W.N. 626=A.I.R. 1929 Cal. 547.

—Where a plaintiff raises a plea in second appeal which is not only not set up in the plaint but is quite inconsistent with it, he should not be allowed to get a decree. 118 Ind. Cas. 291=20 M.L.W. 787=A.I.R. 1929 Mad. 349.

—Plaintiff's pleader making statement at hearing—Case proceeding on that basis—Plaintiff's cannot in appeal raise plea inconsistent with it. 114 Ind. Cas. 113=A.I.R. 1929 Oudh 204.

—**If can be allowed in appeal.**

Where the whole controversy between the appellant's predecessor and the Government proceeded upon the admission or the tacit assertion of the appellant that he was in occupation of the lands or at all events that he took upon himself the burden of indicating the action of his own lessees or sub-lessees in cultivating it, and where a period of nearly 25 years had elapsed between the date when the Government first definitely intimated their claim to the lands in suit.

**Held**, that it is too late for the Board to entertain the contention that the lessees of the appellants who actually cultivated were liable for the assessment as Government had no opportunity of meeting the new plea.

A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary more especially when he thereby places his opponent at a great disadvantage of State. 94 Ind. Cas. 501=49 Mad. 249=53 I.A. 64=43 C.L.J. 378=28 Bom. L.R. 865=24 M.L.W. 9=1926 M.W.N. 585=A.I.R. 1926 P.C. 18=50 M.L.J. 301 (P.C.).

—Where original frame of suit is for enforcement of contract and for damages for breach, plaintiff

cannot afterwards without amendment of plea, allege that the contract was illegal and claim the repayment of money on that ground, paid under the contract. 84 Ind. Cas. 295=2 Rang. 414=A.I.R. 1925 Rang. 49.

—It is not permissible to allow before the Privy Council for the first time an argument contradictory of the case as put up in the lower Courts 11 M.I.A. 7 (P.C.), Foll. 59 Ind. Cas. 767=19 A.L.J. 97=23 Bom. L.R. 713=33 C.L.J. 171=25 C.W.N. 654=13 M.L.W. 256=1921 M.W.N. 77=29 M.L.T. 164=A.I.R. 1921 P.C. 27=40 M.L.J. 144 (P.C.).

—**New plea—Second appeal—Possession—Specific performance.**

If a suit is based on an alleged completed sale, the plaintiff, cannot urge in second appeal that the suit may be regarded as one for specific performance of a contract to sell as the later suit is inconsistent with the alleged completed sale and cannot be entertained without an amendment of the plaint being allowed. 7 Ind. Cas. 568 (Lah.).

—**Inconsistent plea—New case—Not allowed.**

A plaintiff suing for possession on the strength of a sale deed, cannot on the sale being declared invalid, set up a right to remain in possession as mortgagee since such a claim is inconsistent with the absolute right, claimed in the plaint. 20 M.L.J. 141=4 Ind. Cas. 37.

**32. (c) Practice—Inconsistent pleas—Right of parties.**

—**Inconsistent pleas.**

The Code of Civil Procedure does not prohibit inconsistent pleadings; and there is nothing to prevent either party from setting up two or more inconsistent sets of material fact and claiming relief thereunder in the alternative. A plaintiff may rely upon several different rights alternatively although they may be inconsistent; so a defendant may raise, by his statement of defence, without leave, as many distinct and separate and therefore inconsistent defences as he may think proper. (34 Cal. 51; 22 C.L.J. 254; 30 C.L.J. 428; 8 C.L.J. 289; 15 C.L.J. 439, Foll.)

But the litigant who avails himself of the right to press inconsistent cases before the Court, and endeavours to establish both the alternatives by contradictory oral testimony, plainly places himself in peril and may find himself entangled in inextricable difficulty; for evidence adduced in support of two absolutely inconsistent cases which are mutually destructive can hardly be expected to secure confidence. 82 Ind. Cas. 934=28 C.W.N. 131=39 C.L.J. 140=A.I.R. 1924 Cal. 467.

—As a matter of law there is nothing to prevent a party from setting up an inconsistent plea. 60 Ind. Cas. 393=2 P.L.T. 285=A.I.R. 1921 Pat. 326.

—**Inconsistent pleas—Parties if can take.**

Litigant parties cannot be allowed of take up inconsistent positions in court. 24 Ind. Cas. 181 (Cal.).

—**Inconsistent pleas—Defence.**

A defendant can plead as many separate distinct and inconsistent defences as he thinks proper in the alternative in his written statement. 15 C.L.J. 439=13 Ind. Cas. 128.

—**Inconsistent pleas—Defence.**

A defence cannot be ruled out merely because it is inconsistent with another defence. 5 N.L.R. 189=4 Ind. Cas. 801.

**32. (d) Practice—Inconsistent pleas—When allowed.**  
—**Rule of approbate and reprobate—Applicability.**

The rule that when an order shows plainly that it is intended to take effect in its entirety and that several



parts of it depend upon each other, a person cannot adopt one part and repudiate another, does not apply to a case where the various directions in an order or judgment are intended to be distinct and independent of each other. Thus, if a suit is dismissed but the plaintiff is awarded costs, he is not precluded from impeaching the judgment by receiving the costs. 123 Ind. Cas. 337=31 M.L.W. 30=1933 M.W.N. 50=A.I.R. 1930 Mad. 268=58 M.L.J. 137.

—**Suit against son to recover deceased father's debts—Son alleging ignorance of father's dealings—Pleas of satisfaction or criminal nature of debts in the alternative were allowed to be raised.** 112 Ind. Cas. 748=51 All. 386=26 A.L.J. 1353=A.I.R. 1928 All. 582.

—**Where the plaintiff, who in the earlier litigation had been resisting a rafanama (settlement) as defendant, pleaded that a certain village was a ghatwali village and there had been disputes and the Government had intervened and a rafanama had been drawn up to settle the disputes, and claimed such rights as the rafanama gave, not because it represented his real rights, but because he could not get anything more.**

**Held,** that there was nothing contrary to natural justice in plaintiff's accepting this course. 96 Ind. Cas. 188=6 Pat. 51=1926 P.H.C.C. 199=A.I.R. 1926 Pat. 340.

—**Partnership suit.**

Under O. 30 a defendant is not precluded from taking alternative defences in the from, viz., that the defendant is not a partner in the firm sued, and alternatively that assuming that he is a partner, the firm itself is not liable. 93 Ind. Cas. 380=A.I.R. 1926 Sind 154.

—**Inconsistent pleas—Dismissal of suit on basis of evidence of a witness.**

Plaintiff sued the defendant to recover a certain sum of money for a breach of contract and contended that under a contract to deliver "China" or "Small" mills rice either the delivery of "China" or "small" mills rice or the delivery of special big mills rise would be a good delivery. After issues were framed, the evidence of one of the plaintiff's witnesses was taken but it was unfavourable to plaintiff. He therefore intimated his wish to call several other witnesses in support of his contention. But the Court refused and dismissed the suit.

**Held,** that the plaintiff did not take up any inconsistent positions and that the mere fact that the evidence of one witness was unfavourable to him was not a good ground for dismissing the suit without examining the other witnesses whom he wished to produce. 4 Bur. L.T. 260=6 L.B.R. 17=11 Ind. Cas. 930.

—**Inconsistent pleas—Avertments in plaint.**

In a suit to set aside a sale-deed, plaintiff a young woman, alleged that the document was a forgery and that it was brought about by fraud and when the Court asked her to elect which plea she would stand by, she stated that she denied execution; **held,** that the suit was not liable to be dismissed for inconsistent averments in the plaint. 13 M. 549, not approved. 1913) M.W.N. 821=9 M.L.T. 210=8 Ind. Cas. 845.

—**Inconsistent pleas—When allowable.**

A plaintiff or defendant will be allowed to raise inconsistent pleas where they are founded on transactions to which he is a stranger and which have reference to matters not within his personal knowledge. 6 N.L.R. 33=5. Ind. Cas. 745.

—**Inconsistent pleas—When successful.**

If special circumstances are established, a plaintiff may succeed on claim inconsistent with his plaint. 15 C.L.J. 391=2. Ind. Cas. 85.

32. (e) Practice—Inconsistent Pleas—When not allowed.

—**Inconsistent pleas.**

Plea that cause of action accrued on first default and limitation was extended owing to payment of interest is inconsistent with plea of waiver. A.I.R. 1926 P.C. 85, Foll. 33 C.W.N. 250=A.I.R. 1929 Cal. 292.

—**Blowing hot and cold.**

—**Where a respondent to a revision petition gets the revision petition dismissed on the ground that the order can be attached in appeal under S. 105 of the C.P. Code, he cannot afterwards, when the appeal is filed, be heard to say that the proper remedy was by way of revision.** 120 Ind. Cas. 594 (Lah.).

—**Where the appellant definitely claimed in the memo of appeal the whole amount of interest entered in the plaint on the ground that the condition for enhancement was not a penalty but conceded at the hearing that the finding of the lower court regarding condition being penal was correct.**

**Held,** the Court cannot listen to an entirely different plea which was not entered in the memorandum of appeal that the condition was penal but that reasonable compensation should be granted. 89 Ind. Cas. 879=26 P.L.R. 240=A.I.R. 1926 Lah. 11.

Where parties accept a consent decree as one under O. 34, R. 5, they cannot afterwards contend that O. 34, R. 5 did not apply to the decree. 87 Ind. Cas. 820=A.I.R. 1926 Nag. 152.

—**One basis of suit failing another cannot be adopted.**

In a suit for specific performance plaintiff based their suit on a document, which was found to be a manufactured one. The suit failed and thereupon plaintiffs in second appeal invited the Court to look into previous correspondence to see if a completed contract was made out.

**Held,** that the plaintiff cannot be permitted to abandon the case they made in the plaint and to invite the Court to examine whether a completed agreement may or may not be spelt out of the antecedent correspondence. 72 Ind. Cas. 651=A.I.R. 1924 Cal. 461.

—**Inconsistent pleas can't be allowed even in a subsequent suit if such suit grows out of first judgment.**

Where defendant pleaded that the deeds as engrossed accurately represented the contract between the parties, that he executed them in that state, and that they were then materially altered by the plaintiff with the result that they no longer represented the real agreement and the Court pronounced the draft agreement to be genuine and held that the disputed documents were in the form provided by the contract between the parties.

**Held,** this was the ground-work of the decision of the Court when it came to the conclusion that the documents had not been altered after execution and must be deemed genuine and the defendant is not competent to re-agitate the question of the conformity of the documents to the contract between the parties. It is no longer open to him to contend that the documents had been materially altered after execution. Where the defendant contended at a late stage that interpolations had been made not after execution, as pleaded in the previous suit but before execution.

**Held** this new defence must be ruled out on two grounds. In the first place, it contradicts the prior decision that the documents as presented for registration were correct representations of the contract. In the second place the appellant cannot be allowed to take up in this suit a position entirely inconsistent with



that adopted in the previous suit. It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up provided that the second suit grows out of the judgment in the first. 11 C.W.N. 284; 27 C.L.J. 535; A.I.R. 1922 Cal. 114, Foll. 79 Ind. Cas. 520=39 C.L.J. 40=A.I.R. 1924 Cal. 600.

#### —Inconsistent positions.

Where a party failed to object to a wrong order of a Court and thus deprived the opponent of certain remedies open to him if the party had objected, he cannot afterwards raise that objection. 78 Ind. Cas. 958=83 Ind. Cas. 438=51 Cal. 690=28 C.W.N. 559=39 C.L.J. 434=A.I.R. 1924 Cal. 633.

#### —Inconsistent claims.

Where the mortgage has been challenged as fraudulent and the fraud has been attempted to be proved and the plaintiff failed to prove it, he should not be allowed to redeem. 67 Ind. Cas. 394=A.I.R. 1923 Cal. 296.

#### —Inconsistent pleas—Benefit of decision—Right of party to.

Where it appeared that throughout the case and previously, instead of joining the other co-parcener in his litigation as against the trespasser, the plaintiff threw in his lot with the trespassers, and tried to defeat the title of the other co-parcener, he cannot be allowed, on failure of that attempt, after the Court had decided in favour of the other co-parcener, to turn round and claim a share of that property on the ground that it was acquired for the benefit of the joint family. A party ought not to be permitted to allege two absolutely inconsistent pleas each of which is destructive of the other. 26 N.L.R. 367=130 Ind. Cas. 108=A.I.R. 1931 Nag. 57.

#### —Will.

An adopted son cannot, while approbating the provisions of the will under which his adoption was made, reprobate other provisions of the same will. 73 Ind. Cas. 991=17 M.L.W. 31=32 M.L.T. 47=1923 M.W.N. 111=46 Mad. 300=A.I.R. 1923 Mad. 376.

A person who denies the existence of the will cannot claim to be executor under the will, if the will is held as genuine. 71 Ind. Cas. 207=A.I.R. 1923 Nag. 141.

#### —Party cannot adopt contradictory positions to the damage of the other party.

In 1305 B. S. there was a compromise between the plaintiff and the defendants under which the latter made over possession of the lands in dispute to the plaintiff in satisfaction of his dues from them. The plaintiff entered into possession under the compromise but the defendants having refused to execute a *koḥala* in his favour for the lands, he executed the decree and purchased himself this as well as other property of the defendants in the auction sale. The defendants applied to the Court under S. 311 of the G. P. Code of 1882 for setting aside the sale on the ground that the plaintiff had no right to execute the decree as it had already been satisfied by virtue of the compromise between the parties and as under it the plaintiff had been put in possession of the lands in dispute. The sale was accordingly set aside and the plaintiff was dispossessed of the lands in 1322 B.S. He, therefore, sued for recovery of possession of lands and declaration of his title to the property purchased by him in the auction sale.

**Held**, that the defendants are precluded from disputing—the title of the Plaintiff to the lands by virtue of the compromise entered into by them with the plaintiff and by virtue of which the plaintiff was put in actual possession of the lands and remained in possession for about 17 years. A.I.R. 1922 Cal. 313.

Suit for determination of fair and equitable rent—Plaintiff cannot claim decree for enhancement of rent. 68 Ind. Cas. 433=2 P.L.T. 642=A.I.R. 1921 Pat. 435.

#### —Inconsistent pleas—Private and public way.

A right to a private way and a right to a public way over the same soil cannot be pleaded together, as they are inconsistent. The private right, if pre-existing, can be relied on, for there is no compulsion in such a case to resort to the public right which might possibly be disputed by conflicting evidence. 57 Ind. Cas. 151 (Pat.)

#### —Inconsistent pleas—Objection to jurisdiction.

A party who objects to the jurisdiction of a Court of Small Causes on the ground that it is cognizable only by a munsif's court, is estopped from pleading that the munsif has no jurisdiction. 21 C.W.N. 784=27 C.L.J. 96=41 Ind. Cas. 929.

#### —Inconsistent pleas—Defence—Criminal trial.

An accused cannot set up entirely inconsistent pleas in defence. The accused must be given the benefit of the doubt if the case for the prosecution is doubtful and cannot be believed. 18 Cr. L.J. 435=33 Ind. Cas. 995. (All.)

#### —Inconsistent pleas—Objection to jurisdiction.

A defendant is precluded from raising the question of jurisdiction when the case is transferred to the higher Court according to his objection in the lower Court. 9 S.L.R. 164=32 Ind. Cas. 629.

#### —Inconsistent pleas.

The defence ought not to be allowed in appeal to raise a plea inconsistent with their main defence. 9 Bur. L.T. 53=31 Ind. Cas. 875.

#### —Inconsistent pleas—Denial of contract—Void as wager.

**Quære**: It hardly lies in the mouth of a person to say in the same breath, "I did not make the contract, but if I did make the contract, I am sure it was a wager". 39 Bom. 715=17 Bom. L. R. 293=28 Ind. Cas. 538.

#### —Inconsistent pleas—Suit on tenancy.

Where in an ejectment suit the plaintiff treated the defendant as a tenant but failed to prove the tenancy, he should not be allowed to prove his title for the purpose of ejecting him as a trespasser. 21 Ind. Cas. 560 (Mad.).

#### —Inconsistent pleas.

A plaintiff, alleging that a certain agreement of relinquishment was not binding on him cannot, when the agreement is declared to be valid, claim the benefit of its terms. 21 Ind. Cas. (All.).

#### —Inconsistent pleas—Litigation—Party cannot be allowed to take up.

A litigant will not be allowed to take inconsistent positions in court. A party to a foreclosure suit stated that the present title to the property was in himself. He cannot subsequently be permitted to assert that he was entitled to succeed on the death of a widow who was in possession at the time. 41 Cal. 69=17 C.W.N. 877=19 C.L.J. 155=19 Ind. Cas. 686.



**—Inconsistent pleas—Party not allowed to set up procedure successfully objected to by him.**

A party cannot be heard to say that a procedure, to which he himself successfully objected in a former proceeding, was the proper procedure to be adopted by the latter. 38 Mad. 36=23 M.L.J. 513=(1912) M.W.N. 1152=17 Ind. Cas. 420.

**—Inconsistent pleas—Trial finished—Effect.**

An issue whether the alleged *shikmi taluk* existed or not was framed in the first Court. Both parties went into evidence on that question and it was the subject of decision in both the lower Courts.

**Held**, that the defendant could not raise any objection in the High Court to the trial of that issue by the lower Courts. 14 C.L.J. 310=12 Ind. Cas. 462.

**—Inconsistent pleas—Order erroneous—Who can impeach.**

A party taking benefit under an erroneous order cannot subsequently ask that the order may be treated as nullity and be disregarded. 37 Cal. 897=14 C.W.N. 1019=6 Ind. Cas. 813.

**—Inconsistent pleas—Not to be allowed.**

Where the lessor based his suit on a lease for a fixed term he cannot plead that there was no fixed term. 5 Ind. Cas. 350 (All.).

**—Inconsistent pleas.**

A party having got a declaration that it will be invalid cannot rely upon the same will in a subsequent suit against the same opponent. 2 Lah. L.J. 431.

**—Inconsistent pleas—Fraud—Party if can be allowed to take advantage of his own fraud.**

The court should sternly refuse to allow any party in a suit to take advantage of his own fraud. 27 P.R. 1909=33 P.W.R. 1909=46 P.L.R. 1909=1 Ind. Cas. 888.

**33. Practice—Injunction.**

See C. P. CODE, O. 39.

**—Injunction—Jurisdiction of Court—Suit for declaration that proposed provincial law is unconstitutional and for injunction to restrain Provincial Government from bringing it into force—Duty of Court to try—Injunction *ex debito justitiae*.**

There have been cases in which the Court has granted an injunction *ex debito justitiae* to restrain a nuisance; and the Court has, at the same time, suspended the operation of the injunction in order to enable Parliament to introduce legislation which would legalise the nuisance. There is no warrant for the argument that it is not the province of a Court to sit as a third branch of the legislature and to invalidate legislation passed by it with plenary powers in any particular subject. It is or will be the duty and the privilege of the High Court or any other Court, when the occasion arises to interpret and give effect to the will of the sovereign people as embodied and expressed in the Constitution Act. The Court is also not unmindful that the principles to be applied in construing the Constitution Act, are not precisely the same as it would apply in construing an ordinary document; nor is it insensible to the responsibility which it undertakes if and when it pronounces any law to be an unconstitutional law. At the same time it is also the duty of the Court to see that to no suitor who comes before it justice is either delayed or denied. The plaintiff may or may not be entitled to relief, and any relief to which he may be entitled may, in the event, be illusory and of no avail to him. But that is no reason why his suit should not be tried.

12 F. Y. D.—48.

Hence a person whose interests are likely to be affected by a law which has been passed by a Provincial Government and has received the assent of the Governor-General is entitled to ask for a declaration that the law is unconstitutional and for an injunction restraining the Provincial Government from bringing the law into operation. The Court cannot be prevented from trying such a suit though ultimately it might be that the plaintiff is entitled to no relief or only to an illusory relief. A.I.R. 1950 Pat. 179.

**—Payment of batta—Confirmation of interim injunction against a party represented by counsel—Batta to effect service of the injunction, not necessary.**

It is not incumbent upon a party in whose favour an injunction by way of continuation or confirmation of a previous interim injunction, is granted, to pay batta to effect service of notice of the order of continuance or confirmation, when the order is passed in the presence of either of the party himself or of his counsel, inasmuch as the party himself has full knowledge of the Court's order and he must abide by it. 26 Mad. 260 and 42 All. 98, foll. I. L. R. (1948) Mad. 643=A.I.R. 1949 Mad. 362=60 L.W. 787=1947 M.W.N. 744=(1947) 2 M.L.J. 551.

**—Duty of Court—Temporary injunction—Discharge of—Reasons for discharge—Remarks about merits of suit—Propriety—Expunging of remarks in appeal—Appellate Court's powers—Interference with discretion.**

Where a Court discharges a temporary injunction which it had previously granted, it is open to the Court to support its order discharging the injunction with reasons, but, in doing so, the Court should scrupulously guard itself against making any remarks prejudicial to the merits of the case. Nothing shall be said which may tend to convey the suggestion that the Court has made up its mind one way or the other so far as the merits of suit are concerned. This principle should not be overlooked, and if, in disregard of this, the Court makes remarks tending to show that it has formed an opinion as to the merits of the case, the appellate Court, in the ends of justice, will expunge those remarks which are likely to prejudice the parties on the merits. At the same time, if the appellate Court is satisfied that so far as the discharge of the injunction is concerned, the lower Court has exercised a correct discretion, it would not interfere with that order in appeal. A.I.R. 1949 Ajmer 63 (1).

**34. Practice—Interest.**

See also (1) C. P. CODE, S. 34.

(2) INTEREST.

**—Practice—Interest—Custom (Punjab).**

It is a well-known fact so far as the province of the Punjab is concerned, that in documents where the rate of interest only is specified, and the document is silent as to whether it is payable monthly or annually it is understood that such interest is payable monthly. 121 Ind. Cas. 75=30 P.L.R. 741=A.I.R. 1930 Lah. 144.

**—Interest—Contract or usage.**

In the absence of a mercantile custom or usage, interest cannot be charged for either the day on which money was advanced or on which it was repaid.

Where there are conflicting rights as between subject and subject, a fraction of a day will be treated as a whole day. 30 M.L.J. 607=34 Ind. Cas. 825.

**—Interest—Decree—Provision in.**

The prevailing practice in Bengal is to allow interest at the contract rate up to the date fixed for payment



by the decree nisi and thereafter interest at the usual court rate at 6 per cent. "Date of realisation" means date fixed for payment and not date of actual payment by the mortgagors on realisation by execution sale. 9 C.L.J. 288=4 Ind. Cas. 56.

### 35. Practice—Issues.

See also (1) C. P. CODE, 11 AND O. 14.

(2) NOTE 22 (b) AND (f).

—**Issues—Suit for declaration of title to patta land—Scope of inquiry—Inquiry as to possession—Relevancy—Party in possession—Joinder of—Necessity.**

In a suit for declaration of title to patta land any inquiry regarding the possession of the land or impleading the person in possession is unnecessary. The inquiry as to possession of the land is irrelevant in the suit. A.I.R. 1950 Hyd. 58.

### —Issues.

Issues settled by a Judge who knows nothing about the case and who merely signs the issues drafted by counsel who know a little more are worse than useless and have a fictitious importance which they do not deserve. 123 Ind. Cas. 15=30 M.L.W. 914=A.I.R. 1930 Mad. 78=57 M.L.J. 609.

—If an issue can legitimately arise in a case it should be tried upon evidence. 91 Ind. Cas. 784=7 L.L.J. 405=26 P.L.R. 778=A.I.R. 1925 Lah. 571.

—Court should find on all issues. 82 Ind. Cas. 618=24 Bom. L.R. 1162=47 Bom. 110=A.I.R. 1923 Bom. 17.

—It would be better if all the issues in the case are raised. And then, if there was a preliminary issue, that could be dealt with first in appeal. 64 Ind. Cas. 568=46 Bom. 435=23 Bom. L.R. 1236=A.I.R. 1922 Bom. 292.

—**Due execution of a mortgage according to law—Proper issue to be framed indicated.**

An issue raising the question "whether the suit mortgage bond was true, *bona fide*, supported by consideration and binding on defendants does not raise the question as to the execution of the bond in the manner required by law. The issue upon a question of this sort ought to have been whether the mortgage bond was executed as required by the law. 71 Ind. Cas. 390=14 M.L.W. 563=A.I.R. 1921 Mad. 701.

### —Issue—Frame of—Objection.

No objection to the frame of an issue can be entertained for the first time in second appeal, where the issue is wide enough to cover all the grounds of attack and defence and all the available evidence has been produced before the Court. 35 P.W.R. 1917=40 Ind. Cas. 184.

—**Issue—Points not raised may be tried if arising in the case.**

A Court can try a question arising in a case, though not specifically raised in the pleadings. 4 O.L.J. 305=40 Ind. Cas. 456.

—**Issues—Additional issues—Framing or alteration of.**

Where the plea of invalidity of a mortgage bond due to want of proper attestation, was raised not in the pleadings, but at the trial, the proper course for the court to judge its validity or otherwise is to raise a distinct and supplemental issue on the point and give the parties opportunity for adducing fresh evidence. (1915) M.W.N. 637=29 Ind. Cas. 291.

### —Issue—Decision by analogy.

A judge is not bound to decide an issue of fact by analogy, e.g., to follow the opinion of another Judge in some other similar case. 10 N.L.R. 51=24 Ind. Cas. 808.

### —Issue—Ambiguity in—Effect of.

Where an issue, ambiguous in its nature, is understood and acted upon by the parties in its narrower sense a wider interpretation cannot be put upon it at a late stage of the case; but if put forward earlier, opportunity is to be given to the parties to contest it on the wider ground. 24 M.L.J. 271=21 Ind. Cas. 724.

—**Issues—New issue—Raising of, before argument—Issue depending on evidence.**

A court will be acting rightly in refusing to entertain at the very last stage of the hearing after all the evidence is closed, a new question of which the solution must be dependant on evidence (e.g.) the question of a custom of the adoption of a daughter's son. 36 Cal. 789=6 A.L.J. 567=10 C.L.J. 58=13 C.W.N. 920=5 M.L.T. 423=11 Bom. L.R. 833=19 M.L.J. 548=93 P.R. 1909=146 P.W.R. 1909=68 P.L.R. 1910=36 I.A. 103=3 Ind. Cas. 382 (P.C.).

—**Issue—Adverse possession—Whether could be inquired into.**

On an issue of limitation no enquiry into adverse possession could be made as the question of adverse possession is a question of title. 32 Mad. 242=5 M.L.T. 248=1 Ind. Cas. 221.

—**Finding without issue is bad.**

Where execution of a *kabuliat* is admitted and the defendant does not plead that there is fraud, coercion or undue influence:

**Held**, it is not open to the Courts below without a special issue upon the point to find that the defendant in executing the *kabuliats* was not aware of their contents. 1922 Pat. H.C.C. 154=A.I.R. 1922 Pat. 184.

—**Specific issue not raised—Matter put into issue in another suit—Evidence in that suit can be considered to determine the question as no surprise is caused.** 57 Ind. Cas. 564=44 Mad. 283=48 I.A. 1=25 C.W.N. 145=13 M.L.W. 301=18 A.L.J. 1041=1920 M.W.N. 371=A.I.R. 1921 P.C. 84=39 M.L.J. 98 (P.C.).

—**Issue—Omission to frame specific issues.**

The omission to frame a specific issue cannot prejudice the parties in the trial, if the issues framed already are wide enough, and the parties are not taken by surprise. The Court has power to amend an issue even after trial, when a plea has been inadvertently ignored, and call for evidence on that issue. 1 O.L.J. 204=24 Ind. Cas. 72.

—**Issue—Not raised—Law governing parties.**

In the absence of special evidence to show whether Mahomedan or Hindu Law governs the parties but where from the beginning it was made to appear that they were governed by Muhammadan Law, the High Court would not allow the parties in the second appeal to disturb that assumption. 37 Bom. 116=14 Bom. L.R. 1129=17 Ind. Cas. 834.

—**Issue—Omission to raise—Evidence adduced—No prejudice or surprise.**

The master is entitled to drop the allegations of fraud and misconduct and rely entirely on negligence and breach of contract in an action for damages for wrongful dismissal. The object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued in order that each may bring forward evidence appropriate to the issues. No question of surprise arises if a point is covered by the



pleadings and evidence is adduced by both sides regarding it, although no issue on the point has been framed by the Lower Court. 5 S.L.R. 192=15 Ind. Cas. 757.

**—Issues—Not raised—Right of an appellate Court to adjudge on a question not raised in issue.**

An appellate court has no power to adjudge on a question which is not included in the issue. It should frame an issue, take evidence and then give the finding. (1911) 2 M.W.N. 393=10 Ind. Cas. 351.

**—Issue—No specific issue framed—Question of fact decided.**

If evidence is adduced by both parties on a question of fact and decision given, the decision is good even if the fact is not specifically put in issue provided neither party is prejudiced thereby. 9 M.L.T. 407=10 Ind. Cas. 291.

**—Issue—Absence of pleadings—Abandonment of plea.**

Where no issue is raised, on a point covered by the pleadings the parties must be presumed to have given up the point. 7 M.L.T. 106=5 Ind. Cas. 813.

**36. Practice—Judge.**

See also NOTE 22.

**—Judge—Statement of as to what happened in court—Affidavit of Advocate—Admissibility.**

Question as to what happened in Court—Statement of presiding Judge is conclusive and an affidavit of the Advocate in the Court is not admissible to controvert it. A.I.R. 1944 Mad. 450=(1944) 1 M.L.J. 396=57 M.L.W. 318.

**—Judge—Framing of decree.**

The work of the Courts is not completed once they have played about with contention of the parties and conflicting rulings, but they should pay special attention to the decree which they prepare. 127 Ind. Cas. 524=A.I.R. 1930 All. 321.

**—Judge cannot delegate his functions to Commissioner.**

A Judge cannot delegate any of his functions to the Commissioner and ask him to take evidence and try an issue although it may not have the effect of entirely divesting him of his responsibility in the matter. A.I.R. 1930 Pat. 557=11 P.L.T. 456=127 Ind. Cas. 841.

**—Judge—Delegation of functions.**

A judge cannot delegate to the Police his judicial functions. 57 Ind. Cas. 940 (Cal.).

**—Judge—Delegation of authority.**

Judicial functions cannot be delegated without statutory authority. 9 S.L.R. 148=32 Ind. Cas. 634.

**—Acceptance of post of Arbitrator.**

Practice of some Judges of accepting also the post of an arbitrator is strongly deprecated, for Civil Procedure Code nowhere contemplates such procedure. 117 Ind. Cas. 610=1929 A.L.J. 808=51 All. 903=A.I.R. 1929 All. 747.

**—Proof of erasure of writing in absence of other party.**

It is a thoroughly improper proceeding to have something done by a pleader to prove to the private satisfaction of the Court, that it is possible to remove writing from paper without leaving a trace of the writing having been there. The Court should have this performance done in Court and in the presence of the other side. 118 Ind. Cas. 887=56 Cal. 442=A.I.R. 1929 Cal. 479.

**—Reference to documents outside record in absence of parties.**

No Court has a right to look at any documents or any papers other than those on the record, unless it gives to the parties to the suit an opportunity of being heard and making their submissions with regard to what is contained in documents outside the record to which the Judge desires to refer if it becomes necessary to refer to other matters in accordance with the provisions in that behalf contained in the Code of Civil Procedure; reference to such evidence must only be made in the presence of the parties and after hearing them upon the evidence. 67 Ind. Cas. 871=A.I.R. 1923 Cal. 194.

**—Local investigation.**

The Judge should not in civil cases himself hold a local investigation with a view to gather information which he might use as the foundation of his judgement although he might inspect the locality with a view to enable him to understand the evidence and in the absence of prejudice to the parties the mere fact that the Judge held the local investigation without recording a note thereof is not a sufficient ground for setting aside his decision. 15 C.L.J. 138, Applied. 91 Ind. Cas. 715=A.I.R. 1926 Cal. 660.

**—Judge—Personal inspection by a Judge.**

A Judge can take a personal inspection of the site in dispute in an easement case, and decide the case on facts which he finds in his personal inspection and not inferences drawn from such facts. 35 Bom. 317=13 Bom. L.R. 313=10 Ind. Cas. 914.

**—Local inspection—Magistrate, when to make.**

A local inspection by a Magistrate must be held sparingly and only to understand the evidence in the case and it should never be substituted for evidence in the case. The party against whom the result of the inspection is used is greatly prejudiced and is put to irreparable disadvantage is not being able to remove the wrong impression from the mind of the Magistrate and the danger is intensified by the Magistrate holding the local inspection *ex parte*. 61 Ind. Cas. 712=22 Cr. L.J. 424=1 Pat. L.T. 569.

**—Holding Court beyond office hours.**

For practical purposes it is quite improper for a Judge to insist on sitting beyond the prescribed hours unless, of course, the lawyers in the case agree. The lawyers are professional men who have to regulate their interviews in accordance with the regular and prescribed hours of the Court's sittings and it is not reasonable except for really unavoidable necessity or for the agreed convenience of all concerned that a Court should insist on sitting at times neither prescribed nor suitable. 89 Ind. Cas. 961=4 Pat. 646=26 Cr. L.J. 1441=A.I.R. 1925 Pat. 772.

**—Court in camp—Pleaders not attending—Court to deliver judgment without hearing them.** 69 Ind. Cas. 640=A.I.R. 1923 Nag. 208.

**—Successor should not condemn predecessor's order in strong words.**

It is a very grave thing for one Judge to say that the order passed by another Judge particularly by his own predecessor in office is a 'nullity and utterly void' however much he may doubt its correctness. 83 Ind. Cas. 220=51 Cal. 715=28 C.W.N. 795=39 C.L.J. 399=A.I.R. 1924 Cal. 830.

**—A Judge is free to change his opinion as often as he likes until he has definitely made a final order.** 75 Ind. Cas. 682=27 C.W.N. 792=A.I.R. 1923 Cal. 685.

**—Judge—Acting once as counsel in a cause.**

It is a long usage that a judge would refuse to adjudicate on a case in which he was working as counsel be-



fore he was raised to the bench. But if he was acting in another case on behalf of one of the parties he, when raised to bench, may adjudicate a case in which that same person is a party. 31 C.L.J. 313=57 Ind. Cas. 22.

—**Judge acting in two capacities.**

A Judge acting as Sub-Judge and Additional District Judge exercises jurisdiction as two distinct courts. 13 N.L.R. 203=42 Ind. Cas. 746.

—**Judge—Statement of—Events in trial.**

The statement of the Judge trying a case as to what happened before him is conclusive on questions of fact. 55 Ind. Cas. 628 (Cal.)

—**Judge—Anonymous letters.**

Impropriety of addressing anonymous complaints to Court in connection with pending cases pointed out. 43 Cal. 685=20 C.W.N. 278=23 C.L.J. 237=17 Cr. L.J. 5=32 Ind. Cas. 657.

—**Judge—Reason of their existence.**

Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. (1914) M.W.N. 883=26 Ind. Cas. 337.

—**Judge—Knowledge of, not to be imported.**

A judge cannot without giving evidence as a witness, impart into a case his own knowledge of particular facts. In such a case the judge should decline to hear the matter. 16 Ind. Cas. 859 (Cal.).

—**Judge—Personal opinion.**

A magistrate cannot import into his judgment matters of opinion and inference based on circumstances not on record. 39 Cal. 476=16 C.W.N. 425=15 C. L. J. 403=13 Cr. L.J. 156=13 Ind. Cas. 844.

—**Judge—Private opinion.**

It is illegal and improper for a judge to introduce a private man's opinion in his judgment nor can he allow his judgment as to conviction or sentence to be influenced by the said opinion. 8 P.W.R. 1909 Cr.=10 Cr. L.J. 321=3 Ind. Cas. 622.

—**Judges trying a cause consulting another judge, propriety of.**

Judges who have heard the arguments and who are responsible for the decision can hardly with propriety rest it on the authority of one who has not heard the arguments and is not responsible for the decision though he also may be a judge of the High Court. (1901) 5 C.W.N. 729=28 C. 621=3 Bom. L.R. 808=28 I. A. 159 (P.C.).

—**Judge—Duty of—Adjudication of claim.**

It is the duty of the court to adjudicate on a claim as brought. It cannot direct parties to alter their claims. 1 P.R. 1911=47 P.L.R. 1911=22 P.W.R. 1911=9 Ind. Cas. 673.

—**Judge—Demeanour—Pleader.**

Magistrates should not by their demeanour give room to the suspicion that one practitioner is favoured at the expense of the others. (1911) 1 M.W.N. 327=21 M.L.J. 283=12 Cr. L. J. 150=10 M. L. T. 84=9 Ind. Cas. 897.

**37. Practice—Judgment.**

See (1) C.P.C., O. 20, RR. 1, 2, 3, 4; O. 41, R. 31.

(2) CR. P.C., S. 367.

(3) NOTE 22 (b).

(a) General.

(b) Basis of.

(c) Consistency with pleadings.

(d) Expunging from.

(e) Suit upon.

(a). General.

—**Judgment—Binding force of.**

A judgment of a Court, so long as it subsists is binding on the parties to the action in which it was given and their privies: it can however have no binding effect on persons, who were not any way privies to the judgment. A.I.R. 1949 P.C. 54.

—**Judgment—Signed by after retirement—Same pronounced by succeeding Judge—Legality.**

A District Judge retired from office on October 4, 1927. The judgment was signed by him on 9th October, 1927 and the same was pronounced in Court by his successor on 17th October, 1927.

Held, that the judgment was valid in law. 53 A. 133=A.I.R. 1931 A. 90=1930 A.L.J. 1566.

—**Judgment—Amendment.**

Mistake of fact committed by High Court should be corrected in the High Court and not in Privy Council. 94 Ind. Cas. 916=4 Rang. 513=1926 M. W. N. 489=3 O.W.N. 735=A.I.R. 1926 P.C. 29 (P.C.).

—**Erroneous statement, by counsel or misunderstanding by a judge can be corrected only by a review and not by appeal.** 80 Ind. Cas. 601=22 A.L.J. 647=5 L.R.A. Civ. 404=A.I.R. 1924 All. 518.

—**Judgment—Finality.**

When issue cannot be re-opened, decision thereon must be accepted without inquiry. A. I. R. 1929 All. 761.

—**Legal judgments cannot be treated as mere counters in the game of litigation. They are serious pronouncements, for the most part by the judicial officers of the State, touching the rights or disputes of subjects, bringing home to those subjects what the rules of justice required and are enforceable, if need be, by the forces of the State. Moreover, when once pronounced they cannot be lightly set aside.**

The Court has no jurisdiction after the judgment at the trial has been passed and entered to rehear the case. The only cases in which the Court can interfere after the passing and entering of the judgment are: (1) where there has been an accident or slip in the judgment as drawn up, in which case the Court has power to rectify it, and (2) where Court itself finds the judgment as drawn up does not correctly state what the Court actually decided and intended. (1896) 1 Ch. 673. Foll.

The mere fact that the parties to a suit were under the impression that the result of suing and being sued in the names of the respective attorneys of their respective principals would be the same as if the principals themselves were the parties litigant, is not sufficient to vitiate a judgment regularly pronounced. 99 Ind. Cas. 742=1926 M.W.N. 832=4 O.W.N. 1=25 M.L.W. 163=A.I.R. 1926 P.C. 136 (P.C.).

—**Judgment—Setting aside.**

In the judgment in a suit for damages for malicious prosecution it is not proper for the Judge to discuss the judgment in the criminal case, but if the conclusions arrived at by the Judge are not based on the findings of the Magistrate or on evidence recorded by him but he has come to independent conclusions on the evidence produced in the case on the issues framed, his judgment is not vitiated merely on this ground. 99 Ind. Cas. 628=A.I.R. 1927 Lah. 120.

—**Technical defect.**

The High Court refused to set aside the proceedings in the lower Court or order an appeal to be re-heard as a first appeal in that Court merely on the ground



of a technical objection to the form of the judgment. 88 Ind. Cas. 586=6 L.R.A. Civ. 393=A. I. R. 1925 All. 808.

—**Ambiguity in judgment of lower Court is a good ground.**

Where the Judge in the lower Court found in the earlier part of his judgment that M was undoubtedly in possession of the house, and further on he said:—"I have been shown no ruling which requires that the possession of the house on the part of the widow must be exclusive. All that appears to be necessary is to show that she is in actual possession and that there has been no division between her and any other person."

**Held**, that this was not a clear finding and the sentence in question may mean one of two things. It may mean either that M and the other heirs of the family were in actual joint possession of the house, in which case the decree of the court below would be clearly incorrect; or it may merely mean that M was not in possession adversely to the other heirs.

**Held**, further that as M and her husband had given evidence that they were in exclusive possession of the house, as they were not cross-examined and as there was no evidence to the contrary and as the plaintiffs admitted they were out of possession at the time of the institution of the suit, the Judge could not have meant that M was not in sole possession of the house and his decree cannot be attacked on this ground. 78 Ind. Cas. 214=A.I.R. 1924 All. 729.

—**Observations in Judgment.**

Where the order of a Munsif is set aside on appeal by the District Judge, the observations of the Munsif on the question of **benami** though not touched upon by the Appellate Court, cannot be relied upon by a party on the question of the **benami** nature of the transaction. 76 Ind. Cas. 241=27 C. W. N. 38=37 C.L.J. 265=A.I.R. 1923 Cal. 121.

—**Per Coutts-Trotter, J.**—An unappealed order of predecessor could not be effectually reversed by the succeeding Judge. 68 Ind. Cas. 921=16 M.L.W. 608=31 M.L.T. 284=A.I.R. 1923 Mad. 44=43 M.L.J. 480.

—**Erroneous judgment and void Judgment.**

An erroneous judgment is a voidable judgment, for the argument that a judgment is erroneous assumes both the regularity of the procedure and the jurisdiction of the Court to render it. An erroneous judgment is one which though regularly rendered, is contrary to law or facts, and is therefore liable to be reversed by an appellate tribunal.

An irregular judgment is also a voidable judgment but the distinction between an erroneous judgment and an irregular judgment is this that whereas an erroneous judgment will always be reversed by an Appellate Court an irregular judgment will be reversed in Appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceedings has affected the merits of the case between the parties.

A void judgment, on the other hand, is a judgment where there was total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside.

Where there does exist a jurisdiction but, in the exercise of the jurisdiction, the Court has acted illegally or with material irregularity, the judgment is voidable, and it can be vacated in an appropriate proceeding either by the Court which rendered it, or under C.P.C., by the Appellate Court, either in appeal or in revision. 71 Ind. Cas. 705=2 Pat. 335=4 P.L.T. 147=A.I.R. 1923 Pat. 242.

—Where the Appellate Court recorded a finding merely stating that the plaintiff has failed to discharge the burden of proof which lay very heavily upon him.

**Held**; that the judgment is not a good judgment. A.I.R. 1923 All. 412.

—**Judgment simply repeating arguments of Counsel is unsatisfactory.**

Where the judgment of the Court is practically nothing but a recapitulation of the arguments of Counsel with a brief indication of the Court's opinion with regard to the said arguments, the judgment cannot be regarded as satisfactory. 64 Ind. Cas. 929=2 Lah. 271=A.I.R. 1921 Lah. 119.

—**Failure to establish a custom.**

Where a plaintiff in order to succeed has to establish a particular custom and he fails to establish it, the Court should only dismiss the suit. 60 Ind. Cas. 147=7 O.L.J. 474.

—**Hard case—Bad law.**

Hard cases must not be allowed to make a bad law. 7 O.L.J. 164=2 U. P.L.R. (J.C.) 96=56 Ind. Cas. 299.

—**Judgment—Statements in, as to admission of pleader—Value of—Rebuttal.**

The suggestion that the judges of the High Court might have misunderstood the conduct of the pleader in making certain admissions, could not be entertained in the absence of anything showing that the pleader called the attention of the court to the fact that the statement in the judgment regarding his conduct was wrong while the matter was still fresh in the minds of the judges. An affidavit filed before the Judicial Committee long afterwards by a person who said he was present at the trial and the pleader made no admission as stated and the fact that the pleader was unable to recall whether in fact he made the admission or not, are wholly insufficient to prove that the statement in the judgment was erroneous. 21 C.W.N. 897=(1917) M.W.N. 518=6 L.W. 437=42 Ind. Cas. 527 (P.C.).

—**Judgment—Statements in—Court if can go behind.**

A Court should not go behind any statement in the judgment of another court. 13 Ind. Cas. 311 (Cal.).

—**Judgment—Findings of judge—To be specific.**

Judges, whatever reasons they may give in judgments, must make specific and precise statements of their findings. 37 Ind. Cas. 304 (All.).

—**Judgment—Preliminary point—No hearing on merits.**

An appellant is not entitled to a hearing on the merits if the appeal is liable to be dismissed on a preliminary ground. 2 L. W. 999=18 M.L.T. 383=19 M.L.J. 784=(1915) M.W.N. 817=31 Ind. Cas. 74.

—**Judgment—Additions to, before decree.**

Where a decree has not been drawn up and issued, the High Court can supplement its judgment with directions for carrying out the decision and to embody these in the decree. (1913) M.W.N. 906=21 Ind. Cas. 545.

—**Judgment—Delivery of judgment on holiday—Not illegal—Remedy of aggrieved party.**

Delivery of judgment on a holiday is not illegal but if any person is injuriously affected thereby he is entitled to a redress for the grievances. The English rule as to Sundays being **dies non** does not apply to India. (1912) M.W.N. 65=11 M.L.T. 84=22 M.L.J. 212=13 Ind. Cas. 463.



**—Judgment lost.**

Where a judgment has been lost, it is open to the judge to rewrite from memory the substance of it. (1907) 8 C.L.J. 521.

**—Appellate Court—Findings must be clear.**

It is the duty of the Judge when sitting as the final Court of fact to state in his judgment clearly what his findings are, and the High Court sitting in second appeal cannot deduce from casual statements in the judgment, findings of fact which are not clearly expressed. 67 Ind. Cas. 998=A.I.R. 1923 Cal. 278.

**—Judgment—Appellate Court—Grounds of appeal to be specifically dealt with.**

An Appellate Court ought to dispose of specifically the grounds of appeal urged before it. Where the first court had recorded that a party has closed his case, it cannot be urged in appeal that that court had refused to receive further evidence, without conclusively proving that the record is wrong. 3 P.W.R. 1914=27 P.L.R. 1914=23 Ind. Cas. 352.

**(b). Basis of.****—Judgment—Suspicion.**

Court's decision must not rest on suspicion but upon legal grounds established by legal testimony. 123 Ind. Cas. 220=7 O.W.N. 373=A.I.R. 1930 Oudh 272.

**—Judgment—Surmise.**

Judgment must be based on legal evidence and not on surmise. 98 Ind. Cas. 129=A.I.R. 1927 Cal. 140.

—The Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. 94 Ind. Cas. 420=A.I.R. 1926 Oudh 469.

**—Decision—Grounds for.**

A Court must base its decision upon legal ground established by legal testimony and not upon suspicion. 80 Ind. Cas. 692=A.I.R. 1925 Oudh 171.

—A judgment is liable to be set aside where it is conjectural and based on inadmissible evidence. A.I.R. 1923 Pat. 37.

—Court's decision should rest not on suspicion but legal grounds established by legal testimony. 66 Ind. Cas. 694=34 C.L.J. 33=25 C.W.N. 942=A.I.R. 1921 Cal. 435.

**—Judgment—Conjecture.**

A contention on conjectural grounds is of no weight. 25 Ind. Cas. 955 (Cal.).

**—Judgment—Suspicion—Decision based on.**

Suspicion though a ground for scrutiny cannot be made the foundation of a decision. 34 All. 511=12 M.L.T. 392=15 O.C. 278=14 Bom. L.R. 1073=10 A.L.J. 373=17 C.W.N. 49=16 C.L.J. 629=(1912) M.W.N. 1052=23 M.L.J. 741=39 I.A. 68=17 Ind. Cas. 396 (P.C.).

**—Judgment—Conjecture—Surmises independent of surrounding facts—Miscarriage of justice.**

The practice of singling out one fact and making a surmises independent of the surrounding circumstances is very likely to mislead and cause a miscarriage of justice. 14 Ind. Cas. 95 (Cal.).

**—Judgment—Conjectures.**

A judge should not base his decision in favour of party on conjectures as to matters of fact, nowhere alleged by the party. 93 P.R. 1910=128 P.W.R. 1910=186 P.L.R. 1910=8 Ind. Cas. 353.

**—Judgment—Conjecture.**

Conjectures are no substitute for proof where a solemn deed by the father is sought to be set aside by the son.

35 Cal. 1039=42 P.R. 1910=12 C.W.N. 1049=35 I.A. 206=8 C.L.J. 359=18 M.L.J. 379=128 P.W.R. 1908=4 M.L.T. 207=10 Bom. L.R. 790=6. Ind. Cas. 721. (P.C.).

—Discussion about speculative theories built on medical books without any facts established by the evidence in the case was condemned: 23 Cal. 1 (P.C.), Appr. 98 Ind. Cas. 567=1 Luck. 403=3 O.W.N. 761=29 O.C. 305=31 C.W.N. 438=A.I.R. 1926 P.C. 97 (P.C.).

—It is not open to a Court to speculate. 76 Ind. Cas. 881=30 M.L.T. 168=A.I.R. 1922 Mad. 341=42 M.L.J. 124.

**—Judgment—Propriety.**

Judgment based on evidence recorded in another suit at the request of one party but in teeth of the opposition of the other party is liable to be set aside. 85 Ind. Cas. 912=35 M.L.T. 101=A.I.R. 1925 Mad. 230=47 M.L.J. 640.

**—Judgment—Materials for.**

Every Court is bound to base its decision not merely on "evidence" but on "matters before it". The expression "matters before it" in S. 3 of the Evidence Act includes matters which do not fall within the definition of "evidence" as given in that section. Therefore in determining what is evidence other than "evidence" in the phraseology of the Act, the definition of "evidence" must be read with that of "proved" given in the said section. 79 Ind. Cas. 609=A.I.R. 1924 Nag. 385.

**—Judgment—Extraneous matter.**

Where judgment of a trial judge on a question of fact was vitiated by extraneous matter, the appellate judgment was liable to be reversed as it must have been influenced by the finding of the trial Judge on that question. 44 Cal. 711=25 C.L.J. 66=21 C.W.N. 549=18 Cr.L.J. 477=39 Ind. Cas. 317.

**—Judgment—Validity of—District Judge following a finding of Divisional Judge in another case—Validity.**

Where a District Judge affirms a decree following a finding as to the customs arrived at by a Divisional Judge in another case, he does not apply his mind to the point and his procedure is irregular. 221 P.W.R. 1915=43 P.L.R. 1915=27 Ind. Cas. 980.

**—Judgment—Conviction—Magistrate seeking advice of Dt. Magistrate as to jurisdiction, improper.**

Where a Magistrate before whom an accused was placed on trial became doubtful as to his jurisdiction, and thereupon sought the advice of the District Magistrate and on the receipt of the latter's opinion on the question of jurisdiction, proceeded to try the case.

Held, that the Magistrate should not have asked for the advice of the Dt. Magistrate in the way he did, but was bound to finish his inquiry, complete his record by the reception of all evidence of relevant facts including the facts which bore upon the question of accused's amenability to his jurisdiction, and then as a Magistrate pass such order as seemed to him to be legal and proper. 37 Bom. 144=14 Bom. L.R. 891=13 Cr. L.J. 786=17 Ind. Cas. 530.

**—Judgment—Validity—Judgment on materials not evidence or on personal knowledge of the Judge.**

A Judgment on materials that are no evidence or on personal knowledge of the judge is invalid. 38 Cal. 153=12 Cr. L.J. 355=10 Ind. Cas. 955.



## (c). Consistency with pleadings.

## —Judgment—Pleadings.

Judgment inconsistent with pleadings and issues—Pleading should be amended and issues framed if necessary, giving counsel opportunity of dealing with case as then set up. 32 Bom. L.R. 454=A.I.R. 1930 Bom. 249.

## —Plea—Decision in a case should be consistent with the pleadings; else the defendant may be taken by surprise.

The general rule is that it is necessary that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made: (11 M. I. A. 7, Foll.). But there are exceptions to that general rule, of which the underlying principle is mainly for the protection of a defendant, so that he should not be taken by surprise: 115 Ind. Cas. 379=52 Bom. 875=30 Bom. L.R. 1277=A.I.R. 1928 Bom. 484.

—A Court is not competent to rest its decision on a plea which does not arise out of the pleadings. 74 Ind. Cas. 369=9 O.L.J. 629=27 O.C. 64=A.I.R. 1923 Oudh 114.

—Tort—Damages—Collision between motor and motor cycle—Suit for damages—Decision must be absolutely consistent with pleadings. 66 Ind. Cas. 745=34 C.L.J. 178=25 C.W.N. 519=A.I.R. 1921 Cal. 543.

## —Judgment—Redemption suit—Finding on a point not set up in defence.

A finding that the transaction was in fact a sale is wrong when defendant only pleads that the transaction was a sham one to mask the real fact. 7 O.L.J. 389=58 Ind. Cas. 115.

## —Judgment—Case not set up in the plaint.

A party is not entitled to a claim not set up in the pleadings nor consistent with it though the court sets forth such a claim for him. 3 U.B.R. (1920) 201=57 Ind. Cas. 873.

## —Judgment—Suit on easement—Decree on footing of natural right.

A plaintiff who claims a right of easement but fails to establish the exercise of the right for the statutory period, cannot succeed upon his natural right. The Court cannot make out a case not set up in the plaint and then grant relief. 56 Ind. Cas. 970 (Pat.).

## —Judgment—Court not to set up.

The Court is not entitled to set up a case for plaintiff which not only he did not set up but on the contrary which he definitely repudiated through his counsel. 56 Ind. Cas. 638 (Lah.).

## —Judgment—Not to be set up.

The Court is not justified in setting up a new case for the plaintiff on grounds not raised by him in the plaint or pleadings. 50 Ind. Cas. 160 (Lah.).

## —Judgment—Decision on point not raised by either party—Procedure.

A judge commits an error in ignoring the allegations of the parties and deciding the case on a point which found no place in the pleadings. 136 P.W.R. 1918=46 Ind. Cas. 646.

## —Judgment—Case not set up by plaintiff or defendant.

The Court cannot set up a case which is neither the plaintiff's nor the defendant's and where in such a case, an appeal is dismissed, the High Court remanded the case for rehearing. 40 Ind. Cas. 467 (Cal.).

## —Judgment—Case to be based on pleadings.

The Court should never arrive at a conclusion in accordance with the case of neither side and each case must be based upon the pleadings. 34 Ind. Cas. 466 (Pat.).

## —Judgment—New case not to be made.

If a point is outside the pleadings, a court is not competent to decide on the point. 34 P.R. 1916=54 P.W.R. 1916=31 Ind. Cas. 386.

## —Judgment—New case not to be set up.

A suit should not be decreed on the basis of a claim not set up in the plaint or raised in the issues or even in the memo of appeal. 131 M. 531; 2 C. 411, Foll. 1 L.W. 853=1914 M.W.N. 784=25 Ind. Cas. 934.

## —Judgment—New objection—Not to be raised.

Where in a suit for mere declaration challenging an adoption no objection was taken by the defendant as to the form of the suit and no issue was raised regarding the right to the property.

**Held**, that it was not open to the court to take up the point *suo motu* in its judgment and decide it adversely to the plaintiffs. 287 P.L.R. 1913=177 P.W.R. 1913=94 P.R. 1913=29 Ind. Cas. 454.

## —Judgment—Court's duty.

The Court cannot make out a case not set up in the plaint, and not supported by plaintiff's witnesses. 5 Bur. L.T. 167=6 L.B.R. 74=17 Ind. Cas. 900.

## —Judgment—Decision different from the case of either party.

The Court should not decide a suit in a way which is not the case of either party and on a matter on which no issue was raised. (1912) M.W.N. 177=15 Ind. Cas. 185.

## —Judgment—Pleading—Dismissal of suit.

A suit cannot be dismissed on the finding on a point which is not raised either in the written statement or specifically raised in the issues. 11 Ind. Cas. 25 (Sind).

## —Judgment—Pleadings—Finding of Court.

When the plaintiff claimed a certain plot as their own and defendants claimed a right of way.

**Held**, the lower court cannot give a finding of common ownership. 9 M.L.T. 350=9 Ind. Cas. 640.

## —Judgment—Suit brought on one ground—Decree passed on another ground.

Suit brought on one ground cannot be decreed on a different ground, which the defendant had no opportunity of meeting. 34 Bom. 244=11 Bom. L.R. 237=2 Ind. Cas. 146.

## (d) Expunging from.

See (1) C.P.C., S. 151 AND O. 20, R. 4.

(2) Cr. P.C., SS. 367, 439 AND 561-A.

## —Judgment—Expunging from—Finding if can be expunged on the ground that it is unnecessary.

Where evidence is produced by both parties on all the issues and definite findings arrived at, it is not open to the party adversely affected thereby, to ask in appeal that a finding be expunged from the judgment on the ground that it was not necessary for the decision of the case. 51 Ind. Cas. 392 (Cal.).

## —Judgment—Expunging from—Pleader's remarks against, by court.

Where a pleader is justified in making a suggestion the court should not make any remarks describing the suggestion as a daring attempt to mislead the court.



Such a remark should be expunged from the record. 15 Cr. L.J. 420=24 Ind. Cas. 156.

(e). **Suit upon.**

—**Suit upon judgment—Competency—Suit upon preliminary mortgage decree for sale—Maintainability.**

It is true that a suit can be filed upon a debt created by a decree. But a debt is a personal obligation to pay an ascertained sum of money and therefore, the relationship of a debtor and creditor is necessary to found an action upon a judgment which creates a debt. Where no such personal obligation exists, as in the case of a preliminary mortgage decree for sale, it follows that an action upon a preliminary mortgage decree is incompetent. A personal obligation can arise only when the mortgage security is insufficient to discharge the mortgage debt and when an order is made pursuant to O. 34, R. 6, C. P. Code. I.L.R. (1946) Kar. 110=228 Ind. Cas. 54=A.I.R. 1947 Sind 12.

**38. Practice—Judicial order.**

See also JUDICIAL ORDER.

—Order by Court made or deemed to be made in presence of parties—Finality and binding character of—Right of parties to reopen. See C.P. CODE, O. 33, R. 9 (b). I.L.R. (1949) Cut. 578.

—**Judicial Order.**

Court is not justified in passing an order to the detriment of judgment-debtor without giving him an opportunity to show cause against it. 116 Ind. Cas. 714 (Lah.).

—**Formal order—Necessity for.**

There is no provision in the C.P. Code, requiring a Court when deciding any matter which is other than a regular suit to draw up a formal order in addition to and distinct from the document containing the reasons for the order: 6 C.W.N. 283, Foll. 113 Ind. Cas. 646=A.I.R. 1929 Mad. 121.

—**Court overlooking small formalities and granting relief—Order is not illegal.**

Forms and rules are prescribed for the guidance of the Courts and the litigants. Where a Court overlooks certain small informalities and grants the relief asked for, it is not open to the party against whom the relief is granted to question the correctness or the legality of the Court's order on the ground that the application on which the relief is granted is not in the proper form. Where one relief is claimed and another is granted, the Court may be said to act illegally or with material irregularity but when a certain prayer is specifically made under a rule which permits the making of that prayer and when the Court grants the prayer overlooking the informality, if any, the order of the Court is legal. 107 Ind. Cas. 298=A. I. R. 1928 Mad. 129.

—**Finality.**

A wrong order when passed becomes final unless set aside in accordance with law. 92 Ind. Cas. 235=7 L.L.J. 553=26 P.L.R. 837=A.I.R. 1926 Lah. 24.

—The general principle is that persons whom it is desired to bind by proceedings can and must be impleaded in them. 69 Ind. Cas. 977=16 M.L.W. 623=1922 M.W. N. 731=32 M.L.T. 98=A. I. R. 1923 Mad. 57=43 M.L.J. 559.

—Courts are forbidden to issue prohibitory orders by telegram. 67 Ind. Cas. 771=11 L. B. R. 294=1 Bur. L.J. 28=A.I.R. 1923 Rang. 6.

—**Ex-parte order—Application to set aside—Must be considered on merits.**

When a widow of one of the decree-holders got her name recorded in place of her husband without notice to other decree-holders and when the other decree-holders applied to be heard as to whether the order was wrong.

Held, that the Court is bound to decide whether the ex-parte order was correct. 70 Ind. Cas. 859=A.I.R. 1922 Bom. 280.

—**Judicial order—Successor if bound by that order.**

An order made by a judge is binding on his successor, till set aside in due course of law. 21 C.L.J. 571=29 L.C. 966.

—**Judicial order—Order by predecessor in office—Whether successor can go behind.**

In one and the same Court a successor in office cannot go behind the order of his predecessor and cancel it as incorrect. 1 O.L.J. 682=26 Ind. Cas. 872.

—**Judicial order—Transfer of presiding officer of court—Judge cannot re-open.**

If the presiding officer of a court has decided a question involved in a case and is transferred and succeeded by another officer the latter cannot re-open the same question again except on the ground of some palpable mistake committed by the former. 204 P.L.R. 1910=8 Ind. Cas. 779.

—**Judicial order—Hearing parties—Omission of—Remand.**

If a court passes an order on application without hearing the objection of the other party, the appellate court must set it aside and remand the case for a fresh decision on the evidence of both parties. 17 P. W. R. 1912=240 P.L.R. 1912=14 Ind. Cas. 379.

—**Appeal—Opportunity not given to appellant to be heard—Dismissal—Propriety.**

Where on the presentation of appeal, appellant's pleader was asked to argue the case at once and on his failure to do so, the appeal was dismissed.

Held, that the appeal ought to be reheard as reasonable opportunity was not given to the appellant to be heard. 6 M.L.T. 309=10 Cr. L.J. 491=4 Ind. Cas. 97.



## 39. Practice—Jurisdiction.

See also: (1) C. P. C., Ss. 16-21

## (2) Jurisdiction

- (a) General
- (b) Civil and Criminal Court
- (c) Civil and Revenue Court
- (d) Objection to
- (e) Waiver.

## 39 (a). Practice—Jurisdiction—General.

## —Jurisdiction of Court—Question doubtful—Duty of High Court.

Where the question involved is one of jurisdiction and it is not free from doubt, it is the duty of a High Court to seize it. 50 P.L.R. 318=A.I.R. 1949 E.P. 262.

## —Exercise of unusual jurisdiction of making bargain which parties themselves had not specifically made to prevent fraud.

The Court does not exist for the purpose of making a new contract between the parties, but merely to determine and enforce such a contract, if any, as the parties themselves have made. But in very exceptional circumstances such as to prevent a fraud on a party who has erected buildings on another man's land in consequence of certain expectations held out to him the Court can exercise that very unusual jurisdiction of making a bargain which the parties themselves had not specifically made. This jurisdiction, however, being unusual, and at the same time of a powerful character, must be exercised with all due discretion; 123 Ind. Cas. 481=53 Bom. 792=31 Bom. L.R. 1310=A.I.R. 1930 Bom. 84.

—A Civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy, under S. 488, Cr. P. C. in a Criminal Court. 1930 Cr.C. 1153=A.I.R. 1930 Cal. 763.

—Where a Court of a particular place is vested with the powers of a Small Cause Court to try suits up to a particular amount, whoever occupies that Court is competent to try those suits. 121 Ind. Cas. 803=7 Rang. 809=A.I.R. 1930 Rang. 139.

## —Court disowning jurisdiction by assigning to suit character which plaintiff did not intend it to have.

It is not permissible for a Court to disown jurisdiction by assigning to the suit a character which was not intended by the plaintiffs to have and which cannot be assigned to it without resorting to a far-fetched theory not based on the allegations contained in the plaint and on a proper consideration of the entire frame of the suit. 116 Ind. Cas. 802=1929 A.L.J. 890=10 L.R.A. Rev. 363=51 All. 926=A.I.R. 1929 All. 669.

## —Power to add a person who has not attained probate.

In a case of an originating summons Court has jurisdiction, notwithstanding S. 213, Succession Act to add a person, who has not yet obtained probate or

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letters of administration, as representing the estate of the deceased, provided such person undertakes to take out probate or letters of administration prior to any formal decree being drawn up: In Re, Richardson, (1893) 3 Ch. 146, Foll. 120 Ind. Cas. 338=31 Bom. L.R. 511=A.I.R. 1929 Bom. 289.

—Person has remedy in Civil Court if act of Municipal Committee is arbitrary, oppressive and ultra vires. 115 Ind. Cas. 755=A.I.R. 1929 Lah. 774.

## —Mortgage suit—Objection as to paramount title not raised and decision reached.

When the parties to a mortgage suit allowed a matter of paramount title to go to trial without objection, a reversal of the judgment of the first Court on the ground that the issue was not properly triable in the action should not be allowed. There cannot be said to be a flaw in the matter of jurisdiction. At the most there is an undue or unnecessary extension of the frame of the litigation and the scope of the enquiry. 113 Ind. Cas. 884=A.I.R. 1928 Nag. 306.

—Suit premature at institution—Cause of action maturing during pendency of suit—Suit should not be dismissed. 89 Ind. Cas. 333=A.I.R. 1926 Lah. 145.

—No Court can confer jurisdiction on itself by wrongly deciding facts necessary to be proved to determine a question of jurisdiction. 98 Ind. Cas. 65=A.I.R. 1926 Mad. 1089=51 M.L.J. 394.

## —Jurisdiction—Want.

No jurisdiction can be conferred by practice however long continued it may be. 4 L.W. 402=37 Ind. Cas. 436.

## —Jurisdiction over foreign subject.

When the jurisdiction of a Court in British India is involved against a subject of a foreign State on the ground that by coming within the physical boundaries of the jurisdiction of that Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast upon the Court to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. 94 Ind. Cas. 512=50 Mad. 27=1926 M.W.N. 328=24 M.L.W. 94=A.I.R. 1926 Mad. 584=50 M.L.J. 348.

## —Valuation.

Valuation found by Sub-judge was challenged in High Court which increased the valuation and held that appeal lay to it on the increased valuation though on the valuation of the sub-Judge appeal lay to District Judge. 94 Ind. Cas. 343=1 Luck 202=13 O.L.J. 229=A.I.R. 1926 Oudh 428.

## —Successor can override predecessor's order regarding application under O. 9, R. 13.

Where, on the application under O. 9, R. 13 the Court passed the order that it should be considered after taking the evidence of the parties:

Held, that the successor of the Judge who passed the order is not precluded from going into the propriety of the application. 90 Ind. Cas. 512=42 C. L.J. 224=A.I.R. 1925 Cal. 1010.



—The Lower Court is incompetent to deal with directions and costs on commissioner's report while an appeal is pending from an order on objections to the commissioner's report. 72 Ind. Cas. 401=25 Bom. L.R. 237=A.I.R. 1923 Bom. 200.

—Parties should place before Court all available materials.

Where the jurisdiction of the Revenue authorities was challenged by a party as against the Government it was incumbent on the advisers of the Crown to place before the Court all the materials available with a view to establish that jurisdiction had been assumed in strict compliance with statutory requirements. 70 Ind. Cas. 510=36 C.L.J. 345=50 Cal. 276=A.I.R. 1923 Cal. 233.

—The plaint must be read before anything else is done, and, if it discloses no cause of action, the suit dies without reaching the point when jurisdiction can be discussed, or rather there can be no jurisdiction unless there be a cause of action. 75 Ind. Cas. 165=A.I.R. 1923 Lah. 290.

—Jurisdiction—Special court.

Ordinarily when jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy such jurisdiction is exclusive. 10 C. 991 followed.

The Land Acquisition Act creates a special jurisdiction and provides a special remedy. It would not be reasonable to hold that the Legislature having provided a special remedy in the Land Acquisition Act intended to make it optional with a party to apply for a reference under S. 18 or to institute a suit in the ordinary Civil Court.

A person having been served with a notice under S. 9 was bound to apply for reference under S. 18 when he was dissatisfied with the award. He cannot maintain a suit in the ordinary Civil Court. 65 Ind. Cas. 711=26 C.W.N. 506=A.I.R. 1922 Cal. 4.

—Appeal against question of, lies.

The practice in the Madras High Court is to allow an objection to be taken to an order on the ground of want of jurisdiction by way of appeal. 72 Ind. Cas. 482=1922 M.W.N. 483=A.I.R. 1922 Mad. 416.

—Contract—Breach—Canada—British Columbia—Rules of the Supreme Court of British Columbia—O. 11, R. 1 (c)—Leave to sue—Contract for sale of ships—Reasonable evidence of contract is sufficient—Defendant can prove absence of contract, at hearing. A.I.R. 1921 P.C. 193 (P.C.).

—Court is not bound to pass nugatory order.

**Obiter.**—Where facts have come into existence which would make an order for relief nugatory, a Court has always jurisdiction to refuse to make the order, so that if a registered proprietor has already been adjudged by a competent Court to have no title, he will not be given a decree for rent notwithstanding S. 60 of the Bengal Tenancy Act. 61 Ind. Cas. 386=6 P.L.J. 658=2 P.L.T. 337=1921 P.H.C.C. 201=A.I.R. 1921 Pat. 363.

—Jurisdiction — Irregularities in initial procedure—Effect.

Where, in a case which a Court is competent to try, the parties go to trial on the merits without objection one of the parties cannot subsequently dispute the jurisdiction of the Court on the ground of irregularities in the initial procedure which if objected to at the initial stages would have led to the dismissal of the suit. 9 A. 191 Foll. 40 Ind. Cas. 2 (Pat.)

—Jurisdiction—New enactment.

The Court competent to decide appeals filed before a new Act was introduced but pending in the Court, is the Court which would dispose of them, had they been filed after the new Act. 43 P.W.R. 1916=88 P.R. 1916=132 P.L.R. 1916=35 Ind. Cas. 67.

—Jurisdiction—Court having no jurisdiction—If can go into merits.

Where a Court finds it has no jurisdiction, it should not go into and dispose of the case on the merits. 45 P.W.R. 1912=73 P.L.R. 1912=13 Ind. Cas. 401.

—Competency of court to call upon plaintiff to prove bona fides of claim if there is reason to believe that allegation in plaint is falsely made to avoid jurisdiction of Small Cause Court.

Where the court of first instance thinks that there is reason to believe that an allegation in the plaint is falsely made to avoid jurisdiction of the Small Cause Court, it can require the plaintiff to satisfy the court that the allegation is bona fide and not merely colourable for changing the venue. (1899) 24 M. 158.

### 39 (b). Practice—Jurisdiction—Civil and Criminal Court.

—Jurisdiction—Matter agitated and decided in civil Court—Same matter cannot be agitated in criminal Court again.

A criminal Court should not, except for very exceptional and cogent reasons, go behind the finding of a civil Court which has been arrived at on merits.

Where the civil Court grants a decree on the basis of a bond which is alleged to have been executed under duress, and the plea of wrongful confinement, extortion and duress raised by the complainant in the civil suit is decided against him, the complainant shall not be permitted to agitate the same plea in a criminal Court; 33 P.R. 1910 (Cr.). Foll. 120 Ind. Cas. 186=31 P.L.R. 60=1930 Cr.C. 30=31 Cr.L.J. 48=A.I.R. 1930 Lah. 62.

—Criminal Court cannot usurp the function of Civil Courts in ordering the return of goods got lawfully by a third party. 4 L.B.R. 25 followed. 65 Ind. Cas. 1000=23 Cr.L.J. 216=11 L.B.R. 217=A.I.R. 1922 L.B. 17.

### 39 (c). Practice—Jurisdiction—Civil and Revenue Court.

—Jurisdiction—Civil and Revenue Court.

Where from the plaint as framed it is possible to deduce that the one and only object of the plaintiff is really to obtain a declaration of his right to a tenancy the suit is triable by a revenue Court only, whether or no one of the reliefs asked for is such a relief as could, if that alone had been asked for, be entertained



by a Civil Court, because it is the essential object of the plaintiff which has to be considered and if he can obtain that object by a suit in the revenue Court, the revenue Court is the proper Court. 118 Ind. Cas. 583=1929 A.L.J. 1026=10 L.R.A. Rev. 356=A.I.R. 1929 All. 613.

—A suit for profits was instituted in Revenue Court wherein the Court held that the plaintiff's name had been rightly recorded in respect of the shares for the profits of which the suit was brought. The question of title was referred to the Civil Court which however did not completely decide the same and during the pendency of the suit the Revenue Court made alterations in the Revenue papers, to plaintiff's detriment:

**Held**, that the plaintiff was entitled to obtain profits in respect of the share which stood recorded in her name at the date of the institution of the suit and during the years for which profits were claimed. 29 Ind. Cas. 509, Dist. 18 A.L.J. 1008, Foll. 63 Ind. Cas. 976=43 All. 697=19 A.L.J. 732=A.I.R. 1921 All. 124.

—**Jurisdiction—Civil or Revenue Courts—Case partly triable by each.**

In a case cognizable partly by Civil Court and partly by a Revenue Court, the Civil Court should dispose it off to the extent cognizable by it leaving the rest to the plaintiff to lodge a fresh suit in the Revenue Court if so advised. 247 P.L.R. 1912=261 P.W.R. 1912=16 Ind. Cas. 752.

—**Jurisdiction—Civil or Revenue Courts—Difference of opinion Matter to be referred to Chief Court.**

Where a difference of opinion arises as to whether a suit is cognizable by the Revenue Court or a Civil Court, the matter should be referred to the Chief Court. 49 P.W.R. 1912=101 P.L.R. 1912=13 Ind. Cas. 447.

—Civil Court holding suit non-entertainable by it but entertainable by revenue Court cannot dismiss suit but must return plaint for presentation to proper Court. 116 Ind. Cas. 802=1929 A.L.J. 840=10 L.R.A. Rev. 363=51 All. 926=A.I.R. 1929 All. 669.

### 39 (d). Practice—Jurisdiction—Objection to.

—**Jurisdiction—Objection to jurisdiction in second appeal.**

Where defect as to jurisdiction is manifest an objection to jurisdiction must be allowed even in second appeal and even though the objection is not taken in grounds of appeal: A.I.R. 1924 P.C. 95, Foll. 123 Ind. Cas. 681=A.I.R. 1930 All. 519.

—Small Cause suit tried as ordinary suit without objection in trial or first Appellate Court—Objection as to jurisdiction cannot be entertained in second appeal. 21 Cal. 249, Appr. 98 Ind. Cas. 1071=A.I.R. 1927 Nag. 120.

—**Objection whether can be raised in revision.**

The objection as to jurisdiction is not one merely of the place of suing but as to the nature of the Court itself and it may affect the right of appeal. Conse-

quently the objection as to jurisdiction can be entertained in revision because on that question there can be no estoppel by conduct of parties. 1930 A.L.J. 997=52 A. 947=A.I.R. 1930 A. 873.

—Objection to, can be raised at any stage if facts proved disclose the defect. A.I.R. 1924 P.C. 95, Foll. 101 Ind. Cas. 524=49 All. 686=25 A.L.J. 421=A.I.R. 1928 All. 38.

—**Plea of—When to be raised.**

The question of jurisdiction should be raised in the Court of first instance and it should be given effect to by the Appellate Court only when prejudice is caused by the trial in the first Court. 79 Ind. Cas. 857=A.I.R. 1925 Mad. 171.

—The question as to whether Civil Court has jurisdiction to try a suit, though abandoned in the trial Court can be raised in appeal. 11 Mad. 26 P.C. Foll. 77 Ind. Cas. 795=50 Cal. 948=A.I.R. 1924 Cal. 233.

—**Jurisdiction—Objection to rescissions.**

An objection to jurisdiction must be decided by the Court. 26 Cal. 713=9 C.L.J. 563=13 C.W.N. 654=1 Ind. Cas. 356.

### 39 (e). Practice—Jurisdiction—Waiver.

—**Jurisdiction—Submission by parties—If can be questioned Waiver—What is.**

Where the parties to a suit which a Court is competent to try, join issue and go to trial, they cannot afterwards dispute the jurisdiction and they must be presumed to have waived their objection by their submission to it. 36 Cal. 193=5 C.L.J. 611=1 Ind. Cas. 913.

### 40. Practice—Justice, equity and good conscience.

—**Justice, equity and good conscience—Common Law of England.**

When a case has to be decided according to justice, equity and good conscience what should be followed is the Common Law of England: 48 Cal. 338, Foll. 96 Ind. Cas. 913=27 P.L.R. 375=A.I.R. 1926 Lah. 479.

—**English Law should be applied.**

The decision of a case according to the principles of justice, equity and good conscience has generally meant decision according to the principles of English Law applicable to a similar state of circumstances. Where rights of parties are determined according to the general principles of equity and justice this must be done without any distinction, as in England, between that partial justice which is administered in the Courts of Law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity. 74 Ind. Cas. 975=37 C.L.J. 145=27 C.W.N. 587=A.I.R. 1923 Cal. 538.

—In all cases for which no specific statutory directions are given in India, Judges are bound to act according to justice, equity and good conscience and the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding rules of the Common Law of



England (10 Mad. 28) followed. 66 Ind. Cas. 861=1 Pat. 371=1922 Pat. H.C.C. 85=3 P.L.T. 276=A.I.R. 1922 Pat. 104.

**—Justice, equity and good conscience—Duty of Court where no procedure is prescribed by Code.**

Where no specific rule exists, the Court can act according to justice, equity and good conscience. 36 Cal. 193=5 C.L.J. 611=1 Ind. Cas. 913.

**—Justice, equity and good conscience—Mistake of Court—Rule that party should not suffer—Limits.**

Held, that the rule that a party should not be prejudiced as a consequence of an order of Court is inapplicable to a case wherein the party seeking relief has no equity in his favour. A.I.R. 1930 Mad. 921=1930 M.W.N. 524=59 M.L.J. 893=55 Mad. 943=32 M.L.W. 357=128 Ind. Cas. 509.

**—Equitable set off—Right to claim apart from C. P. Code.**

An equitable set off can be claimed independently of the specific provisions of the C. P. Code. 27 All. 145, Foll. 128 Ind. Cas. 763=A.I.R. 1930 All. 875.

**—Hardship.**

It is always desirable to follow a definite rule rather than to be guided by considerations of hardship in individual case: (1923) A. C. 1, Foll. 49 C.L.J. 505=33 C.W.N. 715=A.I.R. 1929 Cal. 568.

—Court cannot grant relief on equitable principle about a cause of action which is created by and especially provided for in a statute if the matter does not fall within its provisions. 96 Ind. Cas. 378=30 C.W.N. 735=A.I.R. 1926 Cal. 957.

**—Misguidance by Judicial Officer vitiates proceedings.**

It would be absolutely shocking, if the Court were to enforce against a mortgagor or any one interested in the equity of redemption a foreclosure decree when he had been misled by its duly accredited agent owing to the issue of a notice for a decree for sale. 82 Ind. Cas. 184=22 A. L. J. 791=5 L.R.A.Civ. 515=46 All. 864=A.I.R. 1924 All. 818.

**—Evading law indirectly.**

A person should not be allowed to do that indirectly which is forbidden to be done directly. (18 W. R. 359, Foll.) 79 Ind. Cas. 950=11 O.L.J. 423=27 O.C. 137=A.I.R. 1924 Oudh 420.

—Where the plaintiff is guilty of instituting a suit which is partly false, the whole suit should be dismissed. 4 L. L. J. 416=A.I.R. 1921 Lah. 336.

**—Equitable considerations.**

Equitable considerations have no room in matters of procedure. (1903) 8 C.W.N. 408=31 Cal. 433.

**41. Practice—Law governing.**

—Codified law cannot be modified by rules of practice.

When law has been codified, it cannot be modified gradually from day to day as the changing circumstances of a community, require, by rules of practice made to meet these imperceptibly changing conditions. Any modification, however small, must be made by the legislature, when a suitable opportunity arrives. 115 Ind. Cas. 258=32 C.W.N. 945=56 Cal. 150=30 C.L.J. 435=12 A. I. Cr. R. 265=A.I.R. 1929 Cal. 57.

**—Law must be applied as it stands.**

If there is a law, then that law must be applied whatever the result may be, and whatever the past practice may be, and however inconvenient it may be to litigants and everybody else connected with the administration of that particular branch of the law. 103 Ind. Cas. 791=52 Bom. 459=30 Bom. L. R. 402=A.I.R. 1928 Bom. 123.

**—Processual law changed but not retrospectively after order but before appeal—Effect.**

Lower Court made an order for execution of a decree, and the other was strictly in conformity with the processual law existing at the time of the order. After the order but before an appeal against it was preferred, the processual law was amended; but the amendment was not retrospective.

Held: that the Appellate Court should not interfere with the lower Court's order. Execution legally started cannot by change in the processual law become illegal. 114 Ind. Cas. 823=A.I.R. 1928 Mad. 1194.

**—Procedure is governed by local laws of the country in which action is brought.**

All matters of procedure are governed wholly by the local or territorial law of the country to which a Court, wherein an action is brought or other legal proceeding is taken balance and the term "procedure" includes *inter alia* remedies and process, evidence, limitation of an action or other proceeding and set-off or counter claim: 40 Bom. 504, Foll. 95 Ind. Cas. 366=22 N.L.R. 92=A.I.R. 1926 Nag. 406.

**—Parties not governed by same personal law.**

It is a well-settled rule that the law to be observed in the trial of suits shall, in the absence of any enactment or usage having the force of law, be the law of the defendant, and in the absence of any specific law and usage, justice, equity and good conscience. 89 Ind. Cas. 690=47 All. 823=23 A. L. J. 768=A.I.R. 1925 All. 720.

**—Law, ascertainment of.**

That private judgments and analogical deduction are in appropriate circumstances and to a greater or lesser extent legitimate methods of ascertaining the law, is recognised in the Text Books. 71 Ind. Cas. 65=45 Mad. 986=16 M.L.W. 626=1922 M.W.N. 662=24 C.L.J. 17=A.I.R. 1923 Mad. 171=43 M.L.J. 663.

**—Retrospective operation—Days of grace.**

A new law ought not to be applied so as to kill causes of action which were alive on the date of its enactment. One underlying principle of the cases which lean against retrospective operation, is that, if the new Act gives no days of grace for its coming into operation, but makes it law as soon as it is passed,



Courts should hold that the Legislature did not intend to interfere with vested rights. But where litigants had previous notice and could have enforced their rights before the Act became law, they cannot claim relief. The law of limitation is a law of procedure and laws of procedure have retrospective effect. 70 Ind. Cas. 743=16 M.L.W. 178=1922 M.W.N. 514=31 M. L. T. 135=A.I.R. 1922 Mad. 417=43 M. L. J. 184.

#### —Law, governing.

**Per Tennon, J.**—The practice of a Court must give way to the law and to the rights conferred by law.

**Per Chaudhuri, J.**—The practice of the Court forms the law of the Court and the Court should be reluctant to depart from the established practice unless it has not the sanction of law and is grossly erroneous. 25 C. L. J. 401=21 C.W.N. 654=18 Cr. L. J. 793=41 Ind. Cas. 313.

#### —Alteration of law after filing of suit—Old law to govern rights of parties.

Where the law is altered when a suit is pending, the law which existed when the suit was commenced must decide the rights of the parties. 3 B. H. C 45 foll. (1908) 10 Bom. L. R. 625.

### 42. Practice—Legal Practitioner.

- See also: (1) Legal Practitioner.  
(2) Legal Practitioners' Act.  
(3) Practice—Pleaders Fees.

#### —Punjab High Court—Criminal case—Right of counsel to take copies from records—Need for amendment of rules.

According to the rules which are in force in the Punjab High Court a counsel appearing for petitioner, or on appellant in a criminal case, even while his client is in jail, is not allowed to make copies even for the limited purpose of arguing his appeal, unless he applies for certified copies. Also, copying of the document *in extenso* during the inspection of record is not allowed, but only taking of short notes of the documents is permitted. Need for amendment of rules on the lines of the Allahabad High Court rules indicated in view of the prohibitive cost of obtaining copies. 1930 Cr. C. 1185=32 P.L.R. 104=129 Ind. Cas. 197=A.I.R. 1930 Lah. 1024.

#### —Legal practitioner—Duty of.

In Subordinate Courts the easy method of tripping a principle of law without much understanding should not be adopted by counsel while the more difficult method of collecting and carefully producing all the available evidence on facts should not be abandoned. It is enough in the Subordinate Courts to ruin any case on facts only if some principle of law is dangled before the eyes of learned counsel. After all, every principle of law has to be applied to facts and there is no easy method of avoiding facts and deciding cases on easily available rulings. 87 Ind. Cas. 208=A.I.R. 1925 Oudh 658.

#### —He should not inform Court privately of his client's hopelessness of defence.

**Per Mookerji, J.**—It is not the duty of the pleader to approach the trial Judge and to apprise him that in his opinion the man, whose fate has been entrusted to his care, has no defence to make.

His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.

A man's rights are to be determined by the Court, not by his attorney or Counsel. A client is entitled to say to his Counsel, 'I want your advocacy, not your judgment. I prefer that of the Court.' 81 Ind. Cas. 353=28 C.W.N. 170=38 C.L.J. 411=25 Cr.L.J. 817=A.I.R. 1924 Cal. 257 (F.B.).

#### —Counsel cannot make the Court wait for him.

The Court cannot be expected to await the convenience of Counsel, and it is time that Counsel should understand that it is incumbent on them to see that their clients are properly represented when the case is called on for hearing. 68 Ind. Cas. 785=A.I.R. 1923 Lah. 97.

#### —Authority to bind client by compromise.

Barristers practising in Indian Courts do so, not because they are members of the bar, but because they are entitled under rules for the admission of advocates of the Court, and are subject to the same liabilities as other advocates of the Court. A Barrister practising in Burma cannot bind his client by a compromise made, or consent given without the client's express authority. 64 Ind. Cas. 528=13 Bur.L.T. 224.

—Facts stated by counsel cannot be ordinarily challenged by the party at later stages. 80 Ind. Cas. 601=22 A.L.J. 647=5 L.R.A.Civ. 404=A.I.R. 1924 All. 518.

—No fresh Vakalatnama is required in claim proceedings. 73 Ind. Cas. 455=25 Bom.L.R. 462=A.I.R. 1923 Bom. 412.

#### —Vakalatnama containing name of pleader can be accepted by him after it is filed in Court.

A Vakalatnama once filed in Court may be subsequently accepted by a vakil or pleader whose name appears in the Vakalatnama. The Court has only to see whether the name of the pleader proposed to be appointed, appears in the Vakalatnama or not and if his name does appear, then the pleader is entitled to sign the Vakalatnama and appear and act in the case. 68 Ind. Cas. 659=3 P.L.T. 447=A.I.R. 1922 Pat 504.

#### —Pleader—Delegation of authority—Pleader employing another to act jointly with him or for him.

Pleader employing another pleader to act for or jointly with him must conform to O. III, R. 4, C.P.C. in case there is no exemption under Cl 3, of the rule. 36 A. 46 Foll. 12 N.L.R. 189=37 Ind. Cas. 103.

#### —Pleader—Appearing for opposite side.

A legal practitioner engaged from the beginning to appear for one party should not appear for the opposite side unless under extraordinary circumstances. 19 O.C. 237=37 Ind. Cas. 142.

#### —Pleader—Right to be heard—Amicus curiae.

It is the general practice to hear Pleaders on behalf of persons in Civil and Criminal matters and secure



their assistance as *amici curiae* though parties have no right to be heard either by pleader or personally. 8 A.L.J. 237=12 Cr.L.J. 231=10 Ind. Cas. 740.

#### —Pleader—Indiscriminate attacks on the police.

The practice of making indiscriminate attacks upon police servants in criminal cases when they are unable to defend themselves and when such attacks are not justified by the record, should be deprecated. 11 Cr.L.J. 66=15 P.R. 1909 Cr.=37 P.W.R. 1909 Cr.=4 Ind. Cas. 264.

—Objection that appeal to lower court was not presented within time—Reason that vakalat was not signed by the party.

Where in second appeal an objection was taken by the appellant that the respondent's appeal to the lower appellate court was not presented within time for the reason that the vakalat did not bear his mark, their Lordships overruled the objection on the ground that as a matter of fact the party had appointed the pleader to file the appeal. 1903 A.W.N. 177=26 A. 14.

#### 43. Practice—Legal Representative.

See: C.P.C., Ss. 2 (11), 50, 52 and 53; O. 22, Rr. 3, 4 and 5.

—Legal Representative—Plea of co-defendant's death prior to decree, can be raised by his legal representatives.

It is not necessary that, in order to enable the legal representative of a deceased defendant to take the objection that the decree is a nullity on the ground that the defendant was dead at the time when the decree was made, the deceased defendant should have been the sole defendant in the suit. 32 All. 301, Foll. 75 Ind. Cas. 321=1923 P. H. C. C. 374=A.I.R. 1924 Pat. 339.

#### —Legal representatives—Addition of.

Where the representatives of a deceased party were substituted in the chief Court on appeal from interlocutory order, no fresh substitution need be made again in the lower Court in the suit. 45 Cal. 94=44 I. A. 218=33 M.L.J. 486=22 M.L.T. 362=6 L.W. 592=126 P.W.R. 1917=15 A.L.J. 777=19 Bom.L.R. 856=3 Pat. L.W. 313=26 C.L.J. 572=104 P.R. 1917=(1917) M.W.N. 811=22 C.W.N. 169=127 P.L.R. 1917=42 Ind. Cas. 43 (P.C.).

#### 44. Practice—Limitation.

See: Limitation Act, S. 3.

#### —Limitation—Time barred demand as defence.

The law of limitation, as distinguished from the law of prescription, merely bars the remedy of the plaintiff but does not extinguish his right. A barred debt can constitute a valid consideration for a fresh contract. Limitation affects only the claim of the plaintiff and has no application to a plea urged by the defendant. The defendant may therefore interpose a demand though barred as a defence to the suit. 96 Ind. Cas. 844=A.I.R. 1926 Lah. 633.

#### —Limitation—Time fixed by Court—Expiry of—Mode of calculation.

Where time is given by a Court to a party to a suit for the performance of an act till a certain date, it includes that date. 39 Mad. 583=2 L.W. 729=18 M.L.T. 199=30 Ind. Cas. 544.

#### —Limitation—Proof of.

The plaintiff must prove from his own allegations that his suit is not barred by limitation. He cannot rely on defendant's allegations. 6 P.R. 1912=218 P.L.R. 1911=204 P.W.R. 1911=12 Ind. Cas. 453.

#### 45. Practice—New Plea. Synopsis.

- (a) Appeal
- (b) Late stage
- (c) Letters Patent Appeal
- (d) Privy Council
- (e) Revision
- (f) Second Appeal
- (g) Supreme Court
- (h) Power of Court to set up
- (i) Abandoned plea
- (j) Adverse possession
- (k) Estoppel
- (l) Further evidence
- (m) Inconsistent pleas. See Note 32 (b)
- (n) Jurisdiction
- (o) Limitation
- (p) Maintainability of suit
- (q) Minority
- (r) Question of fact
- (s) Question of law
- (t) Remand
- (u) Miscellaneous.

#### 45 (a). Practice—New Plea—Appeal.

See: (1) Appeal—New Plea.  
(2) C.P.C., O. 41, R. 2.

- (i) When allowed.
- (ii) When not allowed.

#### 45 (a) (i). Practice—New plea—Appeal—When allowed.

#### —New plea—No injury to opponent.

Plea not taken in trial Court can be raised in appeal to show fundamental flaw in opponent's case if latter does not suffer thereby. 117 Ind. Cas. 385=6 O.W.N. 1251=3 Luck. 521=A.I.R. 1929 Oudh 97.

#### —Plea of registration can be raised for the first time in appeal.

An objection that a document which requires registration, but is not registered, is not admissible in evidence under S. 49, may be taken in the Court of appeal though no objection was taken to its admissibility in the Court of first instance: 2 Bom. 489, Foll. 101 Ind. Cas. 155=51 Bom. 231=29 Bom. L.R. 269=A.I.R. 1927 Bom. 157.



—A fresh plea if raised at the earliest possible opportunity should be allowed.

At the date at which an appeal was filed a Privy Council decision which has made a change in the law favourable to the appellant had been given. But there was no authentic report available at the time. The appellant instead of including the point in his grounds of appeal raised it subsequently.

**Held:** that in the circumstances of the case, the plea was raised at the earliest possible opportunity and ought to be allowed. 88 Ind. Cas. 127=12 O.L.J. 306=A.I.R. 1925 Oudh 435.

To say that certain party had no saleable interest in land was held to amount to plea of relinquishment by that party and the appellate Court was held justified in deciding on relinquishment. 78 Ind. Cas. 503=A.I.R. 1925 Cal. 524.

—A matter which is patent on the record can and ought to be taken into consideration even at the appellate stage for the first time. 22 P.R. 1898; 31 P.R. 1918 and 44 Cal. 47 Foll. 59 Ind. Cas. 877=3 L.L.J. 239=A.I.R. 1921 Lah. 39.

—**New plea—Appeal—Case not set up in pleadings but put forward in cross-examination—If can be raised in appeal.**

A case definitely put forward by a party in cross-examination of the opposite party's witnesses and not objected to by the opposite party can be put forward as a ground of appeal, though not specifically raised in the pleadings. 46 Ind. Cas. 184. (Cal.).

—**New plea—Appellate Court—Pleadings—Point arising out of—No issue.**

An appellate Court is competent to base its decision on a point arising from the pleadings if there is evidence in the record regarding it, although it was not expressly taken before the Court nor covered by any issues raised. 5 O.L.J. 165=46 Ind. Cas. 12.

—**New plea—Appeal—Objection going to the root of the case.**

It is a grave irregularity of an appellate Court to disregard a point utterly which goes to the very root of the case. 8 P.L.R. 1912=254 P.W.R. 1911=12 Ind. Cas. 623.

—**New plea—Appellate Court—New point, touching the very root of the case can be allowed.**

A contention touching the very root of a case and appearing on the face of the pleadings can be allowed to be raised in appeal for the first time. 5 Ind. Cas. 397 (Cal.).

—**Revenue sale—Irregularity in publication—Objection—Time.**

The plea of non service or of any informality in publication may be taken at any stage of the suit or even for the first time in appeal. (1902) 30 C 1=6 C.W.N. 688. But See 26 M. 363.

45 (a) (ii). Practice—New plea—Appeal—When not allowed.

—New plea—Plea of want of legal necessity or benefit to alienation by manager of joint Hindu family—

Consequent unenforceability—If can be raised for first time in appeal—Failure to plead and raise issue in trial Court—Effect. See **Hindu law—Alienation—Manager.** A.I.R. 1950 Pat. 535.

—**New plea—Appeal.**

Plea raised in written statement and in appeal—No issue before trial Judge nor point taken at the trial—Plea cannot be allowed on appeal. 121 Ind. Cas. 205=51 C.L.J. 136=31 M.L.W. 176=32 Bom. L.R. 499=1930 M.W.N. 60=A.I.R. 1930 P.C. 18=58 M.L.J. 245 (P.C.).

—**Plea as to non-joinder of parties.**

Where the plea of non-joinder of parties is neither raised in the trial Court nor in the grounds of appeal, the Appellate Court should not go into it at all. If it raises it and dismisses the suit on that grounds its action is contrary to the provisions of O. 1, R. 9. 129 Ind. Cas. 508=A.I.R. 1930 Rang. 295.

—**New plea—Appeal.**

The plea of fraud or undue influence, not raised in the first Court, cannot be allowed to be raised for the first time in appeal. 129 Ind. Cas. 281=A.I.R. 1930 Lah. 985.

—**New plea—Appellate Court—Fresh pleas—Plea of fraud.**

An appellate Court ought not to allow a plea of fraud to be raised for the first time at the hearing of an appeal without giving an opportunity to the opposite party of rebutting the plea. 52 Ind. Cas. 501 (Cal.).

—**Plaint based upon contract for "sale"—"Agency" cannot be set up in appeal.** 1930 M.W.N. 295=31 M.L.W. 840=A.I.R. 1930 Mad. 606=58 M.L.J. 653.

—To decide a new issue in appeal of which there is nothing in pleadings or issues upon evidence let in for some other purpose collaterally, is not, a satisfactory mode of disposing of such a case; A.I.R. 1914 P.C. 41 Foll. 120 Ind. Cas. 573 (Mad.).

—**New plea—Altering nature.**

—Where a suit for a specified amount of rent for a number of years was fought out in the Courts below on the footing whether the tenants had been dispossessed from any portion of the land leased,

**Held:** that the plaintiffs could not raise a new plea in appeal claiming proportionate rent. 34 C.W.N. 807.

—It would be unfair if the High Court allows a new ground of attack not raised in the Court below. 114 Ind. Cas. 881=1929 A.L.J. 204=A.I.R. 1929 All. 148.

—Where at the time the suit was instituted, the new plea was not open to the plaintiff, and when the relief based on this plea, if granted, would alter the nature of the suit completely, such a relief should not be allowed in appeal. 110 Ind. Cas. 500=A.I.R. 1928 Oudh 424.

—If a certain plea is not specifically pleaded and taken in the lower Court, it cannot be allowed to be raised for the first time in appeal in the High Court. 110 Ind. Cas. 868 (Nag.).



—Appellant is not entitled to set up a different case in appeal as a defence to the plea of limitation from that set up in written statement 109 Ind. Cas. 245 = A.I.R. 1928 Mad. 962.

—Hindu Law—Maintenance—Widow—Expenses of **vritham**—Question as to allotment was not allowed to be challenged in appeal for the first time. 108 Ind. Cas. 712 = 28 M.L.W. 328 = A.I.R. 1928 Mad. 216 = 54 M. L. J. 530.

—Plea of resale having taken place after reasonable time cannot be entertained for the first time in appeal. 106 Ind. Cas. 10 = 8 Lah. 501 = 28 P.L.R. 542 = A.I.R. 1927 Lah. 693.

#### —New plea of negligence.

A new plea of negligence apart from fraud and collusion, which were given up at the time of framing the issues, ought not to be allowed to be raised in appeal, as the plea of negligence is one of fact: A.I.R. 1923 Mad. 718, Foll. 104 Ind. Cas. 405 = 1927 M.W.N. 523 = A.I.R. 1927 Mad. 668 = 52 M. L. J. 709.

—Where a case was fought out on the footing that the properties belonged to all the ostensible mortgagors and all the mortgagors were bound by the mortgage, the position, that if all the mortgagors are not found to be bound by the mortgage it should be decided that some of the properties included in the mortgage do not belong to all of the mortgagors, cannot be allowed to be raised for the first time in appeal. 104 Ind. Cas. 833 = 54 Cal. 687 = A.I.R. 1927 Cal. 836.

#### —New plea—Validity of document.

Where the plea that the re-sale by the plaintiff was invalid by reason of its not having taken place within a reasonable time after the date of breach was not raised in the trial Court and was taken in the memorandum of appeal:

**Held**, the plea could not be raised for the first time in the appeal. 102 Ind. Cas. 698 = 28 P.L.R. 263 = 9 L. L. J. 125 = A.I.R. 1927 Lah. 795.

#### —New plea—Appeal.

Suit on basis of lease deed—Execution of deed admitted—Plea as to material alteration raised in appeal—Not sustainable. 31 P.L.R. 273.

#### —New plea—Attestation.

An objection about due attestation of a mortgage should not be allowed to be taken for the first time in the Appellate Court: A.I.R. 1924 Mad. 513, Foll. 101 Ind. Cas. 498 = A.I.R. 1927 Mad. 662 = 53 M. L. J. 216.

—The objection that a mortgage bond is not duly attested cannot be allowed to be taken for the first time in the Appellate Court, as it raises a mixed question of law and fact. 51 Ind. Cas. 378, Foll. 76 Ind. Cas. 1003 = 18 M.L.W. 620 = 33 M.L.T. 73 = 1923 M.W.N. 789 = A.I.R. 1924 Mad. 513 = 46 M. L. J. 56.

#### —New plea—Appeal—Plea of improper attestation.

A plea of improper attestation of a document cannot be allowed to be taken for the first time in appeal. 19 Ind. Cas. 430 All.

—A plea of disclaimer not taken by the defendant in his pleadings and as to which no issue has been struck cannot be entertained in appeal. 98 Ind. Cas. 1059 = 8 L. L. J. 482 = 27 P.L.R. 727.

—Validity of mortgage on the ground of want of permission from Court by Administrator cannot be allowed to be objected in appeal for the first time. 97 Ind. Cas. 570 = 24 M.L.W. 842 = A.I.R. 1927 Mad. 185.

—Appellate Courts ought not to entertain points which should have been alleged in the pleadings and made the subject of an issue and of arguments and of decision by the trial Court and also stated in the grounds of appeal clearly and directly. 97 Ind. Cas. 292 = 49 All. 55 = 24 A. L. J. 920 = A.I.R. 1927 All. 231.

—New cases cannot, except in exceptional circumstances, be made out in appeal. 85 Ind. Cas. 1006 = A.I.R. 1925 Oudh 619.

—When once a case is made out in written statement and also in the evidence before the Court of first instance the defendant cannot be allowed to make a new case, altogether different from it, in appeal. 79 Ind. Cas. 354 = A.I.R. 1925 Cal. 541.

—A new plea should not be allowed to be raised for the first time in appeal. 79 Ind. Cas. 902 = 1924 M.W.N. 485 = A.I.R. 1924 Mad. 845.

—The Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he never had notice during the hearing of the suit. 33 Bom. 35, Foll. 78 Ind. Cas. 194 = A.I.R. 1924 Nag. 204.

—When a point is not taken in the lower Court, that is a conclusive bar on an appeal in High Court. As soon as it is established that the point ought to have been taken in the Court of first instance the Court should refuse to allow it. 75 Ind. Cas. 612 = A.I.R. 1923 All. 430.

—A plea neither raised in the Court below, nor in the grounds of appeal cannot be allowed to be set up in appeal. 70 Ind. Cas. 1002 = 4 L. L. J. 516.

—A plea not taken in trial Court and about which no issue was framed cannot be entertained for first time in appeal. 69 Ind. Cas. 918 = 15 M.L.W. 99 = 31 M.L.T. 71 = 1922 M.W.N. 67 = A.I.R. 1921 Mad. 697 = 42 M. L. J. 113.

—A new plea which is not raised in the trial court cannot be considered by the District Court. Where the members of a Hindu family put forward a claim to certain property on the ground that it belonged to them by partition and therefore not liable to attachment in execution and that plea was found against, they cannot on appeal put forward the plea that the decree was obtained against the manager in his individual capacity and therefore not executable against the family properties. 68 Ind. Cas. 227 = 3 L. L. J. 392.

—New plea cannot be raised for first time in appeal when there are no sufficient materials before the appellate Court. 63 Ind. Cas. 682 = 19 A.L.J. 672 = 43 All. 652 = A.I.R. 1921 All. 402.



**—Appeal—New case not to be made.**

The High Court will not entertain a contention at the hearing of an appeal which is not contained in the memo. of appeal and which was not brought to the notice of the lower Court. 60 Ind. Cas. 263=14 S.L.R. 224.

—An objection in an appeal to a suit for partition of a house on the ground that another house was not brought into hotchpot is not sustainable. 59 Ind. Cas. 176 (Pat.).

**—New plea—Formal defect.**

Objection to a defect in signature on a petition cannot be raised in appeal for the first time. 1 Pat.L.T. 647=59 Ind. Cas. 282.

**—New plea—Appeal.**

A pleading not raised in lower Court and setting up a new case cannot be advanced in an appellate Court. 11 L.W. 523=56 Ind. Cas. 552.

**—New plea—Change of case—Not to be allowed to be made without giving opponent opportunity to meet it.**

In a suit for pre-emption defendant resisted plaintiff's claim on the strength of deed of gift which not being questioned in the trial, plaintiff's suit was dismissed. On appeal, plaintiff challenged the validity of the gift deed on the ground of want of proper attestation and that attestation had not been proved. Held, that the plaintiff having by implication admitted the validity of gift at the trial ought not to challenge it in appeal. At any rate the appellate Court ought not to have entertained the objection without affording defendant opportunity of proving the due attestation. 56 Ind. Cas. 179. (All.).

**—New plea—Appeal—Change of case.**

A party who in the trial Court fails to establish the case which he set up, is not entitled to advance a new case in appeal for he is entitled to a remand to enable him to establish his claim on the new case set up. 54 Ind. Cas. 645 (Cal.).

**—New plea—Appellate Court—New point.**

An appellate Court ought not to permit a new point to be urged before it which is not founded on facts, and in respect of which no definite issue was raised in the lower Court. 52 Ind. Cas. 1 (Cal.).

**—New plea—Appellate Court.**

A new case cannot be allowed to be set up on appeal. 4 O.L.J. 731=44 Ind. Cas. 624.

**—New plea—Appellate Court—New case not to be set up.**

—An appellate Court is not entitled to accept and act upon a case made for the first time before it and not made in the trial Court. 22 C.W.N. 856=43 Ind. Cas. 59.

**—New plea—Appellate Court.**

A plaintiff cannot be allowed to make a case that turns on the evidence which differs from the case set up in the plaint. A Court of appeal should not reverse the decision of the first Court on a point not set up in

the plaint before the primary Court or in the grounds of appellate Court. 43 Ind. Cas. 29 (Cal.).

**—New plea—Appeal—Disposal on ground not urged.**

A judge of the lower Appellate Court cannot dispose of an appeal on a ground which was not urged by the defence and in respect of which plaintiff had not opportunity of giving evidence. 35 Ind. Cas. 638 All.

**—New plea—Appeal—New contention.**

Where parties in a suit go to proof only on the question whether the land involved is ancestral and whether a right of alienation exists, the plaintiff cannot for the first time in appeal be allowed to raise a new contention. 69 P.R. 1916=120 P.W.R. 1916=131 P.L.R. 1916=35 Ind. Cas. 335.

**—New plea—Appellate Court.**

In a mortgage suit where necessity is disproved, the creditor cannot be allowed to ask in appeal for a simple money decree inasmuch as the defendant had not been allowed to prove immorality. 3 O.L.J. 214=34 Ind. Cas. 757.

**—New plea—Appellate Court—New case not to be allowed.**

When the plaintiff makes a definite case of possession by himself in the plaint he cannot be allowed to make in appeal an entirely new case of possession through co-sharers in order to save the bar of limitation. 34 Ind. Cas. 466 (Pat.).

**—New plea—Change of case—No allegation of title by prescription.**

A relief which is not based on the pleadings as they stand but on certain allegations which ought to have been made, but are not definitely set up cannot be granted where the suit as brought will be turned into another and a different sort of suit. The fact that the plaint contains a vague prayer to the effect that the Court may grant any other relief which it may deem proper, does not affect the question. 2 O.L.J. 584=32 Ind. Cas. 365.

**—New plea—Change of case—Suit on mortgage executed by father—Personal decree against son, if proper.**

Where a suit for sale of the mortgaged property against the son of the executant was dismissed, Held, that simple money decree could be given inasmuch as it would entirely change the cause of action. 31 Ind. Cas. 706 (All.).

**—New plea—Appeal.**

A point neither raised in the Court below nor mentioned in the memo of appeal could not be allowed in appeal. 185 P.W.R. 1915=31 Ind. Cas. 632.

**—New plea—Appeal—Setting up different story from that alleged in grounds of appeal.**

An appellant cannot bring forward, while arguing the appeal, a matter not alleged in the grounds of appeal. 2 O.L.J. 371=30 Ind. Cas. 374.



**—New plea—Appeal—New issue, raising of.**

It is always dangerous to allow a new issue to be raised at the appellate stage. 19 C.W.N. 772=29 Ind. Cas. 216.

**—New plea—Appellate Court.**

An appellate Court cannot decide in favour of a person on a plea not raised by him before the first Court. 104 P.L.R. 1915=40 P.W.R. 1915=28 Ind. Cas. 550.

**—New plea—Appeal—Not to be allowed.**

A plea if not raised before the 1st Court, cannot be raised for the first time in the appellate Court. 18 Cal. 24 Foll. 84 P. W. R. 1914=185 P. L. R. 1914=24 Ind. Cas. 692.

**—New plea—Appeal—Point not raised in the grounds.**

A point not raised nor even touched in the ground of appeal, cannot be raised for the first time in appeal. 53 P. W. R. 1914=47 P. L. R. 1914=22 Ind. Cas. 403.

**—New plea—Appeal—Ground not put forward in lower Court.**

A ground of claim never put forward throughout the pleadings cannot be allowed in appeal to the Chief Court. 133 P. W. R. 1913=224 P. L. R. 1913=19 Ind. Cas. 770.

**—New plea—Appeal—New case of status and liability.**

Plaintiff's case was that his vendors were co-owners with the defendant. In the appellate Court he tried to make out that the defendant was constructive trustee for his vendors. This being entirely new case—concerning the status and liability to be sued of the defendant should not be allowed. 6 S. L. R. 195=19 Ind. Cas. 368.

**—New plea—Appellate Court.**

An appellate Court should not allow a new case to be set up in appeal. 57 P. W. R. 1913=120 P. L. R. 1913=19 Ind. Cas. 253.

**—New plea—Appeal—New case not to be set up.**

An appellate Court cannot decide upon a question not raised in the pleadings or by the issues or the memorandum of appeal. 79 P. L. R. 1913=76 P. W. R. 1913=18 Ind. Cas. 795.

**—New plea—Appeal—New grounds of attack.**

A plaintiff cannot be allowed to alter the nature of his attack for the first time in appeal. 4 P. W. R. 1913=138 P. L. R. 1913=18 Ind. Cas. 608.

**—New plea—Appeal—Partial partition.**

A New plea that a suit is bad for partial partition or that the prepositus left a will could not be advanced on appeal. 3 P. W. R. 1913=26 P. L. R. 1913=18 Ind. Cas. 583.

**—New plea—Change of case—Suit on proprietary title—Right to management of Wakf**

A suit on proprietary title cannot be allowed to be altered into one for ejectment on the basis of a right to the management of a Wakf as it would be to alter the nature of the case. 114 P. W. R. 1913=225 P. L. R. 1913=18 Ind. Cas. 807.

**—New plea—Appeal—No materials on record.**

The appellate Court will not allow a point, not properly raised in the lower Court to be taken on appeal if the materials on record are too meagre for deciding the question satisfactorily. 36 Bom. 53=13 Bom. L. R. 963=12 Ind. Cas. 543.

**—New plea—Change of case.**

Suit for enforcement of lien for non-payment of purchase money directed to be paid to a third person was not allowed to be treated as a suit for an account on the basis of agency or a suit for damages for non-performance of a contract. 21 M. L. J. 359=10 M. L. T. 71=10 Ind. Cas. 98.

**—New plea—Appeal—Waiver—Validity.**

There may be circumstances under which a plea of waiver cannot be entertained by a Court of justice as being contrary to public policy. So it cannot be raised on appeal for the first time. 13 C. L. J. 192=9 Ind. Cas. 698.

**—New plea—Appeal.**

A plea cannot be raised in Appellate Court for the first time and cannot be considered by the Appellate Court. 8 M. L. T. 247=8 Ind. Cas. 354.

**—New plea—Appeal—Defence.**

A defence not set up in the written statement or issues cannot be set up in an appeal. 8 M. L. T. 216=(1910) M. W. N. 628=7 Ind. Cas. 757.

**—New plea—Appeal—Negligence—Not pleaded.**

A mortgagee who in his plaint alleges that a certain partition is fraudulently made, cannot raise in appeal that his mortgagor was negligent in the partition proceedings, if he does not put the point in pleadings nor it is raised in issues. 6 Ind. Cas. 829 (Cal.)

**—New plea—Appellate Court—Legal theory.**

A legal theory not put forth in lower Court cannot be put forth in appeal especially when it is inconsistent with the facts alleged in the lower Court. The plea that a person was ignorant of the facts is different from ignorance of law. 12 Bom. L.R. 53=5 Ind. Cas. 633.

**—New plea—Appeal—New ground whether can be raised.**

An appellate Court will not consider the point urged in appeal but not raised in the lower Court. 5 M. L. T. 126=4 Ind. Cas. 1102.

**—New plea—Appeal—New case cannot be set up in a appeal.**

Where a defendant in the first Court only pleaded that the testator's conduct subsequent to the execution of the will showed that he did not intend to abide by its provision and that the testator's conduct and that



of the plaintiff operated to cancel the will he cannot be allowed to set up in appeal a new case that the testator had destroyed the will with the intention of revoking it. 160 P. W. R. 1909=245 P. L. R. 1913=4 Ind. Cas. 1164.

#### —New plea—Appeal.

Where the plea was that an occupancy holding was transferable by custom without the consent of the landlord, the case of a permanent tenancy or a tenancy in the nature of a raiyati holding at a fixed rate of rent cannot be set up by this defendant, in appeal. 9 G. L. J. 467=1 Ind. Cas. 112.

—**Suit to recover possession of property of deceased Mahomedan—Widow's lien for dower—Plea raised in appeal which was not raised by the pleadings.**

The plaintiff sued the widow of her deceased brother, who was in possession of the brother's property, to recover her share by right of inheritance under the Mahomedan Law. The plaintiff stated that the dower of defendant was only Rs. 40, which had been presumably satisfied either out of the usufruct of the property in their possession or otherwise. The widow asserted and proved that her dower was one lakh and that she had been put into possession of the property in dispute in lieu thereof. The plaintiff's suit was accordingly dismissed. **Held**, that the suit was rightly dismissed. It was not incumbent on the court in a suit framed as this was to go into the question of accounts and ascertain how much of the dower debt had been satisfied out of the income of the property in the possession of the widow. 1905 A.W.N. 125=2 A. L. J. 485.

#### 45 (b). Practice—New plea—Late stage.

—Where a plaintiff has not raised a plea in the plaint but raises the plea at the trial, he should be allowed to do so, where even had the plea been raised in the plaint, the defendant according to his own pleading, could not have disproved the plea. 86 Ind. Cas. 357=19 S.L.R. 12=A.I.R. 1925 Sind 241.

—A plea which is apparent on the face of the proceedings cannot be ignored, though urged at a late stage. 66 Ind. Cas. 612=8 O. L. J. 358=A.I.R. 1921 Oudh 176.

#### —New plea—When can be raised—Late stage.

A court is well justified in declining to allow the plaintiff to embark on a new case at a late stage of the proceeding. 52 Ind. Cas. 47 Cal.

#### —New plea—Trial of suit.

A fresh plea can be raised during the progress of the suit if it arises out of facts subsequently come to light, and not within the knowledge of the parties before. 5 O. L. J. 179=46 Ind. Cas. 52.

#### —New plea—No allegation in pleading and no issue.

Where a point was not raised in the written statement nor raised in issue and no evidence was adduced by either of the parties with respect thereto, it ought not to be allowed to be raised later on. 43 P.W.R. 1909=1 Ind. Cas. 478.

#### 45 (c). Practice—New plea—Letters Patent Appeal.

##### —New Case—Letters Patent Appeal.

An appellant in a Letters Patent Appeal cannot make out a case which was not put forward in the lower Courts. 123 Ind. Cas. 108=A.I.R. 1930 A 466.

##### —New plea—Letters Patent.

A person cannot be allowed in Letters Patent appeal to raise a new point (i.e.) a point which has not been raised before the single Judge. 123 Ind. Cas. 105=A.I.R. 1930 All. 281.

—A new plea cannot be allowed to be taken for the first time in a Letters Patent appeal. 8 Rang. 233=A.I.R. 1930 Rang. 63.

—No point can be raised in Letters Patent appeal which was not raised before the Judges who first disposed of the appeal. 97 Ind. Cas. 594=49 All. 162=24 A. L. J. 1025=A.I.R. 1927 A 28.

—New point amounting to abandoning of original case cannot be allowed in Letters Patent appeal. 98 Ind. Cas. 291=50 Mad. 10=24 M.L.W. 460=A.I.R. 1926 Mad. 1167=52 M. L. J. 259.

—If the lower appellate Court and a Judge of the High Court in appeal allow a new plea, entertain and judicially consider that matter, the High Court will express an opinion as to whether it is in agreement with the decision or not. 70 Ind. Cas. 953=45 All. 21=20 A. L. J. 777=A.I.R. 1922 All. 493.

—Plaintiff having sued all along for possession as mortgagee cannot, at hearing of Letters Patent Appeal, ask for decree of ejectment of defendant as plaintiffs tenant under Punjab Tenancy Act, S. 100. 4 L. L. J. 293=A.I.R. 1921 Lah. 326.

##### —New plea—Appeal—Not raised before single Judge whether could be allowed in Letters Patent Appeal.

The High Court on Letters Patent Appeal reversed a decision of the single Judge on second appeal on the ground that no second appeal at all lay, though the point had not been taken before the single Judge. 17 A. L. J. 875.

#### 45 (d). Practice—New plea—Privy Council.

See also: Privy Council.

##### —New plea was not allowed to be raised.

Where the parties throughout the case treated the transaction in suit as a mortgage by conditional sale, it was so alleged by defendants in their written statements, no objection was taken by the plaintiff in reply, no issue was stated about it, the District Judge assumed it and no complaint was made of his assumption in the High Court:

**Held**, that to allow the plaintiff at the stage of hearing of the Privy Council appeal, having never asked for this remedy either before the District Judge or in the appellate Court or by his case as originally printed, to get such a remedy without very careful examination as to what the effect might be upon third



parties would be contrary to all reasonable procedure. 109 Ind. Cas. 574=30 Bom. L.R. 852=24 N.L.R. 186=28 M.L.W. 248=32 C.W.N. 1149=48 C.L.J. 570=A.I.R. 1928 P.C. 165=55 M.L.J. 292 (P.C.).

—Appeal before P. C.—High Court's judgment reversing lower Court's decree—Objection to lower Court's decree cannot be raised for first time before P.C. 87 Ind. Cas. 357=1925 M.W.N. 692=30 C.W.N. 601=23 A.L.J. 273=2 O.W.N. 335=21 N.L.R. 50=52 Cal. 482=6 L.R.P.C. 97=27 Bom. L.R. 837=52 I.A. 231=A.I.R. 1925 P.C. 118=49 M.L.J. 173 (P.C.).

—It is not legitimate to raise in the Privy Council subsidiary points which were apparently neither raised nor canvassed in the Court's below. 80 Ind. Cas. 203=29 C.W.N. 461=34 M.L.T. 102=20 M.L.W. 82=1924 M.W.N. 431=5 L.R.P.C. 89=26 Bom. L.R. 631=A.I.R. 1924 P.C. 123=47 M.L.J. 180 (P.C.).

#### —Interpretation of statute.

A point which relates to the proper construction of a statute may be allowed to be raised in argument before the Privy Council although not raised in lower Courts. A.I.R. 1921 P.C. 228 (P.C.).

—New plea—Pardhanashin lady—Plea, that executant was a pardhanashin lady can't be allowed to be raised for first time before Privy Council.

In a suit for specific performance of a contract of sale executed by a Hindu widow, the plea that the executant was a pardhanashin lady could not for the first time be raised before the Privy Council. 21 C.W.N. 665=6 L.W. 68=41 Ind. Cas. 957 (P.C.).

#### 45 (c). Practice—New plea—Revision.

See C. P. C., 115.

#### —New plea—Arbitration—Revision.

The objection that an award was illegal as some of the parties interested in the dispute were not parties to the reference is one which relates to the jurisdiction of the Court, and so can be raised for the first time in revision. 42 Mad. 632; and 23 L.W. 769, Foll. 126 Ind. Cas. 735=A.I.R. 1930 Mad. 646.

—New plea cannot be raised for first time in revision if pleadings do not justify it.

Per Fawcett, J. C.—The fact of the contention being raised late, e. g., in Revision need not preclude its being considered if the pleadings fairly justify it. But where to allow it to be raised in revision application would be to permit the plaintiffs to set up an entirely new case from the one brought and tried, the contention should not be allowed to be raised. A litigating party can only succeed *secundum allegata et probata* and the Courts could check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up. The fact that if a party's adviser had put his client's case better the party might have succeeded instead of failing, is no good ground for departing from the general rule of *secundum allegata et probata*. The state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from. This is, of course, subject to the provisions as to amendment of pleadings. No such amendment can

be allowed in revision stage where it would entirely alter the character of the suit nor can a question of estoppel be raised for first time in revision. 83 Ind. Cas. 360=16 S.L.R. 207=A.I.R. 1921 Sind 159 (F.B.).

#### —New plea—Revision.

A point not raised in the Lower Courts, or in an application for review cannot be raised in the Court of revision for the first time. 8 M. L. T. 85=7 Ind. Cas. 404.

#### —New plea—Appeal—Revision.

It is not permissible to raise a new point in an appeal or revision, when it is not raised in the pleadings. 252 P.W.R. 1912=14 Ind. Cas. 513.

#### 45 (f). Practice—New plea—Second Appeal.

See C. P. C., S. 100.

(i) When allowed.

(ii) When not allowed.

#### 45 (f) (i). Practice—New plea—Second Appeal—When allowed.

—Where a defendant appellant in second appeal urged the plea of non-liability for mesne profits although no cross appeal was preferred by him in the lower appellate Court:

Held, that in absence of a decree for mesne profits as contemplated by O. 20, R. 12 of the Code of Civil Procedure, when the appeal was pending hearing in that Court, he should be allowed to urge the plea. 83 Ind. Cas. 529=51 Cal. 853=39 C.L.J. 447=A.I.R. 1924 Cal. 1010.

—A party is not entitled to relief upon facts or documents not referred to or stated in the pleadings; nor on any ground which has never been considered taken or tried in the Courts below, unless it is a pure point of law going to the question of jurisdiction of the lower Courts and capable of being determined without the consideration of any other evidence than that on the record.

Where the plaintiff sued in ejectment as owner in possession but on defendant denying his possession he applied for amendment of the plaint:

Held, the plaintiff may be allowed to change the relief in second appeal as there was no question of any new fact, and the facts relied on were stated in the pleadings. 78 Ind. Cas. 63=A.I.R. 1924 Nag. 372.

#### —New plea—Appeal—When allowed.

The appellate Court may take up other grounds of appeal than those given in the memo if they are necessary for doing substantial justice and preventing litigation unless the decision of such grounds depends upon questions of fact not decided in the lower Courts. 11 L.W. 611=57 Ind. Cas. 800.

#### 45 (f) (ii). Practice—New plea—Second Appeal—When not allowed.

#### —New plea—Second Appeal.

A point not taken in the Court below, whether the omission was by the appellant in that Court or whether the respondent failed to support his decree by taking



the point, will not be permitted to be raised, except possibly; (a) where the point may be described as involving a question of public policy, e. g., involving jurisdiction, or involving the principle of *res judicata* or where the decision of the point would prevent future litigation. In the above instances the point will be allowed to be argued only if it can be decided upon the materials before the Court and does not involve the taking of further evidence of the sending of the case, or any issue, back to the lower Court, or a decision of a question of fact, (b) where the plaint discloses no cause of action or the written statement no ground of defence. It is not a ground for permitting a new point to be argued, merely that it was omitted by oversight in the Court below, or that the materials are all on the record and that the answer to the point is plain. New points, when they lie outside the area of the special classes mentioned above, cannot be permitted to be raised for first time in second appeal. 53 A 65=133 Ind. Cas. 428=1930 A.L.J. 1601=A.I.R. 1931 All. 35 (F.B.).

#### —New plea—Different titles.

Where the plaintiff in both the lower Courts fought out his case on the basis of his title as donee but in appeal fought to raise his title as heir;

**Held** that the latter plea could not be allowed to be raised. 7 O.W.N. 1058=A.I.R. 1931 Oudh 7.

—Where the plaintiff a Hindu widow went to Court on a plea of re-marriage in the *Brahma* form but the Court found against the plea, **Held**, that it is not open to her in second appeal to set up re-marriage in the *Gandharva* form. 7 O.W.N. 753=A.I.R. 1930 Oudh 426.

—Attempts to raise in second appeal points which are not even in the pleadings and which the other side has never been called upon to meet are not to be lightly permitted in second appeal. 122 Ind. Cas. 345=A.I.R. 1930 Mad. 197.

#### —New plea—Objection under O. 8, R. 6.

Where an objection under O. 8, R. 6 is not taken in the trial Court the High Court will not permit the same to be raised for the first time in second appeal. 35 C.W.N. 17=132 Ind. Cas. 195=A.I.R. 1931 Cal. 358.

—Where an objection was not raised in either of the Courts below, it cannot be entertained when brought in second appeal. 113 Ind. Cas. 227=30 P.L.R. 560=10 Lah. 385=A.I.R. 1929 Lah. 810.

—Case not set up in the lower Courts cannot ordinarily be allowed to be raised in second appeal. 121 Ind. Cas. 718=7 Rang. 777=A.I.R. 1929 Rang. 341.

A new cause of action cannot be taken in second appeal. 118 Ind. Cas. 613=12 N.L.J. 72=25 N.L.R. 173=A.I.R. 1929 Nag. 274.

—A new and speculative case, never advanced before, cannot be allowed in second appeal. 115 Ind. Cas. 606=32 C.W.N. 778=A.I.R. 1928 Cal. 870.

—A finding of the trial Court not appealed against in the lower Appellate Court cannot be reargued in second appeal. 113 Ind. Cas. 381=30 Bom. L.R. 1099=A.I.R. 1928 Bom. 425.

—It ought to be an absolutely binding rule that no litigant should be allowed to take in the Court of appeal a point which he has deliberately omitted to take in the Courts below. 97 Ind. Cas. 483=A.I.R. 1927 All. 63.

—A point not argued in the lower appellate Court cannot be raised in second appeal. 102 Ind. Cas. 139=8 L.R.A. Rev. 177=A.I.R. 1927 All. 791.

#### —New point.

A point that was not raised in the first Appellate Court cannot be raised in second appeal. 101 Ind. Cas. 252=A.I.R. 1927 Nag. 200.

#### —Second appeal.

A plaintiff in second appeal cannot have his suit being regarded by Court not as one based on title acquired by adverse possession but as one for possession after he has been deprived of that possession by a wrongful act of defendant. 1927 M.W.N. 753=A.I.R. 1927 Mad. 1185.

—Where the only ground on which a land-lord in an ejectment suit seeks to make out in both the lower Courts that the tenant is a tenant at will, is because and only because he, the plaintiff land-lord, was a pre-settlement inamdar and in that he has failed and the finding is that the inam was a *darmila inam*, then it is not open to him in second appeal to ask the Court to speculate about any matters which he had not either averred or sought to prove. 106 Ind. Cas. 500=A.I.R. 1927 Mad. 1197.

Where a claim to easement on the ground of prescription fails the party cannot be allowed in second appeal to set up a claim based on custom or grant. 100 Ind. Cas. 21=A.I.R. 1927 Nag. 378.

—In the absence of any specific pleadings a belated contention cannot be allowed to prevail at the stage of second appeal, if it exposed the plaintiff to the brunt of a new attack at the stage of appeal at the instance of an unsuccessful litigant. 100 Ind. Cas. 446=22 N.L.R. 175=10 N.L.J. 5=A.I.R. 1927 Nag. 104.

—A new case, the effect of which is to re-open the whole case, cannot be allowed to be set up in second appeal. 102 Ind. Cas. 3=1 L.C. 65=A.I.R. 1927 Oudh 294.

#### —Second appeal—Construction of document.

A construction of a document not put forward in the Courts below will not be accepted in second appeal. 103 Ind. Cas. 74=39 M.L.T. 217=A.I.R. 1927 Mad. 791.

—Where a ground is not taken in the two lower Courts it cannot be taken in the second appeal when it is not expressly a question of law. 99 Ind. Cas. 535=27 P.L.R. 750.

—It is not permissible to raise an issue in second appeal which had never been raised by the parties in the first Court and which the lower appellate Court had refused to raise on appeal. 96 Ind. Cas. 91=23 M.L.W. 709=A.I.R. 1926 Mad. 772=51 M.L.J. 12.



—Namboodri litigants cannot adduce evidence of special usage varying Hindu Law, for the first time in second appeal. 84 Ind. Cas. 973=20 M.L.W. 876=35 M.L.T. 127=1924 M.W.N. 792=A.I.R. 1925 Mad. 260=47 M.L.J. 686.

**—New plea—Altering nature.**

Where the parties went to trial on the footing that an alienation by widow was an alienation of the property itself:

**Held**, that in second appeal the plea that only a widow's life interest was conveyed cannot be raised. 86 Ind. Cas. 4=21 M.L.W. 69=A.I.R. 1925 Mad. 384.

—Where the trial Court refused to permit the setting up of an alternative case but the question was not raised in the First Appeal:

**Held**, that it could not be raised in second appeal. 85 Ind. Cas. 29=12 O.L.J. 30=A.I.R. 1925 Oudh 329.

—Plea of legal necessity cannot be raised in Second Appeal. 86 Ind. Cas. 893=6 L.R.A. Civ. 267=A.I.R. 1925 All. 440.

—A plea that the land in suit was subject to a fluctuating assessment and therefore Court fee was payable under S. 7, cl. 5 Sub-cl. (c) cannot be raised for the first time in second appeal. 8 L.L.J. 316=A.I.R. 1925 Lah. 241.

—Impropriety of substitution of legal representative cannot be raised for first time in second appeal. 81 Ind. Cas. 498=A.I.R. 1925 Mad. 207.

—Where there is no reference to a plea in the judgments of the Courts below or in the pleadings of the parties, the point cannot be allowed to be raised in second appeal. A decree for a sum cannot be granted in second appeal, when no such relief was asked for in the Courts below. 79 Ind. Cas. 990=A.I.R. 1923 Lah. 56.

—A new plea which if had been raised in the lower Courts might have been met by the opposite party, cannot be raised for first time in second appeal. 79 Ind. Cas. 977=5 L.L.J. 108.

—Party resting entire case on one plea cannot raise in second appeal an alternative issue. 4 L.L.J. 426=A.I.R. 1921 Lah. 284.

—Ground not urged in first appeal cannot be raised in second appeal. A.I.R. 1921 All. 405.

—A new defence cannot be raised for first time in second appeal. 60 Ind. Cas. 753=35 C.L.J. 192=A.I.R. 1921 Cal. 816.

—Where none of the grounds sought to be urged in second appeal were raised in the lower appellate Court:

**Held**, that the second appeal should be dismissed. 1921 M.W.N. 600=A.I.R. 1921 Mad. 689=41 M.L.J. 332.

—A new point cannot be raised for the first time in second appeal. 1921 P.H.C.C. 357=2 P.L.T. 525=A.I.R. 1921 Pat. 373.

—Where a defendant omits to raise an objection in his written statement, he cannot raise it in second appeal. 60 Ind. Cas. 766=39 M.L.J. 685.

**—New plea—Second appeal—Tenancy—Terms of.**

A question relating to the acquisition of right of occupancy by an under raiyat or to the rights of a tenant holding over, cannot be urged in the High Court in second appeal for the first time. 53 Ind. Cas. 12 (Cal.).

**—New plea—Appellate Court—Not allowable.**

A plea which is opposed to that put forward in lower Court cannot be allowed in second appeal. 55 Ind. Cas. 975. (Cal.).

**—New plea—Appeal—Tenancy—New basis of claim in.**

The contention as to a new tenancy having been created by an amalgamation of occupancy holdings cannot be allowed in second appeal for the first time. 37 Ind. Cas. 862. (Cal.).

**—New plea—Second appeal—Notice to quit—Questions to be raised.**

Where in an ejectment suit the defendants did not plead any want of notice in the first court and there was no issue regarding it, the plea of insufficiency or invalidity of notice cannot be allowed to be raised for the first time in second appeal. 31 M.L.J. 354=(1916) 2 M.W.N. 180=4 L.W. 168=37 Ind. Cas. 1.

**—New plea—Second appeal—Change of plea.**

When in a redemption suit, the defendant pleaded that the mortgagor had transferred the equity of redemption to the mortgagee but it was found against him, he cannot be allowed to change his ground in second appeal that there had been a foreclosure to which the parties had assented. 3 O.L.J. 244=19 O.C. 166=34 Ind. Cas. 745.

**—New plea—Second appeal.**

The points not raised in the lower courts cannot be heard in Second Appeal. 33 Ind. Cas. 975. (Cal.).

**—New plea—Second appeal—Point not raised in lower courts—Vague reference to the point in the plaint.**

A point not raised in the lower courts can't be taken in the final Court of appeal where there is only a vague reference to it in the plaint. 86 P.W.R. 1916=33 Ind. Cas. 748.

**—New plea—Second appeal—New case not be set up.**

A plaintiff cannot in second appeal be permitted to resile from the position he took up in the plaint. 2 O.L.J. 601=32 Ind. Cas. 740.



**—New plea—Set-off—Second appeal—Questions to be raised.**

An appellant will not be allowed to raise for the first time in second appeal the contention that a decree obtained by the judgment debtor against the appellant's father cannot be set off against a decree obtained by him in his own right. 1 L. W. 431=23 Ind. Cas. 923.

**—New plea — Second appeal — Questions to be raised.**

A case not set up in lower court cannot be raised in second appeal. 1 O.L. J. 38=23 Ind. Cas. 860.

**—New plea—Second appeal.**

A suit for sale of property on a mortgage cannot in second appeal be turned into a suit for recovery of money charged on immoveable property. 11 A.L.J. 580=19 Ind. Cas. 661.

**—New plea—Second appeal — Attestation — Absence of plea.**

If the fact of attester's presence at the time of execution is not put in issue in the lower court, it cannot be raised in second appeal. (1913) M.W.N. 400=24 M.L.J. 534=13 M.L.T. 463=19 Ind. Cas. 589.

**—New plea — Second appeal — Damages — Quantum of.**

A plea not raised in the lower Court to the effect that monetary compensation should have been awarded instead of mandatory injunction and that plaintiff had not proved that he had suffered substantial injury cannot be raised for the first time in second appeal. 2 Lah. L. J. 463=56 Ind. Cas. 1003.

**—New plea—Second appeal.**

Where a point was not raised in the written statement, nor was any issue framed upon it, and no evidence was adduced by either of the parties with regard to it and the Courts below had not expressed any opinion on the point; such a point could not be allowed to be raised for the first time in second appeal. 7 Ind. Cas. 123 (Cal.).

**—New plea—Chief Court.**

A point not raised in either of the lower Courts or in the grounds of appeal cannot be raised for the first time in the Chief Court. 47 P.W.R. 1910=6 Ind. Cas. 651.

**—New plea—Second appeal.**

The High Court refused to consider at the hearing a point not taken in the grounds of second appeal. 5 M.L.T. 210=4 Ind. Cas. 1118.

**—New plea—Second appeal.**

A party cannot raise a new point for the first time in second appeal which was not raised in either of the courts below. 5 M.L.T. 79=2 Ind. Cas. 618.

**—New plea—Second appeal —If can be set up.**

A new case cannot be set up in second appeal. 6 A.L.J. 57=1 Ind. Cas. 821.

**45 (g). Practice—New plea—Supreme Court.**

**—New plea—Application for leave to appeal to Supreme Court—Plea of want of attestation in deed of change—If can be raised for first time.**

A plea to the effect that a document creating a charge has to be attested in the manner laid down in S. 59, T.P. Act, which was never raised at any previous stage of the litigation cannot be raised for the first time in an application for leave to appeal to the Supreme Court.

**Quaere.**—Whether such deed requires to be attested in accordance with S. 59, T.P. Act. A.I.R. 1950 Pat. 478.

**45 (h). Practice—New plea—Power of Court to set up.**

**—Court of appeal should not set up an entirely new case for a party in appeal.** 106 Ind. Cas. 313=A.I.R. 1928 Lah. 43.

**—Court cannot make a new case for the party.**

When the case found by the lower Appellate Court was not the case tried and the relief decreed was not the relief sought, in such a case the suit should be dismissed. 106 Ind. Cas. 659=A.I.R. 1927 Nag. 410.

**—New case.**

Issues framed by trial Court covering all pleadings—Appellate Court could not set up a new case on remand. 98 Ind. Cas. 906=A.I.R. 1927 Lah. 42.

**—Appellate Court cannot make out a new case.**

It is not open to an Appellate Court to make a new case for the plaintiff and decree the appeal on the ground of abandonment which was never pleaded nor was any evidence gone into on that question. 98 Ind. Cas. 835=44 C.L.J. 282=A.I.R. 1927 Cal. 86.

**—Judge cannot make out and decree a case inconsistent with that alleged by the party.**

A Court is not entitled to make a case inconsistent with or different from that which is presented to it on behalf of the parties, and it is not permissible for a Court to pass a decree in favour of a plaintiff upon the basis of a case which is inconsistent with the case which he himself has put forward. This rule is based upon the question of prejudice to the defendant; therefore where a party alleged purchase from the tenant the Court can find on evidence that the tenant's predecessor left other heirs, but that they had no interest and that the vendor was the only tenant on date of the purchase. 85 Ind. Cas. 753=A.I.R. 1925 Cal. 949.

**—Courts cannot set out a case for the parties not pleaded by them.** 66 Ind. Cas. 620=8 O.L.J. 343=A.I.R. 19 Oudh 259.

**—New plea—Appellate Court.**

Where the plaintiff's plea is directly opposed to the entries in the record of rights of which they were aware, the appellate Court is justified in setting up a new case for the defendant and dismiss plaintiff's suit on the weakness of his own title. 50 Ind. Cas. 290 (Cal.).



—New plea—Appellate Court—New case—Not to set up.

A Court of appeal cannot set up a case for any of the parties which is not put forward in the pleadings. 51 Ind. Cas. 751 (Lah.).

—New plea—Appellate Court—New case not to be made.

The determination of a cause must depend on the allegations made in the pleadings and the proof. An appellate Court is not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of those questions. 31 C.L.J. 354=44 Ind. Cas. 416.

—New plea—Appeal—Whether appellate Court can make a new case on appeal.

An appellate Court cannot make a new case for the parties especially when the other party has had no notice if it and has had no opportunity to rebut it in the lower Court. 33 Bom. 35=10 Bom. L.R. 768=1 Ind. Cas. 456.

#### 45 (i). Practice—New plea—Abandoned plea.

—New plea—Abandonment.

Grounds of appeal abandoned in first appeal cannot be raised in second appeal. A.I.R. 1929 All. 761.

—New plea—Necessity.

Per Boys, J.—In a suit by mortgagee of joint family property against a Hindu father, if the plea of legal necessity, having been first raised is afterwards abandoned in the trial Court, it is too late to endeavour to set it up again in the Appellate Court. 115 Ind. Cas. 775=A.I.R. 51 All. 136=26 A.L.J. 1289=A.I.R. 1928 All. 596 (F.B.).

—Whether or not a plea not pressed below should be pressed in second appeal is largely a question of the nature of the plea. 100 Ind. Cas. 40=25 M.L.W. 11=A.I.R. 1927 Mad. 273.

Plea not raised before the trial Court and raised and abandoned before the lower Appellate Court cannot be allowed to be raised in second appeal even if it is a question of law. 98 Ind. Cas. 1044=3 O.W.N. 937=8 L.R.A. Rev. 20=A.I.R. 1927 Oudh 37.

Appeal—Point not referred to in the lower Court's judgment must be presumed to have been given up there. 99 Ind. Cas. 463=A.I.R. 1927 Lah. 125.

—Point abandoned cannot be taken.

An appellant ought not to be allowed to take a point in second appeal which was expressly abandoned in the Court below. 69 Ind. Cas. 44=A.I.R. 1924 Cal. 541.

—Where at an earlier hearing a party abandons any point he cannot be allowed afterwards to take it up. 70 Ind. Cas. 417=A.I.R. 1922 Bom. 233.

—New plea—Appeal—Technical plea whether can be taken for the first time in appeal—Withdrawal of plea, if can be revived.

A technical objection cannot be raised for the first time in appeal. A party who has once withdrawn a plea in one Court cannot revive it subsequently in

appeal or revision. 6 P.W.R. 1917=20 P.L.R. 1917=39 Ind. Cas. 381.

#### 45 (j). Practice—New plea—Adverse possession.

Defendants claimed ownership of the house in dispute as donees from the last male holder or by adverse possession by themselves:

Held, that they cannot be allowed, subsequently to turn round and claim that they had derived title through a female, and her adverse possession should be tacked on to their adverse possession. 91 Ind. Cas. 784=7 L.L.J. 405=26 P.L.R. 778=A.I.R. 1925 Lah. 571.

—New plea—Adverse possession.

The plea of adverse possession being one of limitation the Court is not only justified in raising it *sue motu* but is bound to raise it. 80 Ind. Cas. 582=A.I.R. 1925 Oudh 182.

—A new plea that the suit is barred by Art. 144 cannot be permitted in appeal since its decision would involve a finding of fact whether the appellant's possession was adverse to the knowledge of the respondent. 80 Ind. Cas. 321=6 L.L.J. 151=A.I.R. 1924 Lah. 468.

—New plea—Appeal—Adverse possession—Acquisition of title.

A plaintiff can succeed on a title by adverse possession pleaded even for the first time in the Court of appeal provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. 32 C.L.J. 151=60 Ind. Cas. 165.

—New plea—Change of case—Suit on title—Prescriptive title relief on.

Where a person sues for declaration of title alleging title and also possession for a long period, he can be given relief on the strength of a title by adverse possession, especially where defendants denied any sort of possession in plaintiff. 48 Ind. Cas. 448 (Cal.).

—New plea—Adverse possession—Appellate Court—Prejudice.

Where the plaintiff's suit for declaration of title was dismissed on the ground of estoppel and the first appellate Court gave a decree to the plaintiff on the ground of adverse possession, held, that the appellate Court was wrong in deciding question of adverse possession without giving opportunity to defendant to adduce evidence on that point. 21 P.L.R. 1915=236 P.W.R. 1915=28 Ind. Cas. 50.

—New plea—Question of law—Adverse possession not raised explicitly in plaint—When may be allowed to be raised.

If no case of title by adverse possession is made in the plaint, nor is the question raised in any of the issues, the plaintiff cannot succeed upon such a case. But when the question reduces itself to one of law upon facts admitted or proved beyond controversy, the Court should entertain the plea of adverse possession, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. The true test is, how far is the defendant likely to be prejudiced if the point is permitted to be taken afterwards, though not explicitly raised in the plaint. 12 C.L.J. 459=15 C.W.N. 158=8 Ind. Cas. 41.



**45 (k). Practice—New plea — Estoppel.****—New plea—Estoppel.**

Where plea of estoppel is not set up in the pleadings or issues it cannot be availed of later, because estoppel is eminently a matter of pleadings. 119 Ind. Cas. 152 = A.I.R. 1929 Mad. 467.

Plea of estoppel by acquiescence cannot be pleaded in argument when not raised in defence. 94 Ind. Cas. 307.

**—New plea—Question of fact—estoppel.**

Questions of estoppel which ultimately depend on questions of fact, cannot be raised in argument unless put clearly in issue. 23 C.L.J. 122 = 34 Ind. Cas. 956.

**45 (l). Practice—New plea—Further evidence.****—New plea—Further evidence**

Question not purely of law, and requiring investigation into facts should not be allowed in appeal after several stages of litigation. 123 Ind. Cas. 649 = 33 C.W.N. 1023 = A.I.R. 1930 Cal. 190.

—New plea making further evidence necessary, cannot be allowed in second appeal. 108 Ind. Cas. 883 = 55 Cal. 1167 = 32 C.W.N. 580 = A.I.R. 1928 Cal. 854.

—It is very necessary that every discouragement should be given to an invention of new points at a late stage—Points which might have been met if taken properly by adducing further evidence. 104 Ind. Cas. 733 = 46 C. L. J. 253 = A.I.R. 1927 Cal. 855.

—Parties to suit are bound by the case which arises on their pleadings and which has been enquired into by the Court of first instance, and they cannot rely upon a point, which has not been raised and which depends upon facts for its determination. 104 Ind. Cas. 418 = 9 L.L.J. 165 = 28 P.L.R. 138 = A.I.R. 1927 Lah. 231.

—A new ground of attack dependent on proof of facts cannot be raised at the stage of appeal. 98 Ind. Cas. 674 = A.I.R. 1927 Nag. 99.

—New plea prejudicing party and necessitating re-framing of pleas and production of further evidence cannot be allowed. 20 O.C. 41, Foll. 101 Ind. Cas. 697 = A.I.R. 1927 Oudh 585.

—A point regarding the application of the doctrine of *Musha* raised for the first time specifically in arguments should not be permitted to be raised at that late stage, especially when it required other evidence. 97 Ind. Cas. 781 = 8 L.L.J. 374 = 27 P.L.R. 674.

—Appellant cannot make out an absolutely new case on a question of fact in appeal and ask that the case be sent down so that further evidence may be taken on the new issues. 83 Ind. Cas. 610 = 26 Bom. L.R. 622 = A.I.R. 1924 Bom. 457.

**45 (m). Practice—New plea—Inconsistent pleas.**

See Note: 32 (b).

**45 (n). Practice—New plea—Jurisdiction.****—New plea of jurisdiction in revision.**

A new question of jurisdiction cannot be allowed to be raised in a revision petition against an interlocutory order in a suit when the suit is still pending in the trial Court. 1949 A. M.L.J. 9.

—Where an objection to jurisdiction was taken in the trial Court but overruled and objection was not pressed in appeal from the decision of the trial Court, High Court allowed the question to be argued in second appeal. 52 C. L. J. 247 = A.I.R. 1931 Cal. 29 = 130 Ind. Cas. 232.

**—New plea—Jurisdiction.**

Objection to valuation of claim and jurisdiction cannot be raised for the first time in second appeal. A.I.R. 1930 Mad. 541 = 126 Ind. Cas. 730.

**—New plea—Second appeal—Objection to pecuniary jurisdiction.**

Objections taken to the jurisdiction of a Court due to the increase in the value of the *meine profits* is not allowed for the first time in second appeal. 14 Ind. Cas. 34. (Cal).

—A tenant sued his proprietor for a declaration of the area and boundary of his holding in a Civil Court. The proprietor did not raise the objection that such a suit cannot be entertained in a Civil Court either in the trial Court or in the lower Appellate Court.

**Held**, that the High Court could allow the objection to be raised in second appeal for the first time as its decision does not require facts or evidence. 116 Ind. Cas. 870 = 10 L.R.A.Rev. 278 = A.I.R. 1929 All. 442.

—A plea of want of jurisdiction though abandoned in one Court, can be raised in the higher Court. 92 Ind. Cas. 760 = 23 M.L.W. 3 = 43 C. L. J. 1 = 24 A.L.J. 48 = 27 P.L.R. 1 = 1926 M.W.N. 108 = 53 Cal. 88 = 28 Bom. L.R. 211 = 53 I.A. 58 = 30 C.W.N. 577 = A.I.R. 1925 P.C. 290 = 49 M.L.J. 806 (P.C.).

—Plea as to want of jurisdiction may be raised for the first time in appeal. 86 Ind. Cas. 81 = 49 Bom. 152 = 27 Bom. L.R. 56 = A.I.R. 1925 Bom. 162.

—A question of jurisdiction which requires no further enquiry as to facts can be raised for the first time in appellate Courts. 43 All. 18 = A.I.R. 1921 All. 290.

—An objection to jurisdiction not taken in the lower Appellate Court, cannot be entertained in second appeal. 63 Ind. Cas. 255 (All.).

**—Jurisdiction question.**

Where an objection to jurisdiction was taken in the trial Court but overruled and the objection was not pressed in appeal from the decision of the trial Court, the High Court allowed the question to be argued in second appeal. 52 C. L. J. 247 = 130 Ind. Cas. 232 = A.I.R. 1931 Cal. 29.

**—New plea—Jurisdiction—Appellate Court can allow.**

The appellate Court will allow a new point to be raised in appeal if it goes to the jurisdiction of the



lower Court or if a statute has been contravened. 50 Ind. Cas. 322 (Cal.)

### —New plea—Question of law—Jurisdiction—Objection to.

Questions touching the very root of a suit ought, as a rule, to be raised in the pleadings. Though a question of jurisdiction is a question of law which may be raised at any stage, the defendant ought not, in any event be allowed to raise it after the plaintiff has closed his case. 11 Bom. L.R. 1269=4 Ind. Cas. 569.

### 45 (o). Practice—New plea—Limitation.

#### —Plea—Stage at which plea of limitation can be raised.

The objection that a suit is time-barred is never too late. It can be raised at any stage of a suit or other proceeding provided that, if raised in appeal, it does not require any further investigation into a question of fact. 1949 R.D. 227.

#### —Point of law—Raising at any stage of the proceedings.

Where a point of law is such that it requires no further investigation or finding on any question of fact it is a point which can be taken at any stage of a proceeding with the permission of Court. 1949 R.D. 107.

#### —New plea—Limitation.

The point of limitation though raised for the first time in the High Court can be so allowed to be raised if it does not require any fresh findings. 123 Ind. Cas. 820=1930 A.L.J. 552=A.I.R. 1930 All. 467.

#### —Second appeal.

The mere fact that the question of limitation was not raised in the trial Court or in the first Appellate Court or in memo. of appeal does not debar the Court of second appeal from going into the question, if it arises on the pleadings and no question of fact has to be enquired into to dispose of the question. 35 C.W.N. 103=129 Ind. Cas. 108=A.I.R. 1930 Cal. 703.

—Where a plea of limitation was not raised before the appellate Court on the earlier occasion and the same was sought to be raised at a later stage on a more limited reference. Held, that the plea could not be raised. 51 C. L. J. 283=A.I.R. 1930 Cal. 547.

—Provided a general plea of limitation is taken and facts necessary to come to a decision on the point whether the special rule of limitation applied are gone into and there was no question of prejudice to any party it is not necessary that the plea of special limitation should have been specifically taken in pleadings in lower Court before it can be admissible in second appeal. 11 P.L.T. 197=9 Pat. 788=A.I.R. 1930 Pat. 256 (F.B.).

—Question of limitation depending ultimately on certain facts—Other party not having notice with regard to these facts—Plea of limitation should not be allowed to be raised at very late stage. 111 Ind. Cas. 152=A.I.R. 1929 Mad. 38.

### —Limitation—Question raised in review.

Where a point as to limitation was raised for the first time in application for review, the party was allowed to raise it but was ordered to pay the costs of that application to the other party. 109 Ind. Cas. 1=5 O.W.N. 479=30 Bom. L.R. 842=47 C. L. J. 510=6 Rang. 302=26 A.L.J. 657=32 C.W.N. 845=55 I.A. 161=28 M.L.W. 207=A.I.R. 1928 P.C. 103=54 M.L.J. 696 (P.C.).

—Even a plea of limitation not made except in argument, while it depends on facts, cannot be allowed where the lower Court might have had facts before it to justify its view, which facts, however, neither party was able to point out. 108 Ind. Cas. 14=26 A.L.J. 505=30 Bom. L.R. 765=28 M.L.W. 354=A.I.R. 1928 P.C. 47=54 M.L.J. 651 (P.C.).

—A plea of limitation although not raised in the trial Court or the memo. of appeal to the Appellate Court can be entertained in appeal. 103 Ind. Cas. 418=29 Bom. L.R. 241=A.I.R. 1927 Bom. 398.

—New plea as to the bar of limitation cannot be entertained for the first time in revision. 85 Ind. Cas. 982=A.I.R. 1925 Mad. 986.

—Plea of limitation though abandoned in trial Court can be taken in appeal. 94 Ind. Cas. 611=4 Bur. L.J. 113=A.I.R. 1925 Rang. 313.

—New point of law will not be allowed to be raised if remand becomes necessary. 87 Ind. Cas. 705=26 Bom. L.R. 494=A.I.R. 1924 Bom. 469.

#### —Plea of, under Special Law.

Although a plea of limitation can be raised at any stage of the suit and even for the first time in appeal, a special plea of limitation ought to be taken in the written statement. The defendant must raise question of special limitation in the written statement where the determination of that question depends upon a finding of fact, e. g., the fact as to when service of notice of the deposit was made on the land-lord. 69 Ind. Cas. 419=A.I.R. 1924 Cal. 463.

—Grounds of exemption from limitation may be set up in the alternative—Ground of exemption not set up in Court below cannot be set up in appeal. 69 Ind. Cas. 419=3 Lab. 233=4 L.L.J. 190=A.I.R. 1922 Lah. 39.

—Execution proceedings—Limitation—Failure of judgment-debtor to raise the plea in a previous execution application, will preclude him for raising it later on. 68 Ind. Cas. 267=25 O. C. 13=A.I.R. 1922 Oudh 117.

#### —Defence—Question of limitation—Second appeal.

A point of limitation can be taken in second appeal for the first time if there are sufficient findings of fact on which it could be argued as a question of law. 69 Ind. Cas. 785 (Cal.).

—A question of limitation cannot be raised for the first time in appeal. It must be raised by the defendant in his pleading according to O. 8, R. 2, C. P. Code. A new plea of limitation must be entertained only when



on the face of the record there is evidence which was produced in the trial Court. 60 Ind. Cas. 280=32 C. L. J. 236.

—New plea—Limitation—Pleadings.

The plea of bar by limitation under a special Act must be specially pleaded and if the facts in support thereof are not apparent on the face of the record, the appellate Court cannot make an enquiry whether on certain facts he had found the suit was barred by limitation. 28 C. L. J. 216=46 Ind. Cas. 787.

—New plea—Limitation — Second appeal—Plea requiring fresh evidence on a question of fact.

Per Piggot, J.—A plea even of limitation requiring for its determination fresh evidence on a question of fact cannot be properly put forward for the first time in the second appeal. 14 A. L. J. 1146=37 Ind. Cas. 343.

—New plea—Limitation.

A question of limitation can be taken at any time. 1 Pat. L. J. 221=2 Pat. L. W. 374=36 Ind. Cas. 960.

—New plea—Question of limitation—Appeal—Decision on.

An appellate Court can decide questions of limitation, if no further facts than those before it are necessary for that purpose. 29 Ind. Cas. 36. (Mad).

—New plea—Limitation—Second appeal.

A plea of limitation can be set up even in second appeal if it is patent on the face of it and does not require additional facts to decide the same. 34 C. 941=9 C. 635=25 M. 367=12 A. 300 Foll. 1 L. W. 1032= (1914) M. W. N. 921=17 M. L. T. 18=26 Ind. Cas. 369.

—New plea—Limitation.

The appellant cannot be allowed to raise on second appeal, new pleas of limitation which involve decisions of new questions of fact. 5 M. L. T. 262=4 Ind. Cas. 1167.

45 (p). Practice—New plea—Maintainability of suit.

—New plea—Maintainability of suit—Plea not raised in ground of appeal.

Although a plea may not have been specifically raised in the grounds of appeal in second appeal, High Court can allow the point to be argued if it cut at the root of the case. A. I. R. 1930 All. 434.

—The question of the maintainability of a suit if not raised in the first instance before lower Courts cannot be allowed to be raised in second appeal. 50 C. L. J. 543=A. I. R. 1930 Cal. 267.

—Second appeal.

A father of a minor apprentice can in certain circumstances maintain suits against the master of the apprentice. A point, therefore, as to whether a father can maintain such a suit when not raised in the lower Courts cannot be raised for the first time in revision to the High Court especially when it requires facts for its elucidation; 117 Ind. Cas. 304=A. I. R. 1929 Mad. 781.

—Plea of want of sanction under Civil P. C., S. 91 cannot be raised in the Appellate Court for the first time. 105 Ind. Cas. 113=A. I. R. 1928 Nag. 39.

—Though questions of law involving jurisdiction or going to the root of the plaintiff's claim may be advanced in second appeal notwithstanding the omission to bring them forward before the lower Court or even the trial Court, an objection relating to the non-representative nature of the suit is not a question of this character and the appellant must be taken to have waived the right to advance this objection by failure to include it among the grounds of first appeal. 101 Ind. Cas. 375=A. I. R. 1927 Mad. 666.

—A point affecting the maintainability of suit was allowed for the first time in second appeal. 105 Ind. Cas. 88=51 Mad. 76=26 M. L. W. 572=39 M. L. T. 389=1927 M. W. N. 913=A. I. R. 1927 Mad. 1035=53 M. L. J. 688.

—Where the objection, that the plaintiff could not maintain his suit for a declaration that defendant was not entitled to redeem after he had entered into possession on payment of the amount fixed by the Collector, was raised for the first time in appeal, held: the objection could not be allowed. 68 Ind. Cas. 557=3 Lah. 239=A. I. R. 1922 Lah. 363.

—New plea—Plea of bar of suit whether can be taken first in appeal.

The plea of bar of suit under S. 41 of the Evidence Act can be taken for the first time in appeal. 57 Ind. Cas. 612 (Nag.).

—New plea—Bar of suit—Appellate Court.

Although the objection that the suit was barred by S. 66, C. P. C., had not been raised in the Court below or in the grounds of appeal, the question being one of law, it was allowed to be argued in appeal on the understanding that effect would be given to any defence that respondent might have set up had the matter been agitated in the Court below. 2 Lah. L. J. 353.

—New plea—Question of res judicata.

The plea of *res judicata* being one of restraint of the right of a litigant to have his case fully tried and determined, the judgment which is pleaded in bar of this right must be strictly construed. 31 M. L. J. 311= (1916) 2 M. W. N. 133=20 M. L. T. 228=35 Ind. Cas. 421.

—New plea—Second appeal—Plea of res judicata.

Plea of *res judicata* though not raised in the first appellate court can be allowed in second appeal. 21 A. 446; 4 A. 69, Foll. 5 Ind. Cas. 294. (All.).

—New plea—Question affecting maintainability of suit—Duty of court to raise and decide.

Where in a suit in ejectment, the defect in the title of the plaintiff is apparent in the face of the documents on which he rests his case, it is the duty of the Judicial Committee to dismiss the suit although the point had not been clearly raised in the courts below. 35 All. 273=40 I. A. 86=25 M. L. J. 301=14 M. L. T. 64=17 C. W. N. 669=(1913) M. W. N. 481=11 A. L. J. 469=17 C. L. J. 566=15 Bom. L. R. 525=16 O. C. 136=19 Ind. Cas. 340 (P. C.).



**—New plea—Second appeal—Cause of action—Absence of.**

The question whether the facts set out in the plaint show a cause of action is one which goes to the very root of the case and as such may be allowed to be raised for the first time even in the second appeal. 8 A.L.J. 922=12 Ind. Cas. 111.

**—New plea—Appeal—Preliminary point—Appeal.**

Where a defendant wants to raise a plea under O. 2, R. 2 of the C.P. Code which is not raised in the pleadings or issues, he should not be allowed to raise it for the first time on appeal, except on terms of the other side being fully indemnified by costs, etc. 38 Cal. 629=15 C.W.N. 766=8 A.L.J. 739=13 Bom. L.R. 464=14 C.L.J. 15=(1911) 2 M.W.N. 397=4 Bur. L.T. 153=6 L.B.R. 18=10 M.L.T. 479=11 Ind. Cas. 497 (P.C.)

**—New plea—Question of law—Bar—Under O. 2, R. 2, C.P.C.—Second appeal.**

An objection that the suit is barred under Ss. 42 and 43, C.P.C. 1882 cannot be entertained in second appeal. 12 O.C. 21=1 Ind. Cas. 327.

**45 (q). Practice—New plea—Minority.**

**—New plea—Minority—Not to be allowed—Second appeal.**

A plea of minority which was neither raised in the Courts below nor in the memorandum of appeal before the High Court, cannot be raised for the first time in argument in second appeal. 11 A.L.J. 202=19 Ind. Cas. 55.

**—New plea—Minority.**

A point that certain agreement was not binding on the minors could not be taken up by the Court of appeal, *suo motu* 20 P.R. 1913=101 P.W.R. 1913=185 P.L.R. 1913=19 Ind. Cas. 411.

**—New plea—Minority—Appeal—When the plea is barred.**

If the plea that a certain defendant is minor is not raised in the first Court and a decree is allowed to be passed, the plea cannot be raised in appeal. 6 Ind. Cas. 373 (All.).

**45 (r). Practice—New plea—Question of fact.**

**—New plea—Question of fact—If can be raised in appeal for first time—Whether there was consideration for compromise—When to be raised** See C. P. Code, S. 110 (3). A.I.R. 1950 Pat. 478.

**—Plea never raised in the Courts below and involving questions of fact cannot be allowed to be raised for the first time in second appeal.** 116 Ind. Cas. 903=10 Lah. 694=30 P.L.R. 750=A.I.R. 1929 Lah. 318.

**—New plea—Question of fact.**

A new plea of question of a fact cannot be raised for the first time in appeal. 107 Ind. Cas. 903=A.I.R. 1928 Nag. 273.

**—A new plea on a question of fact should not be entertained in second appeal.** 103 Ind. Cas. 802=1 L.C. 277=A.I.R. 1927 Oudh 341.

**—A party should not be allowed to make out a new case in appeal, if it involves questions of fact for which no evidence has been given.** 102 Ind. Cas. 631=A.I.R. 1927 Lah. 534.

**—A question of fact not raised and made a ground of complaint in the Court of first instance ought not to be allowed to be raised for the first time in appeal.** 91 Ind. Cas. 642=A.I.R. 1926 Cal. 665.

**—New plea—Second appeal—Not to be allowed.**

If a point which ought to be, but is not, taken in the trial Court and in respect of which direct evidence is given, it cannot be taken in second appeal especially when it involves a question of fact. 56 Ind. Cas. 844 (Cal.).

**—New plea—Appellate Court—New case based on facts, whether may be raised.**

An appellate Court ought not to allow a new case to be raised in appeal, when it depends for its determination on facts on which no evidence has been let in. Where the defence in the original Court was that a certain *Kabuliyat* was not executed at all by the defendants, they ought not in appeal allowed to change the defence and to plead to be that the *Kabuliyat* was not enforceable against them. 11 Ind. Cas. 940 (Cal.).

**—New plea—Second appeal.**

A party cannot set up a new case in second appeal especially when the new pleas involve decisions on questions of fact. 5 M.L.T. 262=4 Ind. Cas. 1167.

**45 (s). Practice—New plea—Question of Law.**

- (i) When allowed
- (ii) When not allowed.

**45 (s) (i). Practice—New Plea—Question of Law—When allowed.**

**—New plea—Question of law—Question as to legal effect of compromise—Express plea not raised—Court's power to entertain point and give effect to it.**

The question as to the legal effect of a compromise decree in a suit is a pure question of law, and the mere absence of an express plea on the subject cannot debar the Court from giving effect to it. A.I.R. 1948 E.P. 26.

**—New plea—Question of law.**

**Per Full Bench:**—A question of pure law arising out of admitted facts can be raised in the first instance in the first appeal. 124 Ind. Cas. 733=1930 A.L.J. 156=A.I.R. 1933 All. 136 (F.B.).

**—A question of law can be raised for the first time in second appeal.** 117 Ind. Cas. 100 (All.).

**—A law point patent on the face of the record can be raised in second appeal. The question whether such a matter should be allowed to be raised or not in second appeal depends on the circumstances of the case and upon the nature of the point that is being raised.** A.I.R. 1927 B. 157



and 31 P.R. 1918 followed. 12 Lah. L. J. 203=130 Ind. Cas. 513=A.I.R. 1930 Lah. 937.

—A point as to the frame of suit is a point of law and an objection as to the frame of suit can be raised for the first time even on appeal. 109 Ind. Cas. 867=A.I.R. 1929 Lah. 94.

—Common law contrary to that pleaded can be applied suo motu or at instance of a party.

A point of law, provided it is a point that can be applied to the facts proved and although it directly contradicts anything that may have been said during the whole case about the law applicable to those facts, can be urged by the parties at any time before judgment is pronounced, and it can be basis of the decision of the case even if it occurs only to the Judge himself when he is writing his judgment. 92 Ind. Cas. 926=A.I.R. 1926 Nag. 265.

—Per Das J.—A Court should allow a question of law to be argued which fairly arises on the allegations made in the plaint though it is not stated in that form in the plaint. 88 Ind. Cas. 141=87 Ind. Cas. 849=4 Pat. 510=6 P.L.T. 634=A.I.R. 1925 Pat. 625.

Per Ramesam, J. (Jackson, J. doubting)—Plaintiff suing to set aside adoption by widow and defendants supporting it on the ground of consent of agnatic kinsmen, question of law as to necessity of consent of daughter's sons can be raised for the first time in appeal provided opportunity is given to defendant to prove daughter's sons did consent. 83 Ind. Cas. 59=20 M.L.W. 503=1924 M.W.N. 844=A.I.R. 1925 Mad. 67.

—New Plea — Second Appeal — Question of Law.

Per Broomfield, J.—A new point may be raised for the first time in second appeal, but only when it is a pure question of law arising on the findings of the Court's below and not affected by any facts outside those findings. 32 Bom.L.R. 1001.

—Although a point of law may be taken in appeal for the first time yet it is subject to the well recognized rule that the evidence on the record is complete and no further evidence is necessary to substantiate the point. 78 Ind. Cas. 889=3 Pat. 236=2 Pat. L. R. 53=5 Pat. L. T. 576=A. I. R. 1924 Pat. 446.

—Plea of law on proved facts can be newly raised. 76 Ind. Cas. 172=6 L.L.J. 454=A.I.R. 1924 Lah. 543.

—Where the point is one of law and patent upon the face of the record, it may be raised for the first time in appeal. 80 Ind. Cas. 181=A. I. R. 1923 Lah. 608.

—Question of law requiring no further evidence can be heard in second appeal. 72 Ind. Cas. 230=2 Pat. 469=4 P. L. T. 427=1 Pat. L.R. 201=1923 P.H.C.C. 97=A.I.R. 1923 Pat. 423.

—Question of law raised in arguments.

Where the question of a contract, being void as being illegal and as being opposed to public policy

was not found in the pleadings but was raised for the first time in the arguments.

Held, that when a question of this sort is raised the Court should take notice of it even though not raised in the pleadings. 72 Ind. Cas. 735=18 M.L.W. 564=1923 M. W. N. 335=32 M. L. T. 330=A.I.R. 1923 Mad. 626.

—Where a new point raised before the appellate Court is one of law to be decided without any further evidence it is the duty of the appellate Court to entertain it. 66 Ind. Cas. 466 (Lah.).

—New plea—Appellate Court—Point of law.

A point not urged in the Court below but which depends on the construction of a statute can be raised on appeal. 1 Pat. L.T. 269=5 Pat. L. J. 359=(1920) P.H.C.C. 193=58 Ind. Cas. 749.

—New plea—Question of law.

A pure question of law, though not raised in the primary Court nor mentioned in the memo of appeal and is not one of jurisdiction of the Court to entertain the suit, can be raised in appeal, if it goes to the very root of the matter and raises the question whether the Court was competent to grant the relief claimed. 31 C.L.J. 259=56 Ind. Cas. 571.

—New plea—Question of law.

An objection of clear law apparent on the face of the record should be given effect to even when not pressed. 25 C.L.J. 354=40 Ind. Cas. 230.

—New plea—Question of law—Trial of suit—Plea not raised in the written statement.

A plea raised on a robkar drawn up at the first hearing though not raised by the written statement could be considered by the Courts. 12 A.L.J. 455=25 Ind. Cas. 408.

—New plea—Question of law—Appeal—Vakalatnama—Pleader's name left out by oversight—Whether presentable.

Where in a vakalatnama the pleader's name has been omitted by oversight there is no due appointment of the pleader and the appeal is not on that account properly presented. This objection can be taken at any stage of the case. 36 All. 46=11 A.L.J. 1015=23 Ind. Cas. 461.

—New plea—Question of Law—Appeal.

The Court of Appeal may allow a question of law to be raised for the first time in appeal when it thinks necessary and expedient in the interest of justice, but not unless the court is satisfied that the evidence establishes beyond doubt that the facts if fully investigated would have supported the new plea. 22 Ind. Cas. 553 (Cal.).

45 (s) (ii). Practice—New plea—Question of law—When not allowed.

—New plea—When allowed in second appeal.

Points which have not been raised in the first appeal cannot be allowed to be raised in the second



appeal merely because they are points of law unless good ground is shown for failure to take them before the lower appellate Court. 126 Ind. Cas. 18=A.I.R. 1930 All. 885.

—Questions of law dealing with the admissibility and the legal effect of evidence will not as a general rule be entertained in second appeal if they have not been taken at least at the stage of first appeal. 78 Ind. Cas. 221=22 A.L.J. 153=5 L.R.A. Civ. 44=A.I.R. 1924 All. 709.

—New plea—Question of law—Point of law depending on evidence—If can be raised at late stage of suit.

A point of law depending on evidence cannot be raised for the first time at a late stage of the suit. 7 S.L.R. 11=20 Ind. Cas. 523.

—New plea—Question of law—Waiver—When to be raised.

As a question of waiver is a mixed question of fact and law it ought not to be allowed to be raised at late stage of the proceedings. 13 C.L.J. 192=9 Ind. Cas. 698.

#### 45 (t). Practice—New plea—Remand.

—New plea — Remand — Plea of res judicata raised.

If an order of remand is made by the High Court under O. 41, R. 23, and on retrial the plaintiff's claim is disallowed and plaintiff appeals against the order, it is quite competent for the appellant to raise the plea of res judicata in appeal. The order of remand does not in any way prevent the Court below nor the High Court from holding that the point of res judicata was properly raised and the High Court in allowing it does not in any way go behind the order of remand in the previous appeal. 119 Ind. Cas. 497=A.I.R. 1929 All. 724.

—Case remanded in second appeal—Objection to remand cannot be raised after return of case. 86 Ind. Cas. 445=6 L. R. A. Civ. 117=A. I. R. 1925 All. 369.

—New plea as to bona fide purchase.

Where a defendant's plea of bona fide purchase for value without notice has not been specifically raised in the pleadings or in the issues, the defect may be remedied, if necessary by a remand on terms as to costs, specially as the defence has sometimes been entertained, when it has been pleaded in substance and is a just inference from the facts alleged. 74 Ind. Cas. 975=37 C.L.J. 145=27 C.W.N. 587=A.I.R. 1923 Cal. 538.

—Where there is no indication that a plea was ever submitted to the Lower Court at the remand hearing or had been mentioned to the learned Judges by whom the remand was made, it cannot be raised at the final hearing after remand. 74 Ind. Cas. 804=16 M.L.W. 297=46 Mad. 47=A.I.R. 1923=Mad. 147=43 M.L.J. 406.

#### 45 (u). Practice—New plea—Miscellaneous.

—New pleas—Pleadings essentiality.

No amount of evidence can be worked upon a plea which was never put forward in the pleadings or in the original Court. 58 M.L.J. 7 (P.C.), Foll. 125 Ind. Cas. 33 (Sind).

—New plea.

Where a claim has been never made in the defence presented, no amount of evidence can be looked into upon a plea which was never put forward: A.I.R. 1925 Sind 2, Affirmed. 121 Ind. Cas. 204=31 P.L.R. 150=24 S.L.R. 138=A.I.R. 1930 P.C. 57=58 M.L.J. 7.

—New plea—Fraud.

No amount of evidence can be worked into upon a plea not put forward. The dictum applies with great vigour to a plea based on fraud. 125 Ind. Cas. 33=A.I.R. 1930 Sind 318.

—If the plea, that the suit being for partnership, O. 30, R. 1, Civil P.C., has no application is not raised before reference is made to arbitration, the Court will not go into it after reference is made and award is passed. 117 Ind. Cas. 783=A.I.R. 1930 Sind 40.

—Incident not indicated in plaint but raised before recording evidence—Both parties giving evidence—Case should not be considered to be a new case. 22 Cal. 324 (P.C.) Foll. 111 Ind. Cas. 817=A.I.R. 1929 Oudh 44.

—Where the plaintiffs-mortgagees all along made a substantial case as to the consideration for their mortgage:

Held, that they cannot be allowed to shift their ground and urge that the defendant mortgagor had accepted the civil liability of his brother in respect of defalcations made by his brother in respect of plaintiff's accounts. 107 Ind. Cas. 113=30 Bom. L.R. 296=47 C.L.J. 222=5 O.W.N. 226=27 M.L.W. 523=24 N.L.R. 40=A.I.R. 1928 P.C. 39=54 M.L.J. 208 (P.C.).

—Suit for ejectment on actual possession and dispossession—Subsequent case of constructive possession.

Whether it is open to the plaintiff, where he puts forward a definite case of actual possession and dispossession, when that case fails, to turn round and put forward a case of constructive possession depends upon the circumstances, upon the points at issue and the way in which he has pleaded. It is a matter in the Court's discretion. 105 Ind. Cas. 309=31 C.W.N. 806=A.I.R. 1928 Cal. 118.

—New plea—New case.

If a person asserts that he exercised acts of ownership and adduces evidence in support thereof which is disbelieved by the Court, he cannot turn round and rely upon the presumption raised in his favour by the revenue survey map. 104 Ind. Cas. 514=8 P.L.T. 817=A.I.R. 1928 Pat. 36.



—Where a defendant pleads limitation and in the course of the trial something transpires which shows that the plea of limitation is not sustainable, he cannot turn round and say that the plaintiff should not be allowed the advantage of such evidence as he would be prejudiced. 106 Ind. Cas. 229=39 M.L.T. 415=27 M.L.W. 30=A.I.R. 1928 Mad. 27.

—Plaintiff co-sharer suing for possession after dis-possession by defendant-co-sharer—Plaintiff failing to prove alleged actual possession cannot be allowed to plead constructive possession through defendant. 92 Ind. Cas. 908=A.I.R. 1926 Cal. 589.

—New plea founded on facts suppressed in plaint—Plea not allowed. 90 Ind. Cas. 766=2 O.W.N. 849=A.I.R. 1926 Oudh 22.

—Memo of appeal urging condition regarding enhancement of interest being penal—Condition conceded to be not penal at the hearing—Compensation under S. 74, Contract Act cannot be granted. 89 Ind. Cas. 879=26 P.L.R. 240=A.I.R. 1926 Lah. 11.

—Suit based on title cannot on failure of title be converted into suit based on possession. 33 All. 174 and 8 A.L.J. 404 Foll. 82 Ind. Cas. 324=46 All. 903=A.I.R. 1925 All. 69.

#### —New plea.

A solitary statement elicited in cross-examination from a witness of the opposite party which the opposite party had no opportunity for explaining cannot be utilised for the purpose of founding an objection which had not previously been taken or put into issue. 80 Ind. Cas. 1041=45 All. 59=A.I.R. 1923 All. 176.

#### —Non-objection cures defect.

**Marten, J.**—Where the issue was wide and both parties led evidence on a point not covered by the pleadings, no party can object to the evidence as being not covered by the pleadings. 77 Ind. Cas. 654=25 Bom. L.R. 945=47 Bom. 843=A.I.R. 1923 Bom. 321 (F.B.).

#### —New plea—Omission of issue.

A plea that whether a certain partition deed is valid or not, must be taken early and made the subject of an issue. 76 Ind. Cas. 881=30 M.L.T. 168=A.I.R. 1922 Mad. 341=42 M.L.J. 124.

#### —Partition suit—Change of circumstances—Consideration.

A widow sued her co-widow and her daughter's son to whom half the estate had been bequeathed by will by her husband, for partition of her fourth share. After preliminary decree was passed the co-widow died and plaintiff became entitled to her share also.

**Held:** that plaintiff should be given a decree for half share in that very suit instead of compelling her to have recourse to further litigation. Partition suits form an exception to the rule that cases should be decided with reference to the state of facts on the date of their institution. 76 Ind. Cas. 632=A.I.R. 1924 Nag. 188.

#### —New plea—When can be raised—Failure to establish claim—Effect.

Where in a suit for injunction the plaintiff set up his title as owner of a piece of land, but failed to establish ownership and it appeared that he was in possession of a portion of the land as tenant of the defendants on payment of the customary rate. **Held,** that having failed to establish title set up by him his suit must be dismissed. 75 P.L.R. 1916=36 Ind. Cas. 55.

#### —New plea—No allegation in pleadings.

Prior agreement of partnership or family arrangement being not pleaded would not be gone into by Court. 13 M.L.T. 102=18 Ind. Cas. 636.

### 46. Practice—Notice of hearing.

#### —Notice of motion—Amendment of plaint pending notice—Effect—If waiver or abandonment of notice.

It cannot be stated as an absolute proposition of law that the amendment of the statement of the claim pending notice of motion operates as an abandonment of the notice of motion unless the plaintiff obtains leave to amend without prejudice to the pending notice. As a matter of precaution the plaintiff must seek an order to amend without prejudice. If the circumstances of a particular case warrant that conclusion, the Court is not fettered in holding that under the particular circumstances the plaintiff should not be considered to have waived or abandoned the notice of motion which had been taken out earlier on the bill or statement of claim as unamended. 49 Bom. L.R. 439=A.I.R. 1947 Bom. 424.

#### —Notice of Hearing.

Where a party is once heard it is no denial of justice if the Court decides against him without hearing him again if, after he was once heard there was no new material before the Court upon which to base its decision. 126 Ind. Cas. 833=11 P.L.T. 799=9 Pat. 240=A.I.R. 1930 Pat. 81 (S.B.).

#### —Notice—Order without one is illegal.

It is an elementary principle of law that no order should be passed which prejudices a person without giving him an opportunity to show cause against it. 106 Ind. Cas. 487=A.I.R. 1928 Mad. 361.

#### —Execution of decree.

Objections as to want of notice of hearing cannot be entertained by the executing Court. 84 Ind. Cas. 724=52 Cal. 269=40 C.L.J. 180=A.I.R. 1925 Cal. 57.

#### —Ex parte order.

No order should be passed against a person without allowing him reasonable opportunity to be heard and to adduce evidence in his defence. This rule is of universal application founded upon the plainest principles of justice that no one should be condemned, punished or deprived of his property in a judicial proceeding unless he has had a fair opportunity to be heard. 81 Ind. Cas. 867=39 C.L.J. 279=A.I.R. 1924 Cal. 806.

—It is the usual practice of notifying to the parties the receipt of the record when it goes back from the High Court in order that the parties may be apprised of it and take necessary steps. 76 Ind. Cas. 49=79



Ind. Cas. 188=4 P.L.T. 508=1 Pat. L.R. 393=A.I.R. 1923 Pat. 597.

**—Notice—Hearing not in the usual place—Notice is necessary.**

Notice to defendants is necessary though the other defendants were present where the place of hearing was not the usual place. 69 Ind. Cas. 499=3 Lah. 357=A.I.R. 1922 Lah. 439.

**—Notice to accused always necessary.**

No Court should pass an order prejudicial to the accused without giving him notice to show cause against it. 59 Ind. Cas. 193=18 A. L. J. 1135=2 U.P.L.R. All. 374=22 Cr. L. J. 49.

**—Notice of hearing—Notice to counsel.**

Where notice of the adjourned date of hearing of a petition is given to the counsel who said at the hearing that he had no instructions and had returned the papers it was held sufficient. 4 O. L. J. 561=45 Ind. Cas. 481.

**—Notice of hearing—Ex parte Judicial order—Power of Court.**

A judicial order possibly affecting or prejudicing a party cannot be made without giving that party an opportunity to be heard. 44 Cal. 454=25 C. L. J. 455=39 Ind. Cas. 969.

**—Notice of hearing—Transfer of an appeal to another Court for disposal—Procedure.**

Before an appeal is transferred by one court to another the case should be called on and the parties informed as to the transfer and the order sheet should show that it is so transferred. Otherwise, a dismissal for default by the court to which the appeal is transferred is irregular and will be set aside. 1 Pat. L.W. 245=39 Ind. Cas. 45.

**—Notice of hearing—Setting aside order.**

An order in favour of a party got without fraud should not be set aside without notice to the party. 3 L.W. 250=32 Ind. Cas. 897.

**—Notice of hearing—Absence of statutory provisions—Natural justice.**

In all judicial proceedings where no specific rule as to notice exists the rule *audi altaram partem* applies as the principal of natural justice. 38 Mad. 1091=2 L.W. 200=28 M. L. J. 204=1915 M. W. N. 181=16 Cr. L. J. 128=17 M.L.T. 164=27 Ind. Cas. 192.

**—Notice of hearing—Dismissal for default—Place of hearing.**

Where no intimation was given to the parties that the case will be heard in camp, the magistrate was not justified in dismissing the case for default while in camp. 53 P.L.R. 1914=15 Cr. L. J. 143=22 Ind. Cas. 495.

**—Notice of hearing — Objections to — Waiver.**

Whereby a party having notice of a motion contests it on the merits, he must be held to have waived

objections as to irregularity in the issue or service of notice. 25 M.L. J. 281=(1913) M. W. N. 751=21 Ind. Cas. 96.

**—Notice of hearing—Judicial proceedings.**

Without an opportunity given to a person to say what he has to say, he should not be deprived of his property in any judicial proceeding. 39 Cal. 881=15 Ind. Cas. 176.

**—Notice of hearing—Re-trial—Notice.**

Neither party is entitled as of right to a notice intimating the date fixed for the rehearing of the case, when a case is remanded for retrial to the first Court. This rule applies both to Berar and the Central Provinces. But in fixing a date for hearing the case, the Court should select such date as will give the parties a reasonable opportunity of ascertaining the date fixed. 7 N.L.R. 172=12 Ind. Cas. 807.

**—Notice of hearing.**

It is a material irregularity to decide an appeal against respondent not properly served with the notice of the date of hearing. 59 P. W. R. 1909=55 P.L.R. 1909=4 Ind. Cas. 550.

**—Notice of hearing—Service of notice of appeal—Respondent in England.**

The best way to serve a notice of appeal on a respondent who had left for England would be to make over the notice to the appellant's pleader for service on the Respondent through an agent in England to be appointed for the purpose. 36 Cal. 226=13 C. W. N. 18=9 C.L.J. 244=1 Ind. Cas. 158.

**—Notice of hearing—No date fixed for trial—Decree bad.**

Where no date has been fixed for trial of a suit a decree on the merits is bad. 9 C. L. J. 367=13 C.W.N. 493=5 M.L.T. 360=1 Ind. Cas. 86.

**—Notice of hearing—Parties—Absence during hearing.**

Where the presence of a respondent is unnecessary and the parties present do not object, the appellate court can proceed to hear the appeal. 21 P.R. 1909=32 P.L.R. 1909=27 P.W.R. 1909=1 Ind. Cas. 604.

**—Notice to decree-holder—Duty by appellant to be present on the day fixed for hearing.**

Under C. P. C., no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed. It is the duty of the person who has a case in the paper (notice board or cause list) to be present prepared to support it by counsel or in person. (1903) 14 M.L. J. 7 (P. C.).

**47. Practice—Official translation of documents.**

**—Official translation of documents—Duty of Court to act upon—Translation by Judge—Value of.**

It is the duty of the Courts in India to act upon the official translation of documents unless there is expert evidence which justifies the rejection of such translation.



It may no doubt often happen that a Judge in India knows the vernacular in which a document is written, and he may be as well qualified as the official translator, or even better qualified, to render a correct translation of the document into English. The trouble however, is that the Judge is not a witness, and the parties are not in a position to test the translation which he makes; whilst if the matter is taken in appeal to the Privy Council, the Board have no material upon which they can estimate the linguistic qualifications of the Judge. 53 C.W.N. 803=A.I.R. 1949 P.C. 179=51 Bom. L. R. 960.

#### —Official translation — Departure from—Jurisdiction.

It is not legitimate for the Court to depart from the official translation except upon expert evidence which the parties should have an opportunity of testing. 73 I. A. 264=I.L.R. (1947) Mad. 159=51 C.W.N. 205=1946 O.A. (P.C.) 205=1946 A.W.R. (P.C.) 205=227 Ind. Cas. 12=59 L.W. 681=13 B. R. 36=I. L. R. (1947) Kar. (P.C.) 15=A.I.R. 1946 P. C. 185=(1946) 2 M. L. J. 408 (P.C.).

#### 48. Practice—Parties.

See C. P. C., O. 1. and O. 34, R. I.

- (a) Duty of.
- (b) Addition of.
- (c) Joinder.
- (d) Non-joinder.
- (e) Miscellaneous.

#### 48 (a). Practice—Parties—Duty of.

##### —Duty of.

A party, who has objections to a proceeding before the Court, must put them forward at the earliest opportunity, and must put all of them forward and not keep back any of them for subsequent presentation. A.I.R. 1929 Mad. 404.

##### —Duty of.

It is always the duty of litigants in a Civil Case to pay for the expenses of witnesses and procure their attendance. If they should fail to do so, the Court is not bound to do this for them. 99 Ind. Cas. 890=A.I.R. 1927 Lah. 845.

##### —Duty of.

The novel proposition, that a duty is cast upon every litigant to speak out and set right his adversary whenever he discovers that his opponent has made a mistake, requires very careful scrutiny. 74 Ind. Cas. 770=36 C.L.J. 245=A.I.R. 1922 Cal. 493.

#### 48 (b). Practice—Parties—Addition of.

##### —Parties—Additional Defendants—Whether can be struck off at any stage—Evidence of—Effect of.

Additional defendants brought on record on an application put in by them and allowed cannot be struck off the record and their evidence cannot be

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ignored at the stage of an appeal from a decree in their favour after the whole case has been decided. 1 O.L.J. 591=26 Ind. Cas. 547.

##### —Parties—Addition of—Second appeal.

Plaintiff who tries his best not to join another as party in a rent suit though his joinder was continually urged by the defendants, cannot in second appeal make a new case and join that person as defendant in that suit. 11 C.L.J. 601=5 Ind. Cas. 105.

#### 48 (c). Practice—Parties—Joinder.

Parties — Religious endowment—Suit regarding—Deity—If necessary party when there is shebait. See Religious Endowment—Suit. A.I.R. 1950 Pat. 134.

##### —Parties—Necessary party—Suit challenging validity of Provincial Act—Provincial Government—If necessary party as being responsible for Act.

It is the Legislature of a State or Province which is ultimately responsible for an Act passed with respect to the State or Province, and the Provincial or State Government does not become a necessary party to a suit merely because the validity of that Act is challenged in the suit, even if the Provincial or State Government sponsored the Bill which became the Act and piloted it through the different stages of legislation. (1940) F.C.R. 110, foll. A.I.R. 1950 Pat. 527.

##### —Parties — Pre-emption suit — Hindu joint family—Transfer by father manager—Sons, if necessary parties to suit for pre-emption arising on such sale.

A claim for pre-emption arises on a transfer of property from the vendor to the vendee. The right of pre-emption is a right of substitution, and the pre-emptor is bound to take the property for the same price and subject to the same risks as the vendee has taken. He cannot ask the Court to adjudicate on the title of the vendor to the property sold. He has to accept the position that the vendor had a title to effect a sale and on that basis make a claim for pre-emption. In the case of a sale by a Hindu father, as manager of the joint family of himself and sons, the sons are neither necessary nor proper parties to a suit for pre-emption in respect of that sale. I.L.R. (1949) Nag. 152=A.I.R. 1949 Nag. 185=1949 N.L.J. 81.

##### —Parties—Suit between villagers of different villages regarding right to take water from an irrigation channel — Government paramount owner of the channel—Government necessary party to the suit.

Where a suit between villagers of two different villages is in regard to a disputed right to take water from an irrigation channel and the Government is admittedly the paramount owner of channel in whom the entire right to it vests and have passed orders adverse to the plaintiffs in regard to their right, the Government is a necessary party to such a suit. 61 L.W. 644=A.I.R. 1949 Mad. 161=1948 M.W.N. 515=(1948) 2 M.L.J. 99.

—In originating summons for the construction of will, trustees should not argue on behalf of beneficiaries or next-of-kin apart from exceptional cases. 120 Ind. Cas. 938=31 Bom. L.R. 511=A.I.R. 1929 Bom. 289.



—Parties—Assignee—Pendente lite.

In a suit for possession of land an assignee pendente lite need not be made a party, as he would be bound by the decree in the suit. 9 C.L.J. 523=36 Cal. 675 =1 Ind. Cas. 626.

—Parties—Suit for money left by family firm—Liability renewed in plaintiffs sole name—Other members necessary parties—Acquiescence of other members not sufficient to cure defect and limitation. 19 M.L.J. 372=4 Ind. Cas. 38=32 M. 284.

—Parties—Revenue registry suit for declaration of title for—Collector necessary party. See 19 M.L.J. 33=2 Ind. Cas. 479.

—Parties—Mesne profits, ascertainment of—Receiver, not necessary party when mesne profits are not in respect of properties covered by the mortgage security.

When the decree for mesne profits is made, the decree-holder may find it necessary to proceed against the equity of redemption to enable him to realise his dues. When he finds himself in that position, if the receiver appointed in the course of the mortgage suit is then found to be in possession of the mortgaged properties, the execution creditor may have to obtain the leave of the court before he can attach the properties, in execution. But before he arrives at that stage it is not necessary for him to bring the receiver before the court; and it is absolutely immaterial to the receiver for what amount a decree for mesne profits is obtained by the decree-holder against the mortgagor. The claim which is sought is a personal claim, and the decree will be a personal decree against the mortgagor. It is only when in execution of the decree the mortgaged property is sought to be attached that the receiver may be affected and leave of the court may be necessary. Until that stage, the receiver is a perfect stranger in no way interested in the matter. 10 C.L.J. 22=2 Ind. Cas. 944.

—Parties—Suit for rent against shebaita—All to be parties.

In a suit for rent due from several shebaita, all the shebaita should be made parties. Else the suit is liable to be dismissed. (1907) 35 C. 182=12 C.W.N. 160.

—Parties—Joinder of parties as defendants who should have been added as plaintiffs—No—Onus of proving refusal to join as plaintiffs.

A suit by one of several persons entitled to the relief, making the others defendants, should not be dismissed on the mere ground that plaintiff failed to show that the other persons refused to be made co-plaintiffs. 26 C. 409; 24 A. 226, Foll. (1906) 29 M. 302. Also 1902 A.W.N. 31=24 A. 226.

—Suit for possession—Certificate of sale not challenged—Secretary of State if necessary party.

The Secretary of State is not a necessary party to a suit where the plaintiff does not want to have a certificate and the sale thereunder set aside, but brings his suit for the recovery of the possession of the property treating the sale as a nullity and he is indifferent whether the sale stands or not. 31 C. 159, 25 C. 179, Foll. (1910) 11 C.L.J. 385=14 C.W.N. 606=5 Ind. Cas. 311.

—Suit to set aside revenue sale for arrears of revenue—Secretary of State not a necessary party: (1906) 7 C.W.N. 377.

But see contra. (1903) 8 C.W.N. 657=31 C. 159.

—Suit to set aside auction sale—Decree-holder necessary party.

5 C.W.N. 10=25 B. 337=27 I.A. 216 (P.C.)=10 M.L.J. 368.

—Suit by decree-holder against successful claimant for declaration that certain property belongs to judgment-debtor—Judgment debtor not necessary party.

See: 1905 A.W.N. 172=2 A.L.J. 491=28 A. 41.

—Parties—Offering sacrifice—Co-owners: suit by one co-owner on obstruction by stranger for declaration.

Two zemindars were the owners of a zemindari within which was an idol. The zemindars were entitled to the flesh of the first goat sacrificed to the idol. One of the zemindars died and his heir, on obstruction by the shebaita to her enjoyment of the right, sued for a declaration of her right. Held, that in the absence of objection by the other zemindar to the plaintiff's right to enjoy the subject-matter of the suit, the suit was maintainable without making the co-owners parties. (1906) 4 C.L.J. 469.

—Parties—Worshippers—Disciples' position of—Not co owners.

The shishyas or disciples of a mutt are not co-owners of the mutt along with its head; nor have they such interest in the mutt property as will entitle them to be made defendants in a suit to recover money or property from a Pandara Sannidhi. (1906) 16 M.L.J. 415=29 Mad. 553.

—Parties—Worshippers—Joinder of in suit for declaration—Possession and damages—Misjoinder.

15 M.L.J. 475=29 Mad. 106.

—Parties—Objection that nobody was on record to represent the estate—Suit for construction of will.

In a suit for the construction of the will, a preliminary objection, viz., that the suit was defective for want of a party representing the estate of the testator, was overruled as all the parties who could be any possibility have an interest in the estate were already before the court and as the plaintiff asked for administration only in case such relief were deemed necessary and the court in this case did not deem it to be necessary. (1905) 9 C.W.N. 1033.

—Parties—Receiver—Suit in ejectment by Receiver—Discharge—Receiver—Dissolution inter se:—

See 30 B. 250=6 Bom. L.R. 995.

—Parties to suits—Hindu Law—Joint family. (1907) 9 Bom. L.R. 1126.

—Parties—Hindu Law—Joint family—Parties to suit—Right of Manager to sue in his own name.

See 5 Bom. L.R. 618=28 B. 11



—Parties—Partition—Portion of joint estate—  
Suit for, if maintainable—Ijardar, if a necessary party.

A suit for partition of a portion of a joint estate is maintainable when such portion is the only property held jointly by the plaintiff and the defendants, although the defendants may be jointly interested, with or without other persons in the remaining portion of the estate. (1904) 1 C.L.J. 40.

—Parties—Partners — Suit by one partner  
against agent for breach of contract—Collusion between partner and agent.

A single partner cannot sue the agent of the firm for breach of contract unless it be that the other partner is in collusion with the agent and the cause of action against the agent is one that arose after the collusion and consequent upon it. (1903) 27 M. 80.

—Parties—Trustee—How far representative  
of beneficiary.

The rule under which a beneficiary is sufficiently represented by his trustee does not apply where the contest is between two beneficiaries. (1902) 4 Bom.L.R. 857.

—Parties—Tort—Suit for.

See 6 C.L.J. 383.

—Parties—Mahomedan Law—Suit by creditor  
of deceased.

The creditor of a deceased Mahomedan has the right to sue such of the heirs of the deceased as have taken the estate and has the right to have recourse to a single heir only in case all the assets are in the hands of that heir. (1902) 26 M. 734.

—Parties—Village Officer—Madras Act 11 of  
1864:—Illegal detention of crops after arrears are paid  
—Suit against village Officer—Secretary of State not  
a necessary party. (1902) 26 M. 263.

—Parties—Suit by one uralan without con-  
sulting co-uralan not maintainable, though his  
title denied by the other.

One uralan cannot sue alone, even though the other denies his title unless the other preversely declines to co-operate with the other, after being invited to do so and when it is for the benefit of the institution that proceedings should be taken. In the latter case, he can sue alone impleading the other as a co-defendant 24 M. 296.

[But see 26 M. 461; 26 M. 649 (F.B.).—E.D.]

—Parties—Receiver in possession of proper-  
ties—Suit for declaration of title—Beneficial  
owners parties—Receiver how far a necessary  
party.

A receiver in possession of the properties is not a necessary party to a suit for a declaration of title to the properties when the beneficial owners are parties. (1902) 6 C.W.N. 829=29 Cal. 509.

—Parties—Plaintiff's right not to add a party  
whose title is not necessarily involved in the  
suit.

The plaintiff is dominus litis and is not bound to join all adverse claimants as parties, and he must be left to exercise his own discretion as to the joinder of a defendant whose title is not involved in that of any other party to the suit. (1902) 4 Bom.L.R. 754=27 B. 31.

—Parties—Receiver—Leave to sue—Suit for  
possession.

The receiver is not a necessary party to a suit for possession of immoveable property. (1897) 5 C.W.N. 27.

—Suit to eject trespassers from a village—  
Competence of one or more co-sharers to sue  
—Yes.

5 A. 602 foll; 1888 A.W.N. 156 dissented from  
(1901) A.W.N. 36.

48 (d). Practice—Parties—Non-joinder.

See C. P. C., S. 99 and O. 1, R. 13.

—Non-joinder—Effect—Plaintiff failing to  
implead necessary party in spite of specific plea  
in written statement—Dismissal of suit—Suit for  
eviction—Person in possession of part of property  
not joined—Effect.

Where in a suit for eviction, the defendant specifically pleads in his written statement that portions of the property were in the possession of his wife under a separate tenancy and produces an amalnama and certain dakhilas and that the suit was bad for non-joinder of a necessary party, it is up to the plaintiff to apply for adding the defendant's wife as a party defendant to the suit. Where she is admittedly in possession of part of the property, the suit cannot succeed unless she is made a party and if the plaintiff does not add her a party, the suit in respect of the portion in her possession must fail. 226 Ind. Cas. 369=A. I. R. 1947 Cal. 73=51 C. W. N. 323.

—Non-joinder—Effect—Party impleaded but  
not described properly—Effect—Misdescription.

Before a technical plea of non-joinder is entertained and given effect to, the Court must ascertain what the substantial question in issue is. Where a necessary party is joined as a party to the suit, but he is not described as a shebait (as it should be), the mere omission to describe him as such is a mere technicality and a mere misdescription. 223 Ind. Cas. 324=12 B. R. 392=A. I. R. 1946 Pat. 440.

—Non-joinder—Plea open to whom—C. P.  
Code, O. 1, R. 9.

Plea of non-joinder of others as plaintiffs can be raised only by the defendants who have an interest in the subject matter of the suit and not by those found subsequently not to have any interest therein. 22 Ind. Cas. 129 (Oudh).

48 (e). Practice—Parties—Miscellaneous.

—Parties—Party cannot adopt one part and  
repudiate another part of an order—Estoppel.



When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposing party, there is no intention to benefit the latter except on the terms mentioned in the order itself. If the party receives the costs, his act is tantamount to adopting the order. But if a party receives the benefit reserving his right to object to the order, he will not in that case be precluded from attacking it. A. I. R. 1927 Mad. 1009, Not Foll. 123 Ind. Cas. 337=31 M. L. W. 30=1930 M. W. N. 50=A. I. R. 1930 Mad. 268=58 M. L. J. 137.

—Party adopting an order of Court—Estoppel.

A party who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another. But the principle does not apply where the benefit accepted would in any case be his whether the appeal succeeded or failed. Where in a suit on a money bond payable with compound interest the Court awards simple interest only, an appeal against the decree is not rendered incompetent though the decree-holder accepts the costs deposited by the judgment-debtor on the basis of simple interest, subsequent to the filing of the appeal. 72 Ind. Cas. 554=A. I. R. 1924 Cal. 380.

—Conduct of, relevancy.

It is well established that the parties must be judged by the method with which they conduct their cases. Thus any objection to the admissibility of the evidence of a witness may be regarded as waived by the other party if it indulges in his cross-examination. 73 Ind. Cas. 654=A. I. R. 1923 All. 612.

—Same individual as plaintiff and defendant—Rule—Exceptions.

It is a well-recognised elementary rule of procedure that the same individual even in different capacities, cannot be both a plaintiff and a defendant. The rule, however, is subject to exceptions in equity in cases where it would be possible to ascertain the rights and liabilities of the parties in the event of all the parties being present before the Court either in the group of plaintiffs or defendants. 48 Bom. L.R. 341=A. I. R. 1946 Bom. 516=1947 Comp. C. 21=229 Ind. Cas. 84.

—The same individual in different capacities can be both plaintiff and defendant in one and the same action provided the Court of fact can adjust the rights of the parties. 125 Ind. Cas. 115=A. I. R. 1930 Pat. 231.

—Parties—Plaintiff and defendants to be different—Rule—Exception.

The rule that the same man cannot be plaintiff and defendant in the same suit loses much of its force in India where the Courts or Courts of Equity when all the parties are before the court and when their rights can be determined and adjusted. 2 Ind. Cas. 597 (Cal.).

—A party omitting to defend in trial Court.

When a defendant is served and has notice of the action but does not appear and elects to trust in another defendant for defence, he is precluded from arguing his case for the first time in Letters Patent Appeal. 93 Ind. Cas. 998=A. I. R. 1926 All. 427.

—A party cannot succeed upon evidence which is not relevant to his pleas. 90 Ind. Cas. 58=A. I. R. 1926 Nag. 64.

—Where the process-server was responsible for not serving summons and the witnesses consequently did not appear:

Held, that the plaintiff should not be punished for the negligence of an officer of the Court and the suit should not be dismissed for want of proof. 85 Ind. Cas. 321=6 L.L.J. 418=A. I. R. 1925 Lah. 296.

—Co-plaintiffs must appear by same counsel.

Co-plaintiffs cannot sever at the trial but must appear by the same solicitors and counsel. Nor can the same person be made both a plaintiff and defendant. 25 Bom. 606, Foll. 77 Ind. Cas. 83=24 Bom. L.R. 1111=47 Bom. 349=A. I. R. 1923 Bom. 177.

—Parties — Mortgage — Plea of paramount title.

The defendant cannot in appeal plead that the suit ought to have been dismissed on the ground that he claimed paramount title when the suit is decreed against him with costs. 32 Ind. Cas. 358 (Cal.).

—Parties—Decree—Effect of.

A person who is not a party to a suit is not bound or affected by a decree passed therein. 37 Cal. 239=14 C.W.N. 214=11 C.L.J. 166=3 Bur. L.T. 27=12 Bom. L.R. 234=20 M.L.J. 153=37 I.A. 19=5 Ind. Cas. 151 (P.C.).

—Parties—Declaration in favour of persons who are not parties to the suit.

A Court is not justified in making a declaration in favour of persons who are not parties to suit, on whose behalf no claim was set up, and no issue was raised in regard to it. 9 C.L.J. 421=13 C.W.N. 611=2 Ind. Cas. 641.

—Parties whether can intervene in appeal.

As an ordinary rule, a person who was not a party to the suit in the court of first instance ought not to be allowed to intervene at the appellate stage; but the power is vested in the court to have him as a party respondent. Such power should be exercised with caution. A person who is not a party to proceedings in the probate court in which the validity of a will is questioned, is bound by the result if he was aware of the proceedings and had a right to intervene. *Quaere*:—Whether the doctrine that the mere circumstance that a stranger has promoted litigation or assisted in a suit, does not make him bound by the judgment



applies to probate proceedings. (1910) 12 C.L.J. 91=6 Ind. Cas. 912.

—Parties—Joint vendees, suit by one for recovery of lands purchased.

Per Banerjee, J.—One of several joint vendees can maintain a suit for his share of the property purchased. If both sue and one of them dies, and the deceased man's representative are not brought on the record, the remaining plaintiff can recover his share of the property. Per Richards, J.—One of the joint vendees can sue for the whole property purchased. 1905 A.W.N. 274=3 A.L.J. 30.

#### 49. Practice—Partition suit.

—Partition suit—Prayer in plaint for past mesne profits—Court-fee paid on the prayer—No provision made in the preliminary decree—Subsequent application by plaintiff—Order for provision in the final decree—Jurisdiction of Court to make.

Where a preliminary decree for partition is silent as to the claim for mesne profits, the parties are not precluded from applying or the Court from awarding, mesne profits by its final decree, especially, when the plaint specifically asked for past mesne profits and court-fee on that relief was paid. (1938) 2 M.L.J. 704, foll. 1949 M.W.N. 236=62 L.W. 386=A.I.R. 1949 Mad. 743=(1949) 1 M.L.J. 522.

—Partition suit—Abatement and withdrawal—Second suit—Maintainability. See C.P. Code, O. 22, R. 9. 26 Pat. 304=A.I.R. 1948 Pat. 244.

—Partition.

It is not necessary in a partition suit that a defendant who claims a share in the property should be made a co-plaintiff. 119 Ind. Cas. 656=53 Bom. 472=31 Bom. L.R. 647=A.I.R. 1929 Bom. 345.

—Omission to include certain property.

An offer by the plaintiff in a suit for partition to include other property, not mentioned in the plaint, which may be proved to be joint, is sufficient to cure the defect of omission of any properties from the partition and the suit is not liable to be dismissed on the technical ground of certain items not having been included in the plaint. 117 Ind. Cas. 412=6 O.W.N. 142=A.I.R. 1929 Oudh 162.

—Partition suit—Preliminary decree—Dismissal of suit—Legality.

The Court has no jurisdiction to dismiss the suit after a preliminary decree has been passed in a partition suit merely because there has been delay in producing the Commissioner's fee. 6 P.L.T. 152=86 Ind. Cas. 785=A.I.R. 1925 Pat. 433.

—Dismissal of suit after preliminary decree for partition is bad.

A Court is completely wrong in dismissing a suit after a preliminary decree for partition has

been passed on the ground that the lands which were partitioned by the Commissioner were different from the lands ordered to be partitioned under the preliminary decree. 72 Ind. Cas. 916=2 Pat. 432=4 P.L.T. 257=A.I.R. 1923 Pat. 342.

—Partition suit—Plaintiff's title originally defective, perfected pending suit—Suit may be decreed. 61 Ind. Cas. 398=45 Bom. 983=23 Bom. L.R. 391=A.I.R. 1921 Bom. 455.

—Partition suit—Impossibility—Decree for sale.

When there are actual difficulties in partition the court may order sale; otherwise partition may be granted. 20 C.W.N. 1806=1 Pat. L.J. 441=2 Pat. L.W. 383=35 Ind. Cas. 861.

#### 50. Practice — Plea.

—Plea—Suit for recovery of possession on basis of document, property in suit being left out as result of clerical mistake—Suit for rectification barred—Mistake, can be proved.

In a suit for recovery of possession based on a document which contains a mistake, the property in suit being left out through clerical mistake, although a suit for rectification may be barred by limitation, the plaintiff is entitled to succeed and mistake can be proved under S. 92, Evidence Act. A.I.R. 1930 All. 387.

—Where the judgment of an Appellate Court makes no mention of a ground of appeal it must be presumed that it was abandoned before that Court. 117 Ind. Cas. 905 (Lah.).

—Third party made defendant—He cannot impeach a title obtained against the real owner. 110 Ind. Cas. 383=A.I.R. 1928 All. 665.

—Second Appeal—Grounds given up to cause admission of appeal cannot be argued at the hearing. 98 Ind. Cas. 328=24 M.L.W. 764=A.I.R. 1927 Mad. 75=51 M.L.J. 639.

—Plea of payment and plea of set-off.

Payment means that the debt claimed by the plaintiff is not due at all as it has been paid already. The plea of set-off is a request that the debt due to the plaintiff be regarded thereafter as paid by being set-off against another debt due by the plaintiff to the defendant. 84 Ind. Cas. 956=2 Rang. 349=A.I.R. 1925 Rang. 22.

—Failure to raise a plea is not equivalent to consent. 65 Ind. Cas. 345=8 O.L.J. 596=A.I.R. 1922 Oudh 5.

—Plea of minority under special law—Bond executed by person otherwise of full age.

Where a person being of full age at the time of executing a bond and a fortiori of the suit on it and executed the bond as of full age the ground for exempting him from liability such as that the fact that a certain person was appointed his guardian under a certain Act had the effect of prolonging his minority to a latter age